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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MINH THO SI LUU,

Plaintiff and Appellant,

v.

CHARLES GEORGE, Individually and as
Trustee, etc., et al.,

Defendants and Respondents.

G050324

(Super. Ct. No. 30-2013-00691988)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Derek W. Hunt, Judge. Affirmed.

Law Offices of Andrew D. Weiss and Andrew D. Weiss for Plaintiff and
Appellant.

Rutan & Tucker, Stephen A. Ellis and Proud Usahacharoenporn for
Defendants and Respondents.

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INTRODUCTION

Plaintiff Minh Tho Si Luu filed a complaint containing claims for fraud, malicious prosecution, and declaratory relief against defendants Charles George and Jacqueline George.¹ In this case, the Georges' agent listed their rental property for lease; the listing stated that pets would be considered. Luu submitted a rental application to the Georges' agent; the application disclosed she had Maltese dogs. The Georges, through their agent, offered Luu a lease agreement. After discussing it with her agent and making a counteroffer that she be required to pay a lesser deposit, which the Georges accepted, Luu entered into a two-year residential lease agreement with the Georges. Paragraph 13 of the lease agreement stated no pet "shall be kept on or-about the Premises without Landlord's prior/written consent, except: ____." Luu moved into the property with her dogs. The Georges thereafter demanded Luu remove the dogs from the property, and, when she failed to do so, filed and prosecuted an unlawful detainer action (the unlawful detainer action) against her, which they later dismissed.

Luu contends the trial court erred by (1) sustaining the Georges' demurrer to the fraud claim without leave to amend, and (2) granting the Georges' anti-SLAPP² motion to strike the malicious prosecution claim (based on the dismissal of the unlawful detainer action), pursuant to Code of Civil Procedure section 425.16, on the ground that Luu failed to demonstrate a probability of prevailing on that claim. (All further statutory references are to the Code of Civil Procedure unless otherwise specified.)

We affirm. The trial court did not err by sustaining the Georges' demurrer because Luu failed to allege facts supporting a fraud claim. Because she has failed to show there is a reasonable possibility the defects in the pleading of her fraud claim could

¹ We refer to Charles George and Jacqueline George, individually by their first names, for the purpose of clarity and intend no disrespect. We refer to them collectively as the Georges.

² "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

be cured by amendment, the demurrer was properly sustained without leave to amend. The trial court properly granted the anti-SLAPP motion because Luu failed to carry her burden of showing a probability of prevailing on the merits of her malicious prosecution claim as she did not make a prima facie showing of malice.

BACKGROUND

I.

SUMMARY OF THE ALLEGATIONS OF THE COMPLAINT AND OF RELEVANT PROVISIONS OF THE LEASE AGREEMENT³

In December 2013, Luu filed a complaint against the Georges, individually and as trustees of The George Family Revocable Living Trust UTD June 30, 1988, containing claims for malicious prosecution, fraud, and declaratory relief. The trust owns residential property in Huntington Beach, which the Georges have used as a rental property (the property). In November 2012, after the tenant of the property moved out, the Georges renovated the property. The renovations included plumbing, electrical, and

³ The Georges filed a request for judicial notice in support of their demurrer, which included a declaration that Luu had filed in support of her opposition to the Georges' motion for summary judgment in the unlawful detainer action that, inter alia, authenticated the lease agreement; a "true and correct" copy of the lease agreement was attached to the declaration as an exhibit. In *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604, 605, the appellate court held: "[A] pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless. In this regard the court passing upon the question of the demurrer may look to affidavits filed on behalf of plaintiff" but "only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court." (See *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 83 ["a complaint's allegations may be disregarded when they conflict with judicially noticed discovery responses"]; *Pich v. Lightbourne* (2013) 221 Cal.App.4th 480, 490 ["[I]n testing a complaint against a demurrer, we may disregard allegations that are inconsistent with attached exhibits and matters judicially noticed."]) In light of the foregoing, portions of the lease agreement that are inconsistent with the allegations of the complaint are judicially noticeable under Evidence Code section 452, subdivision (d), and may be properly considered in determining whether the complaint stated a cause of action for fraud.

other work. In June 2013, they began to look for a new tenant by placing a “for rent” sign in a window at the property. Only one person responded to that solicitation, but Jacqueline rejected the person as a potential tenant because he or she had a dog.

The Georges asked Charles Buscemi, a licensed real estate salesperson, to list the property for rent. Buscemi agreed to do so for no commission because he had known the Georges for over 50 years.

Beginning in July 2013, Buscemi, on behalf of the Georges, ran newspaper advertisements seeking tenants for the property, which specified that no pets were permitted. On August 1, the Georges listed the property for rent on the California Regional Multiple Listing Service (the CRMLS listing). The CRMLS listing indicated that the Georges would consider allowing pets with a \$500 pet deposit in addition to the requested \$2,200 security deposit.

On August 30, 2013, Luu submitted a written application to rent to Buscemi, using a standard California Association of Realtors form. Luu “disclosed she had Maltese dogs” on her application.

On August 31, 2013, the Georges, through Buscemi, offered Luu a two-year lease requiring \$2,100 per month for rent and a security deposit of \$6,300. Luu made a counteroffer that reduced the security deposit to \$4,200; the Georges accepted. Luu executed a six-page lease agreement. Buscemi executed the lease on behalf of the Georges, pursuant to their signed authorization.

Paragraph 13 of the lease agreement stated: “PETS: Unless otherwise provided in California Civil Code § 54.2, no animal or pet shall be kept on or-about the Premises without Landlord’s prior written consent, except: _____.”

After the lease agreement was signed, Jacqueline reviewed Luu’s credit report and became concerned about a fraud-alert entry in the report.

Luu moved into the property on September 1, 2013. She discovered plumbing and electrical problems and the property did not have air-conditioning as

advertised in the CRMLS listing. She requested that the Georges remedy the deficiencies, but they did not do so.

On September 13, 2013, Buscemi e-mailed a document entitled “NOTICE TO PAY RENT OR QUIT,” in which the Georges demanded that Luu remove her dogs from the property or vacate it. On September 30, the Georges provided Luu with a “NOTICE TO PERFORM OR QUIT,” which reiterated their demand that Luu remove her dogs from the property or vacate it. On October 4, the Georges filed the unlawful detainer action (*George v. Luu* (Super. Ct. Orange County, No. 30-2013-00679555)).

In November 2013, the Georges filed a motion for summary judgment in the unlawful detainer action, in which they asserted the lease agreement prohibited pets. On November 22, the trial court denied the motion, “finding that a triable issue of material fact existed concerning whether CHARLES GEORGE and JACQUELINE GEORGE consented to Plaintiff having her dogs in the Property.” A few days before a jury trial was scheduled in the unlawful detainer action, the Georges offered to settle by, inter alia, permitting Luu to maintain two dogs at the property; Luu rejected the settlement offer.

On December 3, 2013, the Georges dismissed the unlawful detainer action, notified Luu of the dismissal the next day, and also caused a new “NOTICE TO PERFORM OR QUIT” to be posted at the property, in which they again demanded that Luu remove her dogs from the property.

Luu alleged the Georges represented they accepted her application by agreeing to rent the property to her, entering into the lease agreement with her, and accepting her security deposit and first month’s rent, without voicing any objection to dogs on the property. She also alleged that she reasonably relied on the actions of the Georges. She alleged the representations by the Georges were false as the Georges had never intended to permit Luu or any tenant to keep pets at the property, but had intended to object to the dogs after accepting her first month’s rent and security deposit.

Before filing the complaint in the instant action, Luu offered to mediate the underlying disputes in accordance with paragraph 39A of the lease. The Georges rejected Luu's offer to mediate.

Luu alleged she had suffered no less than \$25,000 in damages, sought recovery of her attorney fees and costs, and prayed for a judgment declaring her right to maintain her dogs at the property for the remainder of the lease term.

II.

THE GEORGES FILE A DEMURRER SOLELY CHALLENGING THE FRAUD CLAIM.

The Georges filed a demurrer solely challenging the fraud claim in the complaint, on the ground it failed to state facts sufficient to constitute a cause of action, including facts showing a false representation of fact, justifiable reliance, or damages. The Georges requested that the trial court take judicial notice of (1) Luu's declaration filed in support of her opposition to the Georges' motion for summary judgment in the unlawful detainer action; (2) a copy of the CRMLS listing, which was authenticated in and attached to Luu's declaration; and (3) a copy of the parties' lease agreement, which was authenticated in and attached to Luu's declaration.

Luu filed an opposition to the demurrer and objection to the request for judicial notice; she did not request leave to amend her fraud claim or otherwise argue the existence of a reasonable possibility the defects in the pleading could be cured by amendment.

III.

THE GEORGES FILE AN ANTI-SLAPP MOTION CHALLENGING THE MALICIOUS PROSECUTION CLAIM.

On February 7, 2014, the Georges filed an anti-SLAPP motion challenging the malicious prosecution cause of action.

A.

Summary of the Georges' Evidence in Support of the Anti-SLAPP Motion

The Georges' anti-SLAPP motion was supported by Jacqueline's declaration. Jacqueline stated that in early July 2013, she and Charles contacted Buscemi, who, she understood, is a licensed real estate agent with extensive experience in waterfront properties, to help them find a new tenant for the property. She told Buscemi that she did not want to permit tenants to keep any pets, such as dogs, on the property. Jacqueline did not see the CRMLS listing that Buscemi's office had prepared before it was published; she did not see it until around September 11. She did not see Luu's application until after the lease agreement had been signed.

On August 31, 2013, Buscemi told the Georges that he had found a prospective tenant who was a single woman with a credit rating in the low 600's. Jacqueline thought the credit rating was low, but she knew that with the recession, "many decent people had similarly low credit ratings." She signed the authorization allowing Buscemi to sign the lease on the Georges' behalf. At no time before the lease was signed, was she aware that Luu desired or intended to keep any dogs on the property. On September 1, Buscemi provided her with a copy of the lease signed by Buscemi and Luu. Jacqueline understood that Luu moved into the property on September 1.

On September 3, Jacqueline spoke with Luu's real estate agent who informed her communications with Luu go through him because Luu was very busy; the agent did not mention anything about dogs at the property. During the conversation, Jacqueline told the agent that she planned to install lighting fixtures in the hall and dining room and asked him to find out whether Luu intended to place a table in the dining room, as that would determine whether a hanging fixture or a flush mount fixture would be needed. Neither the agent nor Luu ever provided Jacqueline with that information.

On September 4, Jacqueline received a copy of Luu's credit report. She noticed multiple entries in the report, stating "HIGH RISK FRAUD ALERT." Although

Jacqueline was concerned, she did not take action because the lease agreement had already been signed. She did not discuss the entries with anyone, and they did not have anything to do with her decision to initiate the unlawful detainer action.

Jacqueline first learned that dogs were being kept on the property on September 11, 2013, when she received an e-mail from Luu's agent, which attached a \$240 plumbing bill for an after-hours emergency call. Jacqueline called the plumbing company to find out what had happened. She was told the plumber unclogged a toilet and that Luu had told him she had dumped one or more bags of dog feces down the toilet, which caused the backup. That same day, Jacqueline received a letter from the property manager of the community in which the property is located, notifying her that a neighbor had complained about a dog that continually barked for over three hours, on the balcony of the property. The letter stated that the barking dog incident constituted a deficiency or violation of the homeowners association's rules and regulations, and requested that the problem be eliminated within 24 hours.

Jacqueline was concerned because the Georges never intended to allow dogs to be kept at the property for fear the property would get damaged. She understood that the lease agreement clearly stated that no pets were permitted on the property and believed Luu was therefore in breach of the lease agreement. Jacqueline asked Buscemi what steps could be taken to address the issue and he volunteered to prepare a three-day notice that would demand Luu remove her dogs or vacate the property. Jacqueline agreed with that course of action.

On September 13, Jacqueline sent Luu's agent an e-mail informing him that paragraph 13 of the lease agreement prohibited keeping pets on the property. She notified him of the letter she had received from the property manager regarding the complaint about the barking dog and her understanding that a barking dog constituted a violation of the homeowners association's rules and regulations. She faxed a copy of the property manager's letter to Luu's agent. That same day, Luu's agent sent Jacqueline an

e-mail stating that Luu intended to install fixtures herself and take them with her when the lease expired. Jacqueline told Luu's agent that the tenant is not supposed to make alterations to the property without the written consent of the landlord and further informed him the Georges still intended to purchase the light fixtures and have them installed. She did not receive a response.

"Shortly after Mr. Buscemi served the three-day notice," Luu told Buscemi she would not agree to remove the dogs, and would not vacate the property either.

On September 24, 2013, after giving notice, the Georges entered the property with an electrician who was to install light fixtures. They discovered Luu had already installed light fixtures. Jacqueline saw three dogs at the property; they were barking. On September 25, Jacqueline retained counsel to assist her in enforcing her rights under the lease agreement.

On September 30, Jacqueline received a second letter from the property manager, which stated that "the barking dogs problem had not been resolved" and additional complaints had been received. Jacqueline directed her attorneys to serve Luu with another three-day notice for her continuing breach of paragraph 13 of the lease.

On October 4, 2013, Jacqueline knocked on the door of the property to determine if Luu was there. There was no response. Jacqueline also knocked on a window and saw the dogs were still there; they began to bark. That same day, Jacqueline's attorneys filed an unlawful detainer complaint against Luu on the Georges' behalf. In her declaration, Jacqueline stated: "I decided to pursue the UD [(unlawful detainer)] Action because I believed that Luu was in breach of the Lease by continuing to keep dogs on the Property despite being notified multiple times that pets were prohibited. My decision to bring the UD Action was motivated solely by my desire to enforce the terms of the Lease prohibiting pets. Prior to initiating the UD Action, and at all times since then, I have never held a personal grudge against Luu and I did not file the UD Action because I wanted to retaliate against Luu for any reason or because I did not want

her as a tenant based on the fraud entries in her credit report. To the contrary, I have at all times been willing to allow Luu to remain a tenant on the Property, and have so informed her, as long as she continued to pay the rent and otherwise complied with the terms of the Lease”

By December 1, 2013, Luu was three months behind in paying rent and owed a total amount of \$6,300. Jacqueline believed that Luu was trying to stay at the property for as long as possible without paying rent, and that the nonpayment of rent was another basis for terminating the lease. Jacqueline stated in her declaration that in order to bring all of the breaches of the lease before the court in a single case, she dismissed the unlawful detainer action without prejudice with the intent to serve on Luu a three-day notice to pay rent or quit and a notice to perform covenant or quit. In her declaration, Jacqueline stated she dismissed the unlawful detainer action without prejudice because she wanted a single and stronger case, not because she did not believe Luu was in breach of the lease or because Jacqueline feared the Georges would not prevail at trial.

On December 4, 2013, Luu was served with a three-day notice to pay rent or quit and a three-day notice to perform covenant or quit. The instant action was filed by Luu on December 9.

Buscemi also filed a declaration in support of the anti-SLAPP motion. He stated that the Georges had told him they did not want tenants to be permitted to keep any pets, such as dogs, on the property. On August 1, 2013, his office created and ran the CRMLS listing. Luu’s agent sent Buscemi an e-mail with Luu’s application attached. Buscemi did not review it but arranged for an assistant to run a credit check on Luu. Buscemi was present when Luu and her agent inspected the property on August 31, 2013. The assistant prepared the lease which Luu and Buscemi signed. Prior to signing the lease, neither Luu nor her agent mentioned Luu’s desire or intent to keep dogs on the property or asked questions about paragraph 13 of the lease, which prohibited pets. Buscemi also stated in his declaration that he did not notice the word “Maltese” on the

line entitled “Pet(s) or service animals (number and type)” on Luu’s application before he signed the lease agreement on behalf of the Georges.

Buscemi further stated that on or about September 11, 2013, after Jacqueline told Buscemi that she had learned Luu was keeping dogs at the property, Buscemi prepared the notice to pay rent or quit demanding removal of all pets, which he sent to Luu on September 13. Luu responded with an e-mail stating: “My dogs will be out within 3 days.” On September 17, however, Luu told Buscemi that she would not remove her dogs from the property and she would not vacate the property.

B.

Luu’s Evidence in Opposition to the Anti-SLAPP Motion

Luu filed a declaration in support of her opposition to the anti-SLAPP motion, which added the following information. Shortly after Luu moved into the property, she noticed there were several problems with the property. Specifically, the toilet clogged; two light fixtures did not work; the washer and dryer did not function properly; there was no air-conditioning, contrary to the CRMLS listing; and her mailbox key, boat-dock gate key, and gate opener did not work. She stated the Georges identified the wrong assigned parking spot, “resulting in hate notes from my neighbors when I parked in spaces assigned to other tenants.” Luu stated, “[a]fter I requested Defendants correct the above-referenced deficiencies in the Property, Defendants demanded I remove my dogs.”

IV.

THE TRIAL COURT SUSTAINS THE DEMURRER TO THE FRAUD CLAIM WITHOUT LEAVE TO AMEND, GRANTS THE ANTI-SLAPP MOTION AS TO THE MALICIOUS PROSECUTION CLAIM, AND DISMISSES THE DECLARATORY RELIEF CLAIM; JUDGMENT IS ENTERED AND LUU APPEALS.

The trial court issued a minute order explaining its rulings on the demurrer to the fraud claim and the anti-SLAPP motion as to the malicious prosecution claim, as

follows: “As more fully discussed on the record, motion to strike is granted. [Citations.] As also stated on the record, the court sustains without leave to amend the demurrer to the 3rd cause of action (declaratory relief). [Citations.] The 2nd cause of action for fraud is also demurrable and the court would give plaintiff 10 days leave to amend, but for the fact that the court also finds that said alleged cause of action arises out of the same set of operative facts as the 1st cause of action for malicious prosecution as to which it has granted the motion to strike.”

The court also signed an order that stated:

“ . . . After considering both the Motion and the Demurrer, including all papers and pleadings filed in support of and in opposition to the Motion and Demurrer, and after argument of counsel, and good cause appearing, IT IS HEREBY ORDERED:

“1. Defendants’ Special Motion to Strike is GRANTED, and the cause of action for malicious prosecution is stricken from the Complaint;

“2. Defendants’ Demurrer to the fraud cause of action is SUSTAINED without leave to amend; and

“3. The cause of action for declaratory relief is STRICKEN as moot. Plaintiff has vacated the subject premises and the Lease has been cancelled, therefore the claim for declaratory relief is moot.^[4]

“4. Defendants are entitled to recover their attorney’s fees and costs for the Motion to Strike in accordance with Code of Civil Procedure section 425.16(c)(1).”

Judgment was entered in the Georges’ favor. Luu appealed.

⁴ Luu does not challenge the substance of the court’s resolution of the declaratory relief claim on appeal. We therefore do not refer to it further in this opinion.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR BY SUSTAINING THE DEMURRER TO THE FRAUD CAUSE OF ACTION.

Luu contends the trial court erred by sustaining the Georges' demurrer to her fraud cause of action. The court did not err because Luu failed to allege sufficient facts to state a cause of action for fraud against the Georges.

A.

Standard of Review

A judgment following the sustaining of a demurrer is reviewed under the de novo standard. (*McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144; *Bocato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797, 1803-1804.)

Accordingly, we treat the properly pleaded allegations of a challenged complaint as true, and liberally construe them to achieve ““substantial justice”” among the parties.

(*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118.)

We consider only the allegations of a challenged complaint and matters subject to judicial notice to determine whether the facts alleged state a cause of action under any theory. (*American Airlines, Inc. v. County of San Mateo, supra*, 12 Cal.4th at p. 1118.) “Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

B.

The Complaint Failed to Allege Facts Sufficient to State a Claim for Fraud.

The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at

the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) ““In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] “Thus “the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.”” [Citation.] This particularity requirement necessitates pleading *facts* which ‘show how, when, where, to whom, and by what means the representations were tendered.’”” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.)

The trial court did not err by sustaining the demurrer to the fraud claim because the complaint did not allege facts showing all of the elements of fraud. Luu argues the CRMLS listing’s statement that pets would be considered by the landlord with a \$500 pet deposit constituted a false statement of fact because the Georges never intended to permit any tenant to keep pets at the property. But the complaint alleged the statement was made by Buscemi, as the Georges’ agent, not by the Georges themselves. There is no allegation in the complaint the Georges had authorized that statement or had even known about it before it was seen by Luu. The CRMLS listing’s statement regarding pets, therefore, does not show the Georges made a false statement of fact.

Even if we were to assume the CRMLS listing’s statement regarding pets qualified as a false statement of fact by the Georges, the complaint did not allege Luu suffered damages by simply submitting a rental application in reliance on the hope that the Georges would consider allowing her pets. Luu alleged she reasonably relied on the Georges’ actions of agreeing to rent the property to her, entering into the lease agreement with her, and accepting her security deposit and first month’s rent, as communicating their consent to pets at the property because those actions did not include the Georges notifying her of their objection to her dogs.

Luu's allegations do not show *reasonable* reliance on a false statement of fact. It was not reasonable, as a matter of law, for Luu to interpret the CRMLS listing's statement that pets would be *considered* by the landlord and the Georges' entry into the lease agreement prohibiting pets to mean that the Georges had actually consented to pets. As discussed *ante*, the lease expressly prohibited pets without the Georges' written consent. At oral argument on appeal, Luu's counsel argued a sentence in paragraph 38 of the lease agreement affected this analysis, but that sentence only contained a warranty by *Luu* that all her statements in the application were accurate. That sentence does not constitute an agreement by the Georges. What is more, paragraph 43 of the lease agreement contains an integration clause, providing that all agreements are in the written lease agreement.

II.

LUU HAS FAILED TO SHOW THERE WAS A REASONABLE POSSIBILITY SHE COULD AMEND THE COMPLAINT TO STATE A FRAUD CLAIM.

Luu argues the trial court erred by failing to grant her leave to amend her fraud claim. When a demurrer is sustained without leave to amend, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

“Furthermore, where the plaintiff requests leave to amend the complaint, but the record fails to suggest how the plaintiff could cure the complaint's defects, ‘the question as to whether or not [the] court abused its discretion [in denying the plaintiff's request] is open on appeal’ [Citation.] Because the trial court's discretion is at issue, we are limited to determining whether the trial court's discretion was abused as a

matter of law. [Citation.] Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found “only if a potentially effective amendment were both apparent and consistent with the plaintiff’s theory of the case.” [Citation.]” (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 507.)

In *Lincoln Property Co., N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 916, the appellate court held: “[W]e find no abuse of discretion in the trial court’s denial of leave to amend. Although [the plaintiff] has consistently requested leave to amend, it has never suggested what facts it is prepared to allege that would cure the defect in its complaint. There is nothing in the record that suggests that [the plaintiff] could amend its complaint to state a cause of action which would not similarly be barred by the judgment in the prior . . . action.”

Luu argues the trial court erred in sustaining the demurrer without leave to amend based on the court’s determination that the fraud claim arose out of the same set of operative facts as the cause of action for malicious prosecution. Luu, however, has failed to show there is a reasonable possibility the defects in the pleading of her fraud claim can be cured by amendment. We therefore conclude the demurrer to the fraud claim was properly sustained without leave to amend.

III.

THE TRIAL COURT DID NOT ERR BY GRANTING THE ANTI-SLAPP MOTION.

Luu contends the trial court erroneously granted the Georges’ anti-SLAPP motion challenging her malicious prosecution claim. As we will explain, the trial court did not err because Luu’s malicious prosecution claim was based on conduct protected by section 425.16, subdivision (e)(1), and Luu failed to carry her burden of establishing the probability she would prevail on that claim.

A.

Section 425.16 and Standard of Review

Section 425.16 provides for a special motion to strike “[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.” (§ 425.16, subd. (b)(1).) “Section 425.16, subdivision (b)(1) 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. [Citation.] 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. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) “‘The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.’” (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.) To establish a probability of prevailing on a claim, “‘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.’”” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.)

We independently review the trial court’s order granting an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) “‘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.]’ [Citation.]” (*Id.* at p. 326.) We further observe that the anti-SLAPP statute is to be broadly construed. (§ 425.16, subd. (a).)

B.

The Georges Met Their Burden of Demonstrating the Act Underlying Luu’s Malicious Prosecution Claim Arose from Protected Activity.

A defendant can meet his or her burden of making a threshold showing that a cause of action is one arising from protected activity by demonstrating the acts underlying the plaintiff’s cause of action fall within one of the categories of section 425.16, subdivision (e). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Section 425.16, subdivision (e) provides in relevant part: “As used in this section, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.”

The Georges met their burden of showing Luu’s malicious prosecution claim was based on conduct protected by the anti-SLAPP statute. Luu’s malicious prosecution claim was based on the Georges’ act of filing the unlawful detainer action, which squarely falls within section 425.16, subdivision (e)(1). Luu has not argued otherwise in the trial court or on appeal.

As the Georges have satisfied their burden of showing the conduct underlying Luu’s claim for malicious prosecution came within section 425.16, subdivision (e)(1), the burden shifted to Luu to show a probability of prevailing on the merits of that claim.

C.

Luu Failed to Carry Her Burden of Showing a Probability of Prevailing on Her Malicious Prosecution Claim.

The elements of a cause of action for malicious prosecution are (1) a favorable determination on the merits of the underlying action, (2) which was brought without probable cause, and (3) which was initiated or maintained with malice. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 226 (*Daniels*)). For the reasons discussed *post*, Luu failed to carry her burden of making a prima facie showing that the unlawful detainer action was prosecuted by the Georges with malice.

The California Supreme Court has explained that the malice element of malicious prosecution claims “relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will or some improper ulterior motive.” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292, italics omitted.)

In *Daniels, supra*, 182 Cal.App.4th at page 224, a panel of this court stated that in the context of malicious prosecution claims, “[i]mproper purposes can be established in cases in which, for instance (1) the person bringing the suit does not believe that the claim may be held valid; (2) the proceeding is initiated primarily because of hostility or ill will; (3) the proceeding is initiated solely for the purpose of depriving the opponent of a beneficial use of property; or (4) the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim. [Citation.]”

Luu has provided no direct evidence of malice by the Georges in their prosecution of the unlawful detainer action. We therefore consider whether Luu has produced circumstantial evidence from which malice might be reasonably inferred.

(*Daniels, supra*, 182 Cal.App.4th at p. 225 [““Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.””].)

Jacqueline declared that she had decided to pursue the unlawful detainer action because she believed Luu was in breach of the lease agreement by keeping dogs on the property after being repeatedly told pets were prohibited. Jacqueline stated she was “motivated solely by [her] desire to enforce the terms of the Lease prohibiting pets” and she never held a personal grudge against Luu for any reason. Jacqueline also stated she had at all times been willing to have Luu remain as a tenant on the property, and told her so, as long as she paid her rent and complied with the terms of the lease agreement.

Luu asserted the Georges initiated the unlawful detainer action, and continued to harass her about her dogs, with malice “in an attempt to evict [Luu] in retaliation for [her] requests for repairs, because they no longer wanted [her] as a tenant based on entries in her credit report, and because they never intended to permit [her] to keep her dogs in the Property.” Luu’s assertion is not supported by the evidence in the record. There is no evidence that Luu’s requests to the Georges that certain problems at the property be fixed, including a clogged toilet, missing light fixtures, broken appliances, and keys that did not work, caused the Georges to develop malice against Luu, which motivated them to file the unlawful detainer action.

The evidence shows the Georges first learned that Luu intended or desired to keep dogs on the property after the lease agreement was signed. It is undisputed the Georges never intended to have a tenant keep pets on the property and never expressed their consent to any such arrangement. In light of Luu’s refusal to comply with the Georges’ requests that she remove the dogs, the express language in the lease agreement prohibiting pets (absent a written consent by the Georges), and the Georges’ fear that pets would cause damage to the property’s upgraded condition, the Georges filed the unlawful detainer action to have the dogs removed from the property.

Because Luu failed to make a prima facie showing of facts that the Georges prosecuted the unlawful detainer action with malice, she has failed to show a probability of prevailing on the malicious prosecution claim. We therefore do not need to determine whether Luu demonstrated a probability of establishing the remaining elements of a malicious prosecution claim.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FYBEL, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.