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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

EDGAR ISRAEL HERNANDEZ et al.,

Cross-complainants and
Respondents,

v.

ROBINSON TAIT, P.S. et al.,

Cross-defendants and Appellants.

H036655

(Santa Clara County
Super. Ct. No. CV153271)

I. INTRODUCTION

Appellant Robinson Tait, P.S., a Seattle law firm, filed a debt collection action on behalf of its client, Mortgage First, alleging that respondents Edgar Israel Hernandez and Theresa Velasco had failed to repay an \$84,000 loan. Hernandez and Velasco responded by filing a cross-complaint alleging violations of the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692). They also asserted that the collection action was barred by California's anti-deficiency judgment statute, Code of Civil Procedure section 580b,¹ because the \$84,000 loan was a junior loan used to purchase the home they later lost to foreclosure. The second amended cross-complaint included a third cause of action for malicious prosecution.

¹ All statutory references hereafter are to the Code of Civil Procedure unless otherwise indicated.

Robinson Tait brought a special motion to strike the cross-complaint's cause of action for malicious prosecution pursuant to section 425.16, the anti-SLAPP² statute, which provides that a cause of action arising from constitutionally protecting speech or petitioning activity is subject to a special motion to strike unless the cross-complainant establishes a probability of prevailing on the claim. (§425.16, subd. (b)(1).) The trial court denied the motion.

On appeal, Robinson Tait argues that the trial court erred because respondents do not have a probability of prevailing on their malicious prosecution claim, since (1) there was probable cause to initiate the collection action; (2) Robinson Tait promptly abandoned the claim after the lack of probable cause was discovered; and (3) there is no evidence that Robinson Tait acted with malice.

For the reasons stated below, we determine that respondents met their burden to show a probability that they will prevail on their malicious prosecution claim. Therefore, we will affirm the order denying Robinson Tait's special motion to strike the cross-complaint's third cause of action for malicious prosecution.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Junior Loan

Hernandez and Velasco are married. In 2002, they purchased a primary residence in San Jose for \$420,000. As indicated in the borrower's settlement statement, the financing for the purchase included two loans from Meritage Mortgage Corporation: a first loan of \$336,000 and a second loan of \$84,000 (the junior loan). Both loans were secured by deeds of trust. Hernandez and Velasco never refinanced either of the loans, and in 2003 they fell behind on their mortgage payments. The property was sold in 2004 during non-judicial foreclosure proceedings initiated by the first loan creditor.

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

B. Mortgage First's Attempts to Collect Payment of the Junior Loan

Approximately five years after the 2004 foreclosure sale, Hernandez received a demand letter from Mortgage First. The letter, dated May 28, 2009, was captioned, "Notice of Intent to seek Judgment and Garnish Wages," and stated in part, "You are being notified of our intent to seek judgment against you and garnish your wages for the delinquent balance on a Promissory note." Hernandez understood that Mortgage First was attempting to collect payment of the \$84,000 junior loan on the San Jose home.³

Hernandez spoke with Tony Martinez of Mortgage First on July 20, 2009. According to Hernandez, he explained to Martinez that he was protected from collection under California law because the junior loan had been used to purchase Hernandez's home and had never been refinanced. Mortgage First nevertheless continued its collection efforts.

C. Robinson Tait's Attempts to Collect Payment of the Junior Loan

In July 2009, Mortgage First retained a Seattle law firm, Robinson Tait, to collect payment on the promissory note in the amount of \$84,000 that was purportedly owed by Hernandez and Velasco. According to Joe John Solseng, vice-president of Robinson Tait, the materials provided by Mortgage First did not indicate that the promissory note might have been a junior loan used entirely for the purchase of the home owned by Hernandez and Velasco.

Robinson Tait began its attempt to collect the \$84,000 promissory note by sending a letter to Hernandez and Velasco dated August 10, 2009. The letter stated in part, "NOTICE IS HEREBY GIVEN that you have failed to make payments commencing on October 1, 2003 pursuant to that certain Promissory dated July 18, 2002, duly executed by [Hernandez and Velasco] in favor of Meritage Mortgage Corporation, the original

³ The record does not reflect the manner in which Mortgage First acquired the promissory note for the \$84,000 junior loan.

beneficiary in the original principal amount of \$84,000.00. Mortgage First, is now the owner and holder of the Promissory Note ¶ . . . [T]he amount of the delinquency totals \$65,743.95. . . ¶ . . . ¶ You must make this payment no later than thirty days from the date of this letter or legal action may be commenced.” The letter also stated in a subsequent paragraph that the total amount owed was \$144,327.59.

After receiving the letter, Hernandez telephoned Mortgage First on August 20, 2009. He “explained that our home had been foreclosed, the junior loan was used to purchase the home and had never been refinanced, and mentioned that California had a law protecting [him].”

A few days later, Hernandez telephoned Robinson Tait. During his August 24, 2009 telephone conversation with John Edmundson, a Robinson Tait paralegal, Hernandez “informed him that [he] had conducted the research and they could not sue [him] to try to obtain a deficiency balance. [Hernandez] explained the circumstances surrounding the purchase of [the] home, that the home had been foreclosed, the junior loan was used to purchase the home, and [they] had never refinanced. [Hernandez] mentioned that [he] looked up on the internet that California law protected [him] because [he] had never refinanced and the loan was used to purchase [his] home.” According to Edmundson, he “explained to Mr. Hernandez ‘that the second [deed of trust] lender never received compensation, so they are now attempting to recover on the note,’ as reflected in [his] entry into [his] firm’s phone log.”

D. The Complaint

On September 24, 2009, Robinson Tait filed a complaint on behalf of Mortgage First against Hernandez and Velasco. Mortgage First alleged that Hernandez and Velasco had failed to make any payments on a Meritage Mortgage promissory note with the principal sum of \$84,000 since October 2003, and claimed that it was owed the principal amount plus interest at the rate of 12.5 percent per annum.

On October 20, 2009, Hernandez sent a letter to both Robinson Tate and Mortgage First that stated, “Can you please stop bothering us? I spoke with both of you guys and told you my wife declared Chapter 7 bankruptcy in 2004 and I never refinanced my house. I am asking you why do you keeping bothering us? You have now sued us. [¶] I told both of you that I checked the Internet on California Law and it says that if we never refinanced the house and the house is foreclosed that we don’t owe anything[.] Please stop bothering us and please stop this lawsuit against us immediately. [¶] We are sending you proof (settlement statement) that we borrowed the money you are suing us about to buy the house and that we never refinanced our house. We are also sending proof of [Velasco’s] bankruptcy. [¶] The lawsuit you made against [us] please stop immediately.”

On October 27, 2009, Hernandez and Edmundson, Robinson Tait’s paralegal, had another telephone conversation. According to Hernandez, Edmundson told him that Robinson Tait had received Hernandez’s letter but would not dismiss the lawsuit. Edmundson recalled that he advised Hernandez that “ ‘we did not believe that Ms. Velasco’s bankruptcy case got rid of the debt,’ ” as noted in Edmundson’s contemporaneous telephone log. Edmundson’s telephone log does not indicate that Hernandez informed him, during the October 27, 2009 telephone conversation, that “the note was a purchase money note and/or that the California anti-deficiency judgment statute barred enforcement of the debt.”

E. The Cross-Complaint

On November 25, 2009, Hernandez and Velasco filed a cross-complaint against Mortgage First, Robinson Tait, and two Robinson Tait attorneys, John Solseng and Nicolas Daluiso. The cross-complaint alleged that Mortgage First was unlawfully attempting to collect a debt in violation of the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692). The cross-complaint also included a cause of action for declaratory

relief, in which they asserted that they were not liable for the debt because the money judgment sought by Mortgage First was subject to section 580b.⁴

On January 18, 2010, after the cross-complaint was filed, attorney Rhonna Kollenkark of Robinson Tait emailed the following message to Sergio Delgado of Foreclosure Management Company, the intermediary for Mortgage First: “In their Cross Complaint, the borrowers include the attached Settlement Statement in support of their claim that loan number [redacted] was used to finance their purchase of the home. If this is indeed the case, then the client is likely barred from suing to enforce the note under [section] 580(b). [¶] I suspect the answer to this question will be in the loan origination file. Does the client have the loan origination file and, if they do, could you request it for me?” Delgado responded in an email dated January 19, 2010, to Edmundson that the “[c]lient advises that they do not have an origination file on this account. All they have is a copy of the promissory note.”

A few hours later on January 19, 2010, attorney Kollenkark advised Delgado in an email that “[f]rom [her] review of the borrower’s settlement statement that [she] provided to [Delgado] yesterday, it appears that the borrower’s assertion about the purchase money nature of the loan is correct. If the client has no additional information about the formation of the loan, then we will be unable to contest the borrower’s assertion that loan # [redacted] was a purchase money loan. [¶] *Unfortunately, [section] 580(b) prohibits a deficiency judgment against a purchase money loan. This includes suits on the note by sold out junior lienors like the client. Accordingly, the client is prohibited from bringing*

⁴ Section 580b provides in part, “No deficiency judgment shall lie in any event after a sale of real property . . . for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property. . . .” Thus, “[t]he language of section 580b is plain. A vendor is barred from obtaining a deficiency judgment against a purchaser in a purchase money secured land transaction.” (*DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 663 (*DeBerard Properties*).)

its present law suit and will need to dismiss its case. [¶] The borrowers have filed a Cross Complaint seeking money damages against the client. It is possible that we may be able to get the borrowers to agree to dismissal of their claims, including their claim for damages, if we can [sic] the client's prompt agreement to dismissal of its case. [¶] Please inform the client the impact [sic] law on its case and advise us as to how they would like to proceed." (Italics added.)

On February 3, 2010, attorney Solseng sent an email to Delgado advising him that Hernandez and Velasco had rejected Mortgage First's "offer to dismiss both lawsuits." Additionally, after noting that Mortgage First had "declined to authorize the filing fee for answering this complaint," Solseng stated that "[w]e can dismiss our lawsuit if Mortgage First wishes, but the cross-suit will still remain. If we do not answer, defaults will be taken against Mortgage First and us and judgments will be entered against Mortgage First and us."

Andrea Lattimore of Foreclosure Management Company responded in a February 4, 2010 email that Mortgage First did not "appear to care. Their response was, 'Tony said to drop this case. We are not going to approve any more fees on this. Tony said that we do not care . . . what the consequences are.'" Attorney Jennifer Tait of Robinson Trait replied in an email later the same day that Robinson Tait would "go ahead and withdraw as Mortgage First's counsel."

However, on February 10, 2010, attorney Daluiso of Robinson Tait advised Andrea Lattimore that "[w]e have yet to file the withdrawal. We will do so tomorrow if that is still what is desired. Let me know." Robinson Tait then attempted to file a motion to withdraw as attorney of record for Mortgage First, but the motion was rejected by the court clerk on February 25, 2010, because the documents were not on Judicial Council forms.

The record reflects that Robinson Tait eventually filed a motion to withdraw as Mortgage First's attorney on March 23, 2010. However, the record does not reflect that

the motion was ever heard or ruled upon. Attorney Solseng of Robinson Tait recalled that “[t]he withdrawal was complicated both by communication problems between Robinson Tait and Mortgage First and by the fact that Mortgage First, as a business entity, could not represent itself.” According to Robinson Tait, “Though the Court initially accepted the Notice of Withdrawal, suggesting to Robinson Tait that the withdrawal had been permitted, Robinson Tait became aware on May 11, 2010, that the Court had rejected the Notice (separate from the Motion to Withdraw, which was also rejected), and that Robinson Tait remained counsel of record for Mortgage First.”

About three months later, on June 21, 2010, new counsel for Mortgage First forwarded an email from Tony Martinez to attorney Daluiso of Robinson Tait that instructed attorney Solseng to “[p]lease dismiss Mortgage First Inc’s case against Hernandez without prejudice immediately.” According to attorney Daluiso, “[o]nce Mortgage First retained new counsel, it authorized me to file the dismissal of the Complaint, which Robinson Tait did promptly in June 2010.”

The request for dismissal was not included in the record. On our own motion, we take judicial notice of the request for dismissal of the complaint without prejudice that was filed by Robinson Tait in the trial court on June 29, 2010. (Evid.Code, § 452, subd. (d).)

F. The Second Amended Cross-Complaint

On November 9, 2010, Hernandez and Velasco filed a second amended cross-complaint that included a cause of action for malicious prosecution as well as causes of action for violation of the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692) and declaratory relief.

The malicious prosecution cause of action was asserted against Robinson Tait, Mortgage First, and other defendants who, like Mortgage First, are not parties to this appeal. Hernandez and Velasco alleged that Hernandez’s October 2009 letter to Robinson Tait put the law firm on notice that the collection action was baseless, and that

Robinson Tait acknowledged in correspondence with Foreclosure Management Company in January 2010 that the action was baseless, but the complaint was not dismissed until July 2, 2010.⁵

G. Robinson Tait's Section 425.16 Special Motion to Strike

On December 3, 2010, Robinson Tait filed a special motion to strike the cause of action for malicious prosecution in the second amended cross-complaint (hereafter, the cross-complaint) pursuant to the anti-SLAPP statute, section 425.16.

Robinson Tait argued that the anti-SLAPP statute applied to a malicious prosecution claim because such claims arise from the constitutional right to petition, and therefore the burden shifted to Hernandez and Velasco to show that they had a probability of prevailing on the claim. They could not do so, Robinson Tait argued, because based on the information known to the law firm at the time, the initial filing of the complaint was reasonable. Robinson Tait also argued that it “acted diligently to obtain authorization to dismiss the Complaint as soon as it became aware of facts questioning the legitimacy of the action against [Hernandez and Velasco].”

Further, Robinson Tait contended that Hernandez and Velasco could not show that it acted with malice in filing and prosecuting the complaint, since there was no evidence that Robinson Tait harassed them, used abusive language, or harbored any hostility or ill will towards them. Robinson Tait also asserted that it advised its client, Mortgage First, to dismiss the complaint “immediately upon concluding that the case may lack merit,” and refrained from taking any action to litigate the complaint.

H. Opposition to the Section 425.16 Special Motion to Strike

In their opposition to the special motion to strike the malicious prosecution cause of action in their cross-complaint, Hernandez and Velasco did not dispute that their cross-

⁵ As stated *ante*, we take judicial notice that the request for dismissal of the complaint without prejudice was filed on June 29, 2010.

complaint is subject to the anti-SLAPP statute. They argued instead that the motion should be denied because they have a probability of prevailing on the malicious prosecution claim in their cross-complaint.

According to Hernandez and Velasco, Robinson Tait lacked probable cause to file the debt collection action since Hernandez had previously informed law firm personnel that the junior loan had been used to purchase his home and had never been refinanced. They also argued that Robinson Tait lacked probable cause to file the debt collection action because it did not have any documentation of the loan, such as the original promissory note.

Hernandez and Velasco also contended that Robinson Tait initiated the collection action and continued it with malice, since the evidence shows that the law firm personnel handling the matter were indifferent to their rights and ignored their multiple requests for dismissal.

I. The Trial Court's Orders

On February 2, 2011, the trial court issued its order continuing the hearing on Robinson Tait's special motion to strike the malicious prosecution cause of action to February 22, 2011, to allow Robinson Tait to file a supplemental reply brief responding to supplemental evidence of damages submitted by Hernandez and Velasco.

During the February 22, 2011 hearing, the trial court noted that Hernandez alleged in his declaration that he had told John Edmundson, the Robinson Tait paralegal, that the loan that was the subject of the collection action had been used to purchase a home, but Edmundson responded that it did not matter.

Thereafter, on February 24, 2011, the trial court issued its order denying Robinson Tait's motion. Robinson Tait filed a timely notice of appeal from the order on March 3, 2011.⁶

III. DISCUSSION

On appeal, Robinson Tait contends that the trial court erred in denying its anti-SLAPP motion to strike the cause of action for malicious prosecution in the cross-complaint, because Hernandez and Velasco have no probability of prevailing on their malicious prosecution claim. We will begin our evaluation of Robinson Tait's contentions with an overview of section 425.16, the anti-SLAPP statute, followed by a discussion of the applicable standard of review.

A. Section 425.16

Section 425.16 was enacted in 1992 in response to a "disturbing increase" in lawsuits brought for the strategic purpose of chilling a defendant's rights of petition and free speech. (§ 425.16, subd. (a).)⁷ SLAPPs (strategic lawsuits against public participation) are unsubstantiated lawsuits based on claims arising from defendant's constitutionally protected speech or petitioning activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier.*))

⁶ An order denying a special motion to strike under section 425.16 is an appealable order. (*Chambers v. Miller* (2006) 140 Cal.App.4th 821, 824.)

⁷ Section 425.16, subdivision (a) provides: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly."

Section 425.16 applies to any 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, subds. (b)(1), (e)(4).) The stated purpose of section 425.16 is to encourage protected speech by permitting a court to promptly dismiss unmeritorious actions or claims that are brought “primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (§ 425.16, subd. (a); *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278 (*Soukup*).)

Under section 425.16, the trial court evaluates the merits of a possible SLAPP by “using a summary-judgment-like procedure at an early stage of the litigation.” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) The procedures authorized in the statute allow a defendant to stay discovery before litigation costs mount, obtain early dismissal of the lawsuit, and recover attorney’s fees. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 197-198.)

A defendant seeking the protection of the anti-SLAPP statute has the burden of making the initial showing that the lawsuit arises from conduct “in furtherance of [a] person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue^[8]” (§ 425.16, subds. (b)(1), (e)(4); *Navellier, supra*, 29 Cal.4th at p. 88.) Once the defendant has shown that the plaintiff’s claim arises from one of the section 425.16, subdivision (e) categories of protected activity, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88.)

⁸ A public issue within the meaning of section 425.16 includes speech activity that takes place before, during, or in connection with an “official proceeding authorized by law.” (§ 425.16, subd. (e)(1), (e)(2); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116-1117.)

Thus, “ ‘[s]ection 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.’ [Citation.] ‘Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at pp. 278-279.)

B. The Standard of Review

“Review of an order granting or denying a motion to strike under section 425.16 is *de novo*. [Citation.] We consider ‘the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’ (§ 425.16, subd. (b)(2).) 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.]” (*Soukup, supra*, 39 Cal.4th at p. 269, fn.3.)

Applying this standard of review, we will independently determine from our review of the record whether the malicious prosecution cause of action in the cross-complaint is a SLAPP under the two-prong test set forth in *Soukup, supra*, 39 Cal.4th at pages 278-279.

C. The First Prong of the Anti-SLAPP Statute

We find that Robinson Tait’s anti-SLAPP motion satisfied the first prong of the anti-SLAPP statute by making a threshold showing that the malicious prosecution cause of action arises from activity protected under section 425.16: Robinson Tait’s filing and prosecution of the debt collection action. “The filing of lawsuits is an aspect of the First Amendment right of petition.” (*Soukup, supra*, 39 Cal.4th at p. 291.) And, “ ‘[b]y

definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit.’ [Citation.]” (*Ibid.*) The California Supreme Court has accordingly held that a malicious prosecution action that arises from a civil lawsuit is not exempt from the anti-SLAPP statute. (*Jarrow, supra*, 31 Cal.4th at p. 741.)

D. *The Second Prong of the Anti-SLAPP Statute*

Since Robinson Tait’s motion satisfied the first prong of the anti-SLAPP statute, the burden shifted to cross-complainants Hernandez and Velasco to demonstrate the probability of prevailing on the cause of action for malicious prosecution and thereby establish that the second prong of the anti-SLAPP statute has not been satisfied. (*Soukup, supra*, 39 Cal.4th at pp. 278-279.)

The California Supreme Court has described the plaintiff’s burden as follows: “To establish a probability of prevailing, 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.’ [Citations.]” (*Soukup, supra*, 39 Cal.4th at p. 291.) Importantly, we do not “weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) We emphasize that our standard of review requires us to consider the defendant’s evidence “ ‘only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation]” (*Soukup, supra*, 39 Cal.4th at p. 269, fn. 3.)

Thus, Robinson Tait’s anti-SLAPP motion must be granted unless Hernandez and Velasco made a prima facie showing of facts sufficient to support each element of their malicious prosecution claim. (*Soukup, supra*, 39 Cal.4th at p. 291.) “To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated

with malice.” (*Soukup, supra*, 39 Cal.4th at p. 292.) We will discuss each element in turn.

1. Favorable Termination

The record reflects that showed that Robinson Tait voluntarily dismissed the complaint without prejudice on June 29, 2010. The general rule is that a voluntary, unilateral dismissal of a complaint, even where made without prejudice, constitutes a favorable termination for purposes of a malicious prosecution action. (*Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808; *Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1401.) Therefore, we find that cross-complainants’ showing is sufficient to support the first element of their malicious prosecution claim. Robinson Tait has not argued to the contrary, either in the proceedings below or on appeal.

2. Lack of Probable Cause

The Parties’ Contentions

Robinson Tait argues that it had probable cause to initiate the debt collection action because it could properly rely upon the representations of its client, Mortgage First, that it was entitled to a money judgment on the \$84,000 promissory note. Additionally, Robinson Tait argues that there is no evidence that it maintained the debt collection action without probable cause, since it did not take “any action to advance the lawsuit after its initial filing,” and also because “as soon as Robinson Tait’s probable cause was cast into doubt through the allegations in the Cross-Complaint, Robinson Tait promptly abandoned the claim.”

Hernandez and Velasco contend that Robinson Tait lacked probable cause to file the complaint because Hernandez had previously informed the law firm, during his August 24, 2009 telephone conversation with paralegal Edmundson, that California law protected him from debt collection action on the junior loan because the loan had been used to purchase his home. We also understand Hernandez and Velasco to contend that Robinson Tait continued the lawsuit without probable cause after receiving Hernandez’s

October 20, 2009 letter enclosing a copy of the settlement statement for the purchase of their home, which showed that the junior loan had been used to finance a home purchase.

Analysis

The existence or absence of probable cause is a question of law to be determined by the court. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 875 (*Sheldon Appel*)).) The California Supreme Court has instructed that “[t]he question of probable cause is ‘whether, as an objective matter, the prior action was legally tenable or not.’ [Citation.] ‘A litigant will lack probable cause for his [or her] action either if he [or she] relies upon facts which he [or she] has no reasonable cause to believe to be true, or if he [or she] seeks recovery upon a legal theory which is untenable under the facts known to him [or her].’ [Citation.] ‘In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at p. 292.)

In other words, “the probable cause element calls on the trial court to make an objective determination of the ‘reasonableness’ of the defendant’s conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable.” (*Sheldon Appel, supra*, 47 Cal.3d at p. 878.) “ ‘The test applied to determine whether a claim is tenable is “whether any reasonable attorney would have thought the claim tenable.” [Citation.]’ ” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 971 (*Zamos*)).)

A claim for malicious prosecution is not limited to a cause of action that lacked probable cause when the complaint was filed. In *Zamos*, the California Supreme Court determined that the standard for probable cause “will apply to the continuation as to the initiation of a suit.” (*Zamos, supra*, 32 Cal.4th at p. 970.) Thus, “an attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause.” (*Ibid.*) Moreover, “[b]ecause an attorney will be liable only for the damages incurred from the time the attorney reasonably should have caused the dismissal

of the lawsuit after learning it has no merit, an attorney can avoid liability by promptly causing the dismissal of, or withdrawing as attorney in, the lawsuit. . . .” (*Id.* at pp. 969-970.)

Having independently reviewed the record in this matter (§ 425.16, subd. (b)(2)) we find that, even assuming that Robinson Tait had probable cause to believe that the complaint was legally tenable at the time it was filed, Hernandez and Velasco made a prima facie showing that Robinson Tait continued to prosecute the debt collection action after discovering facts demonstrating the absence of probable cause.

The evidence shows that on January 18, 2010, attorney Kollenkark of Robinson Tait emailed the following message to Delgado of Foreclosure Management Company, the intermediary for Mortgage First: “In their Cross Complaint, the borrowers include the attached Settlement Statement in support of their claim that loan number [redacted] was used to finance their purchase of the home. If this is indeed the case, then the client is likely barred from suing to enforce the note under [section] 580(b). [¶] I suspect the answer to this question will be in the loan origination file. Does the client have the loan origination file and, if they do, could you request it for me?”

Delgado responded to paralegal Edmundson of Robinson Trait in an email dated January 19, 2010, that the “[c]lient advises that they do not have an origination file on this account. All they have is a copy of the promissory note.”

A few hours later on January 19, 2010, attorney Kollenkark of Robinson Tait advised Delgado in an email that “[f]rom [her] review of the borrower’s settlement statement that [she] provided to [Delgado] yesterday, it appears that the borrower’s assertion about the purchase money nature of the loan is correct. If the client has no additional information about the formation of the loan, then we will be unable to contest the borrower’s assertion that loan # [redacted] was a purchase money loan. [¶] *Unfortunately, [section] 580(b) prohibits a deficiency judgment against a purchase money loan. This includes suits on the note by sold out junior lienors like the client.*

Accordingly, the client is prohibited from bringing its present law suit and will need to dismiss its case.” (Italics added.)

We assume the truth of this email evidence because our standard of review requires that “[we] accept as true the evidence favorable to the plaintiff.” (*Soukup, supra*, 39 Cal.4th at p. 269, fn.3.) Thus, the evidence shows that as of January 19, 2010, Robinson Tait had discovered that its client, Mortgage First, could not dispute the showing made by Hernandez and Velasco that the subject of Mortgage First’s debt collection action was a junior loan that had been used to purchase their home. Robinson Tait also recognized that under section 580b, a debt collection action on the junior loan was prohibited. As we have noted, section 580b prohibits “a deficiency judgment against a purchaser in a purchase money secured land transaction.” (*DeBerard Properties, supra*, 20 Cal.4th at p. 663.) On this evidence, we find that Hernandez and Velasco have made a prima facie showing that Robinson Tait lacked probable cause to continue prosecuting the debt collection action after January 19, 2010, when it discovered that the action was not legally tenable.

We also determine that Robinson Tait has not submitted any evidence that would defeat the evidence submitted by Hernandez and Velasco as a matter of law. (*Soukup, supra*, 39 Cal.4th at p. 269, fn.3.) On appeal, Robinson Tait contends that it did not maintain the debt collection without probable cause because (1) it did not take any action, such as initiating discovery, after the complaint was filed; and (2) once probable cause “was cast into doubt through the allegations in the Cross-Complaint, Robinson Tait promptly abandoned the claim.”

Robinson Tait’s arguments are not convincing. It has not provided any authority for the proposition that a law firm’s failure to take any action after filing and serving a complaint precludes a finding that the law firm continued to prosecute the action after discovering it lacked probable cause. To the contrary, the California Supreme Court in *Zamos* stated that to avoid liability for malicious prosecution, an attorney who discovers

that an action lacks merit should promptly dismiss the action or withdraw from representation of the plaintiff. (*Zamos, supra*, 32 Cal.4th at p. 970.) Here, the evidence shows that Robinson Tait did not promptly dismiss the complaint or withdraw from representation of Mortgage First.

Instead, Robinson Tait made an offer to Hernandez and Velasco to dismiss the complaint in exchange for dismissal of the cross-complaint. On February 4, 2010, attorney Solseng sent an email to Delgado advising him that Hernandez and Velasco had rejected Mortgage First's "offer to dismiss both lawsuits." On the same day, Robinson Tait was informed by Mortgage First's intermediary, Foreclosure Services Company, that Mortgage First wanted the law firm to " 'drop this case.' " Robinson Tait made ineffective attempts to withdraw from representation and did not dismiss the complaint until June 29, 2010, over six months after it discovered in January 2010 that the action lacked merit because it was barred under section 580b.

For these reasons, we determine that Hernandez and Velasco made a prima facie showing that by January 19, 2010, Robinson Tait knew facts that made the debt collection action legally untenable, and therefore Robinson Tait continued to prosecute that action after that date without probable cause. (*Zamos, supra*, 32 Cal.4th at p. 970.)

In light of this determination, we need not address the parties' other contentions regarding the presence or absence of probable cause, including Robinson Tait's reliance on *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613 (disapproved on another ground in *Zamos, supra*, 32 Cal.4th at p. 973) for its contention that it had probable cause to file the complaint based on the information supplied by the client.

3. Malice

Finally, we consider whether Hernandez and Velasco made a showing sufficient to support the element of malice.

In a malicious prosecution action, the plaintiff must also prove that "the action was initiated with malice. [Citation.]" (*Sheldon Appel, supra*, 47 Cal.3d at p. 874.) " 'The

“malice” element . . . 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 . . . 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.’ [Citations.] . . . Malice ‘may range anywhere from open hostility to indifference. [Citations.] Malice may also be inferred from the facts establishing lack of probable cause.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at p. 292.)

“Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence. [Citation.]” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 225 (*Daniels*)). Thus, “malice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause.” (*Id.* at p. 226.) “ ‘Continuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset.’ [Citation.]” (*Ibid.*)

Relying on the decision in *Daniels*, Robinson Tait argues that Hernandez and Velasco cannot establish the element of malice because they presented no evidence to show that the law firm acted with ill will or an improper motive in pursuing the debt collection action. Robinson Tait emphasizes that it advised its client to dismiss the action and, when the client did not authorize dismissal, it “immediately sought to withdraw.” Further, they assert that Hernandez and Velasco mischaracterize the evidence regarding the parties’ communications when they argue that Robinson Tait threatened to sue them after being informed that the loan was not collectible under California law and also told Hernandez and Velasco that it did not matter what they said.

Robinson Tait’s reliance on the decision in *Daniels* is misplaced. As we have discussed, the *Daniels* court determined that “malice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause.” (*Daniels, supra*, 182 Cal.App.4th at p. 226.) However, the evidence in *Daniels*

did not show that the attorney defendants had knowledge that their case lacked probable cause. (*Id.* at p. 227.) The court therefore ruled that the evidence was insufficient to support an inference of malice. (*Ibid.*)

In contrast, in the present case we have determined that the evidence was sufficient for Hernandez and Velasco to make a prima facie showing that Robinson Tait continued to prosecute the debt collection action with knowledge that the action lacked probable cause. The evidence shows that after Robinson Tait discovered in January 2010 that the action was barred under section 580b, it did not withdraw from its representation of Mortgage First, remained attorney of record, and did not dismiss the action until June 2010. Robinson Tait’s malice may therefore be inferred from its continued prosecution of the collection action for six months despite its knowledge that the action lacked probable cause. (*Daniels, supra*, 182 Cal.App.4th at p. 225.)

For that reason, we find that the showing of Hernandez and Tait is also sufficient to support the element of malice.

E. Conclusion

As we have discussed, it is well established that “ ‘[o]nly a cause of action that satisfies *both* prongs of the anti-SLAPP statute [section 425.16]—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at pp. 278-279.) Where, as here, the defendant has established that the plaintiff’s malicious prosecution action arises from protected activity—a lawsuit—the burden shifts to the plaintiff to make a prima facie showing that the malicious prosecution action has a probability of prevailing because the defendant lacked probable cause to initiate or continue prosecuting one or more causes of action in the underlying lawsuit. (§ 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88; *Zamos, supra*, 32 Cal.4th at p. 970.)

We have determined from our independent review that Hernandez and Velasco met their burden by making a prima facie showing sufficient to support each element of

their cause of action for malicious prosecution. Since they have demonstrated a probability of prevailing, we conclude that the trial court did not err in denying Robinson Tait's special motion to strike the complaint under section 425.16.

IV. DISPOSITION

The February 24, 2011 order denying the special motion to strike the third cause of action for malicious prosecution in the second amended cross-complaint pursuant to Code of Civil Procedure section 425.16 is affirmed. Costs on appeal are awarded to respondents.

BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

MIHARA, J.

WALSH, J.*

*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.