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

FARHANG OSHIDARY,

Plaintiff and Appellant,

v.

PARI JAMSHIDI, et al.

Defendants and Respondents.

H038989

(Santa Clara County

Super. Ct. No. CV226441)

I. INTRODUCTION

Appellant Farhang Oshidary, a former stockbroker and financial adviser, was sued by clients who had lost their investments in a company known as Blue Control Technologies, Inc. (BCT) After a petition to compel contractual arbitration was granted, the issues involving respondents Pari Jamshidi¹ and Khosrow Jamshidi in his capacity as trustee for the Jamshidi Joint Revocable Trust U/A/D 01/19/1999 (the Jamshidi Trust)

¹ For purposes of clarity, we will follow the practice of the parties and the trial court of referring to Pari Jamshidi as Mrs. Jamshidi. Since a trust cannot be named as a party, (See Prob. Code, § 17200, subd. (a); see also *Portico Management Group, LLC v. Harrison* (2011) 202 Cal.App.4th 464, 473), for purposes of this appeal we have designated Khosrow Jamshidi as a defendant and a respondent in his capacity as trustee of the Jamshidi Trust.

were resolved in binding arbitration conducted before a panel of arbitrators of the Financial Industry Regulatory Authority (FINRA).² Oshidary then filed a lawsuit against Mrs. Jamshidi and the Jamshidi Trust that arose from their participation in the FINRA arbitration. Oshidary alleged that Mrs. Jamshidi and the Jamshidi Trust were liable for malicious prosecution, abuse of process, and negligence.

Defendants brought a special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16,³ the anti-SLAPP⁴ statute. Section 425.16 provides that a cause of action arising from constitutionally protected speech or petitioning activity is subject to a special motion to strike unless the plaintiff establishes a probability of prevailing on the claim. (§425.16, subd. (b)(1).) The trial court granted the motion.

On appeal, Oshidary contends that the trial court erred in granting the anti-SLAPP motion because his claims do not arise from constitutionally protected activity and he has demonstrated a probability of prevailing on the malicious prosecution and abuse of process claims. For the reasons stated below, we disagree and therefore we will affirm the order granting the section 425.16 special motion to strike the complaint.

² “FINRA is the self-regulatory organization for securities brokers and brokerage firms and is the successor to the National Association of Securities Dealers, Inc. (NASD). [Citation.] FINRA is responsible for regulatory oversight of all securities brokers and firms that do business with the public; professional training, testing, and licensing of persons registered by FINRA; and arbitration and mediation of disputes. [Citation.]” (*Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 834, fn.1.)

³ All further references to section 425.16 are to Code of Civil Procedure section 425.16.

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

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The FINRA Arbitration and Award*

In 2007, several clients sued Oshidary, their stockbroker and financial adviser, and his former employer, Smith Barney, in San Mateo County Superior Court (*Andriola v. Smith Barney*, No.465168) (*Andriola*.) The plaintiff clients included Grace Purpura Andriola, Khosrow Jamshidi,⁵ John Daudi, Michael Mashaydkh, and Michael Harichi. The named defendants were Smith Barney and Oshidary.

The plaintiffs in *Andriola, supra*, No. 465168 alleged that defendants were liable for breach of fiduciary duty and intentional and negligent misrepresentation because Oshidary had misrepresented the financial condition of BCT when he solicited their purchase of BCT shares. The plaintiffs asserted that the BCT shares they had purchased with funds from their accounts at Smith Barney were worthless. Defendant Smith Barney filed a petition to compel contractual arbitration, which the trial court granted in February 2008. (*Andriola, supra*, No.465168)

Binding arbitration was then held before a FINRA panel of arbitrators, with multiple hearing sessions in 2010 and 2011. A statement of claims was submitted to the arbitrators by claimants Pooroushasb and Parima Parineh; Grace Purpura-Andriola TTEE FBO Grace Purpura-Andriola Revocable Living Trust (Andriola Trust); the Jamshidi Trust; John and Maro Davoudi; Mike and Jackie Mashayekh; Majid and Katayoun Rezaie Harirchi; and Olga Michel Basil. The claimants sought compensatory damages in the amount of their lost investments in BCT. Neither Mrs. Jamshidi nor Dr. Jamshidi (in his individual capacity) submitted a statement of claims.

Oshidary submitted a response to the statement of claims in which he denied liability and asserted counterclaims against five claimants. His counterclaims against the

⁵ For purposes of clarity, we will follow the parties' practice of referring to Khosrow Jamshidi as Dr. Jamshidi.

Jamshidi Trust included interference with contractual relations with Smith Barney, intentional infliction of emotional distress, defamation, conspiracy, and interference with economic advantage.

After considering the pleadings, the testimony, and the evidence presented at the hearing, the FINRA arbitration panel issued its “Amended Award FINRA Dispute Resolution” (Award) on February 10, 2012.⁶ The case summary included in the Award states, among other things, that “[i]n the Amendment to Counterclaim, Respondent Oshidary added Mrs. Jamshidi and Mrs. Purpura-Andriola as parties and asserted the following causes of action against [them]: 1) defamation per se; 2) defamation; 3) invasion of privacy; 4) negligent infliction of emotional distress; 5) intentional infliction of emotional distress; 6) interference with economic advantage; 7) conspiracy; and 8) negligence.”

The Award also states: “Counter-Respondents Mrs. Jamshidi and Mrs. Purpura-Andriola, who Respondent Oshidary named as individual respondents, are not FINRA members. . . . Having appeared and participated in the hearing and thus submitting to the jurisdiction of the Panel, the Panel ruled that it had jurisdiction over Mrs. Jamshidi and Mrs. Purpura-Andriola for purposes of this matter and Award.”

The FINRA arbitration panel’s resolution of the parties’ issues was stated in the Award, as follows: (1) Oshidary was ordered to pay the Andriola Trust \$250,000 plus interest; (2) Oshidary was ordered to pay Olga Michel Basil \$120,000 plus interest;⁷ (3) the claims of Parima Parineh were dismissed without prejudice; (4) Oshidary was not

⁶ The testimony and evidence presented to the FINRA arbitration panel was not included in the record on appeal.

⁷ The record indicates that the Andriola Trust and Olga Michel Basil claimed in the FINRA arbitration that they had loaned money to BCT in the amounts of \$250,000 and \$125,000, respectively.

liable for punitive damages, attorney's fees, or costs; (5) Oshidary was not awarded any compensation and shall take nothing on his claims; and (6) all other relief, including punitive and exemplary damages, was denied.

Oshidary subsequently filed a petition to vacate the Award in federal district court. In its June 12, 2012 order, the federal district court denied Oshidary's petition and confirmed the Award. (*Oshidary v. Purpura-Andriola*, (N.D.Cal., 2012, No. C 12-2092 SI.) Judgment on the Award was entered on July 10, 2012.

B. *The Complaint*

On June 13, 2012, Oshidary filed the instant action in Santa Clara County Superior Court against defendants Mrs. Jamshidi and the Jamshidi Trust. The unverified complaint included the following factual allegations.

From 1994 to September 2006, Oshidary was a stockbroker with Smith Barney, then Citigroup Global Markets, Inc. (Citigroup) after Citigroup acquired Smith Barney. Dr. Jamshidi had an individual securities account at Citigroup, with Oshidary as the registered representative. In September 2001, Dr. Jamshidi invested in BCT, a Silicon Valley technology startup, using funds from his Citigroup account. Oshidary asserted that defendants Mrs. Jamshidi and the Jamshidi Trust did not invest in BCT and had no interest in Dr. Jamshidi's "individual funds."

Oshidary further asserted that during the FINRA arbitration proceedings Mrs. Jamshidi "moved for standing to participate as a party in the proceedings and to sue [Oshidary]." She also testified, according to Oshidary, that she had a community property interest in Dr. Jamshidi's BCT investment. Oshidary alleged that the FINRA arbitration panel, in addition to granting Oshidary's motion to add Mrs. Jamshidi as a "Counter-Respondent," "granted Mrs. Jamshidi standing as a party to sue [Oshidary] and Citigroup." Dr. Jamshidi allegedly testified during the arbitration proceedings that he was aware of the risks in investing in BCT.

Additionally, Oshidary alleged that Mrs. Jamshidi had knowingly made a false written complaint to her “Congressman” that Oshidary had defrauded her in connection with the BCT investment and had misappropriated the funds of elderly clients. She also requested an FBI investigation of Oshidary.

Based on these allegations, Oshidary asserted causes of action for malicious prosecution, abuse of process, and negligence.

C. Special Motion to Strike Under Section 425.16

Defendants responded to the complaint by filing a special motion to strike the complaint under section 425.16. In support of the motion, they argued that Oshidary’s lawsuit was a SLAPP because it arose from their involvement in constitutionally protected petitioning activity: a state court action and subsequent FINRA arbitration. Defendants also contended that Oshidary could not demonstrate a probability of prevailing on his malicious prosecution cause of action because (1) Mrs. Jamshidi was not a plaintiff in the underlying action and therefore the element of favorable termination could not be established as to her; (2) there was probable cause to initiate and continue the underlying lawsuit; and (3) there is no evidence to support a finding of malice.

As to the cause of action for abuse of process, defendants argued that Oshidary could not demonstrate a probability of prevailing because the mere filing of a lawsuit does not constitute abuse of process, and, to the extent Oshidary based his claim on testimony during the FINRA arbitration, the claim was barred by the litigation privilege set forth in Civil Code section 47, subdivision (b).

Defendants also argued that the negligence cause of action was barred by the doctrine of res judicata, since Oshidary had asserted a counterclaim for negligence against Mrs. Jamshidi in the FINRA arbitration that the arbitrators had denied.

D. Opposition to the Motion

At the outset, Oshidary conceded that the complaint arose from constitutionally protected activity because the “[c]omplaint alleges that Defendants wrongfully pursued the FINRA litigation and [he] does not dispute that Defendants’ pursuit of the FINRA litigation was activity protected by the free speech and petition clauses. [Citation.]” However, Oshidary argued that he could demonstrate a probability of prevailing on his malicious prosecution and abuse of process causes of action.

According to Oshidary, his malicious prosecution claim had merit because the FINRA arbitration had terminated in his favor as to both Mrs. Jamshidi and the Jamshidi Trust; defendants lacked probable cause to assert claims in the FINRA arbitration since they had no interest in Dr. Jamshidi’s BCT investment; and defendants’ FINRA claims were initiated with malice, as shown by Mrs. Jamshidi’s false testimony and her false written complaint to her “Congressman.”

Oshidary further argued that the abuse of process cause of action had merit because he could establish that (1) Dr. Jamshidi had invested in BCT solely in his individual capacity and he had no desire to sue Oshidary; and (2) Mrs. Jamshidi’s testimony in the FINRA arbitration that Dr. Jamshidi was incapacitated and incapable of giving competent testimony, and that she had an interest in his BCT investment, was false. Oshidary did not address the negligence cause of action in his opposition to the anti-SLAPP motion.

Defendants submitted written objections to the evidence submitted by Oshidary in support of his opposition to the anti-SLAPP motion, which included Oshidary’s declaration and the declaration of Oshidary’s attorney. Defendants also requested that the evidence be stricken.

E. The Trial Court's Order

On September 10, 2012, the trial court entered its order granting defendants' request for judicial notice, denying defendants' motion to strike evidence, ruling on defendants' evidentiary objections, and granting the special motion to strike the complaint under section 425.16. The court determined that Oshidary had not shown a probability of prevailing on any of his claims.

Specifically, with regard to the malicious prosecution cause of action, the trial court found that Oshidary had failed to show that defendants acted without probable cause in bringing and maintaining the underlying FINRA arbitration. The court stated: "When the inadmissible evidence in support of Oshidary's argument is stripped away, all that remains is the bare assertion in the declarations of Oshidary and his attorney that the Jamshidi Defendants presented absolutely no evidence to the panel that either of them had an interest in the [BCT] investment. [Citation.] . . . With respect to Mrs. Jamshidi, the fact that she never presented evidence that she had an interest in the investment is irrelevant since she was not a claimant in the underlying arbitration. [Citation.] With respect to the [Jamshidi] Trust, not only is there no evidence that the Trust's lack of standing was the basis for the [FINRA] panel's decision, but there is also no indication that the Trust's standing was ever challenged, such that the Jamshidi Defendants *should* have produced any such evidence."

The trial court further found that Oshidary could not establish the element of malice in the malicious prosecution cause of action, stating: "Even if probable cause were lacking, Oshidary fails to show the existence of malice because there is absolutely no admissible evidence that the Jamshidi Defendants knew that their allegations and testimony in the underlying action were false, or that they otherwise had an improper, ulterior motive for prosecuting the Trust's claims against Oshidary. [Citation.]"

As to the cause of action for abuse of process, the trial court determined that the “claim lack[ed] merit as a matter of law. Merely filing and maintaining an action does not support a claim for abuse of process. [Citation.] Oshidary also predicates his abuse of process claim on purportedly false testimony by Mrs. Jamshidi in the underlying arbitration proceeding, but such testimony cannot support an abuse of process claim. [Citations.]”

Finally, the trial court ruled that Oshidary had conceded that his negligence cause of action lacked merit since he failed to present any evidence or argument in support of that claim. Defendants were awarded attorney’s fees of \$9,275 and Oshidary’s request for attorney’s fees and costs was denied.

Oshidary hereafter filed a timely notice of appeal.⁸

III. DISCUSSION

Oshidary, who is self-represented on appeal, argues that the trial court erred in granting the special motion to strike under 425.16 because he has shown a probability of prevailing on the causes of action for malicious prosecution and abuse of process. He does not challenge the trial court’s evidentiary rulings.⁹

We will begin our evaluation of Oshidary’s contentions with an overview of section 425.16, the anti-SLAPP statute, followed by a discussion of the applicable standard of review.

⁸ An order granting a special motion to strike under section 425.16 is immediately appealable. (§ 425.16, subd. (i), Code Civ. Proc., § 904.1, subd. (a)(13); *City of Costa Mesa v. D’Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371.)

⁹ Oshidary’s request for judicial notice of a San Mateo County Superior Court minute order in *People v. Parineh*, No. SC074152, dated July 12, 2013, is denied on the ground that the document is irrelevant to the issues to be decided in this appeal. (See, e.g., *Hayward Area Planning Assn. v. City of Hayward* (2005) 128 Cal.App.4th 176, 182 [only relevant material is a proper subject of judicial notice].)

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).)¹⁰ SLAPPs 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*).)

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

¹⁰ 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.”

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 (*Kibler*).

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” (§ 425.16, subs. (b)(1), (e)(4); *Navellier, supra*, 29 Cal.4th at pp. 87-88.) Once the defendant has shown that the plaintiff’s claim arises from one of the section 425.16, subdivision (e) categories of constitutionally protected activity, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88.)

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 the applicable standard of review, we will independently determine from our review of the record whether the causes of action for malicious prosecution and abuse of process in Oshidary's complaint constitute SLAPPs under section 425.16, beginning with the threshold showing of protected activity.

C. Threshold Showing of Protected Activity

On appeal, Oshidary challenges the trial court's implicit ruling that defendants' motion satisfied the first prong of the anti-SLAPP statute because the complaint arises from constitutionally protected speech or petitioning. (*Soukup, supra*, 39 Cal.4th at pp. 278-279.) Oshidary argues, for the first time on appeal, that the complaint's allegations regarding Mrs. Jamshidi's statements in the community show that she conducted a "vilification campaign" that does not constitute protected speech under section 425.16 because the statements were slanderous and placed him in a false light, and were therefore illegal. Defendants respond that since Oshidary did not state causes of action for slander and false light in his complaint, whether Mrs. Jamshidi's alleged statements in the community constitute protected activity is irrelevant.

As we have discussed, 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"

(§ 425.16, subds. (b)(1), (e)(4); *Navellier, supra*, 29 Cal.4th at pp. 87-88.)

Section 425.16, subdivision (e) provides in pertinent 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, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. . . .”

Thus, since “[t]he filing of lawsuits is an aspect of the First Amendment right of petition” (*Soukup, supra*, 39 Cal.4th at p. 291), a claim based on actions taken in connection with litigation fall “squarely within the ambit of the anti-SLAPP statute’s ‘arising from’ prong. (§ 425.16, subd. (b)(1).)” (*Navellier, supra*, 29 Cal.4th at p. 90, fn. omitted.) The California Supreme Court has instructed that “[b]y definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit. [Citation.]” (*Jarrow, supra*, 31 Cal.4th at p. 735, fn. omitted.) A malicious prosecution action that arises from a civil lawsuit is therefore not exempt from the anti-SLAPP statute. (*Id.* at p. 741.) Similarly, an abuse of process claim arising from allegations of misconduct in the underlying litigation falls within the scope of the anti-SLAPP statute and is subject to a special motion to strike. (*Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370.)

Here, Oshidary has changed his theory on appeal regarding whether his claims arise from constitutionally protected activity. The record reflects Oshidary did not argue during trial court proceedings that his claims were based on Mrs. Jamshidi’s statements in the community that were illegal and not constitutionally protected speech. Instead, he conceded in his opposition to the anti-SLAPP motion that the complaint arose from constitutionally protected activity because the “[c]omplaint alleges that Defendants wrongfully pursued the FINRA litigation and [he] does not dispute that Defendants’ pursuit of the FINRA litigation was activity protected by the free speech and petition clauses. [Citation.]”

“ ‘The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new

and different theory on appeal. To permit him [or her] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.’ [Citations.]” (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12.) Since Oshidary conceded during the trial court proceedings that defendants’ anti-SLAPP motion made the threshold showing that the causes of action in the complaint—for malicious prosecution and abuse of process—arose from protected activity, we determine that he has forfeited that issue on appeal. We also agree with defendants that since Oshidary has not stated any causes of action (for example, slander or false light) that arguably arise from Mrs. Jamshidi’s alleged statements in the community, we need not reach the issue of whether the alleged statements constitute constitutionally protected speech.

We will therefore assume that defendants’ anti-SLAPP motion made the threshold showing that the challenged causes of action for malicious prosecution and abuse of process arise from protected activity. (*Soukup, supra*, 39 Cal.4th at pp. 278-279.) Moreover, it has been held that “the NASD [National Association of Securities Dealers; predecessor to FINRA] is the type of regulatory body before which communication is routinely protected by the anti-SLAPP law.” (*Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 730, disapproved on another ground in *Kibler, supra*, 39 Cal.4th at p. 203, fn. 5; see, e.g., *McDaniel v. Wells Fargo Investments, LLC* (9th Cir. 2013) 717 F.3d 668, 673 [Congress has vested FINRA with the power to promulgate rules that once adopted by the SEC have the force of law].)

D. Probability of Prevailing

Since defendants’ anti-SLAPP motion satisfied the first prong, the burden shifted to Oshidary to demonstrate the probability of prevailing on the complaint’s causes of

action for malicious prosecution and abuse of process,¹¹ thereby establishing that the second prong of the anti-SLAPP statute has not been satisfied. (See *Soukup, supra*, 39 Cal.4th at pp. 278-279.)

1. Plaintiff's Burden

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.) "The showing must be made through 'competent and admissible evidence.' [Citations.] Thus, declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded. [Citation.]" (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.) "[T]he plaintiff 'cannot simply rely on the allegations in the complaint' [citation]" [Citation.]" (*Alpha and Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.)

However, 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.) Instead, 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.)

2. Malicious Prosecution Cause of Action

Oshidary had the burden to make a prima facie showing of facts, supported by admissible evidence, that is sufficient to support each element of his malicious prosecution claim. (See *Soukup, supra*, 39 Cal.4th at p. 291.)

¹¹ Oshidary has not argued on appeal that he has a probability of prevailing on the cause of action for negligence.

“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.) “ ‘Thus, “[i]t is hornbook law that the plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he [or she] complains terminated in his favor.’ [Citation.]’ [Citation.]” (*Siebel v. Middlesteadt* (2007) 41 Cal.4th 735, 741 (*Siebel*).

Favorable Termination

We will begin our analysis by addressing Oshidary’s showing with respect to the first element of favorable termination. He argues that the Award shows that the FINRA arbitration terminated in his favor as to both Mrs. Jamshidi and the Jamshidi Trust. Defendants acknowledge that “ ‘[a] person who had no part in the commencement of the action, but who participated in it at a later time, may be held liable for malicious prosecution.’ [Citation.]” (*Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1398.)

With regard to Mrs. Jamshidi’s participation in the FINRA arbitration, our review of the Award indicates the following: (1) Oshidary amended his counterclaim to add Mrs. Jamshidi as a party; (2) since Mrs. Jamshidi had participated actively in the arbitration process, the arbitration panel ruled that it had jurisdiction over her for purposes of the Award even though she had not submitted a submission agreement; (3) Mrs. Jamshidi is expressly identified in the Award as one of the “Third-Party Respondents,” not as one of the “Claimants/Counter-Respondents”; and (4) Oshidary was awarded nothing on his counterclaims. We determine that since the Award does not identify Mrs. Jamshidi as a claimant whose claim was denied by the arbitration panel, and the arbitration panel denied Oshidary’s counterclaim against Mrs. Jamshidi, Oshidary has not met his burden to show the first element of favorable termination as to her.

On the other hand, we find that the Award does show that the arbitration panel dismissed all claims by the Jamshidi Trust against Oshidary and denied relief to all claimants except the Andriola Trust and Olga Michel Basil. Oshidary therefore met his burden to show favorable termination of the FINRA arbitration as to Jamshidi Trust. (See (*Siebel, supra*, 41 Cal.4th at p. 741.)

We next consider whether Oshidary met his burden to show that the Jamshidi Trust asserted claims in the FINRA arbitration without probable cause. (See *Soukup, supra*, 39 Cal.4th at p. 292.)

Probable Cause

The existence or absence of probable cause is a question of law to be determined by the court. (*Sheldon Appel Co. v. Albert & Olike* (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.)

Oshidary argues that the Jamshidi Trust did not have probable cause to assert or to continue asserting a claim against him in the FINRA arbitration because, as stated in his declaration and his attorney’s declaration, no evidence was presented at the arbitration to show that the Jamshidi Trust had an interest in the funds that Dr. Jamshidi invested in BCT. The Jamshidi Trust does not dispute the lack of evidence as stated in Oshidary’s declarations. However, the Jamshidi Trust contends that since its standing as a party was never challenged, “the absence of evidence of the Trust’s interest in the investment was not the reason for the panel’s decision to dismiss its claim. Rather, as the [A]ward makes clear, the Trust’s claim was dismissed for ‘failure to prove facts upon which [it was] based.’ ”

The Award shows that the Jamshidi Trust, along with the other claimants, asserted the following causes of action at the FINRA arbitration: “1) breach of fiduciary duty; 2) failure to supervise; 3) intentional misrepresentation; 4) negligent misrepresentation; 5) respondeat superior; 6) conspiracy; and 7) breach of contract. The causes of action relate to Claimants’ investment in [BCT].” We determine that Oshidary’s bare assertion that the Jamshidi Trust lacked probable cause to assert these claims without evidence of an interest in Dr. Jamshidi’s individual funds invested in BCT is insufficient to show a lack of probable cause.

The standard for probable cause requires a showing that the litigant relied upon facts that the litigant had no reasonable cause to believe to be true, or that the litigant sought recovery upon a legal theory that was untenable under the facts known to the litigant. (*Soukup, supra*, 39 Cal.4th at p. 292.) Here, Oshidary has not attempted to show

that the Jamshidi Trust relied upon facts regarding the BCT investment that it had no reasonable cause to believe to be true. Oshidary also has not attempted to show that the Jamshidi Trust sought recovery in the FINRA arbitration upon a legal theory that was untenable under the facts known to the Jamshidi Trust. He merely asserts that no evidence was presented at the arbitration to show that the Jamshidi Trust had an interest in the funds that Dr. Jamshidi invested in BCT. We find that there is nothing in the record on appeal to show that Oshidary ever challenged the Jamshidi Trust's standing to assert claims in the FINRA arbitration that arose from Dr. Jamshidi's BCT investment. Thus, as the Jamshidi Trust points out, there was no reason for the Jamshidi Trust to present the arbitrators with evidence of its interest in Dr. Jamshidi's investment in BCT.

Since Oshidary has not shown that the Jamshidi Trust lacked probable cause to assert claims in the FINRA arbitration, we need not consider the third element of malice. Accordingly, we determine that Oshidary has not shown that he has a probability of prevailing on his malicious prosecution cause of action.

3. Abuse of Process Cause of Action

“The common law tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed. [Citations.]” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056-1057 (*Rusheen*)). “To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings. [Citation.]” (*Id.* at p. 1057.)

The complaint's allegations in the cause of action for abuse of process state that “[d]efendants misused the legal process by filing the FINRA Claim upon [Oshidary] with the sole purpose of damaging [his] reputation and harassing [him]. Defendants acted

with malice and conscious disregard for the rights of [Oshidary] in that their ulterior purpose in misusing the legal process was to damage [his] professional reputation.”

On appeal, Oshidary argues, without any citation to the record, that he has a probability of prevailing on his abuse of process cause of action because (1) defendants knew that Dr. Jamshidi had invested only his individual funds in BCT; (2) defendants knew that Dr. Jamshidi had no desire to file an action against Oshidary; (3) defendants “falsely filed and prosecuted the FINRA claim”; and (4) Mrs. Jamshidi gave false testimony that Dr. Jamshidi was incapable of giving competent testimony and that she had a community interest in Dr. Jamshidi’s BCT investment.

In response, the Jamshidi Trust contends that Oshidary has not shown that he has a probability of prevailing because the alleged filing of a frivolous lawsuit is not sufficient for a cause of action for abuse of process. The Jamshidi Trust also argues that the allegations regarding Mrs. Jamshidi’s testimony during the FINRA arbitration are not sufficient because her testimony is protected by the Civil Code section 47, subdivision (b) litigation privilege. We agree.

To begin with, there is no evidence that the Jamshidi Trust knew that Dr. Jamshidi invested only his individual funds in BCT or that he had no desire to file an action against Oshidary. The trial court sustained defendants’ evidentiary objections to the portions of Oshidary’s declaration that stated, at most: “Defendant Jamshidi Trust never had an interest in Dr. Jamshidi’s individual funds that he invested in BCT,” “Defendant Mrs. Jamshidi never had an interest in Dr. Jamshidi’s individual funds that he invested in BCT,” and “Defendant Mrs. Jamshidi sought to ruin my career in the securities industry and ruin my reputation in the South Bay Zoroastrian Community.” The trial court also sustained defendants’ evidentiary objections to the portion of his attorney’s declaration that stated: “Dr. Jamshidi testified also that Defendant Mrs. Jamshidi had no involvement in the BCT investment.”

Even assuming that the above evidence in the declarations supported the claim of abuse of process, it is inadmissible. Where, as here, the trial court has ruled on a party's evidentiary objections, "[i]t is appellant's 'burden on appeal to affirmatively challenge the trial court's evidentiary ruling, and demonstrate the court's error.' [Citation.]" (*Salas v. California Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.) Failure to challenge the trial court's evidentiary rulings on appeal results in forfeiture of any claim of error. (See, e.g., *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1492, fn. 14.) Since Oshidary did not challenge any of the trial court's evidentiary rulings on appeal, we may not consider evidence to which the trial court sustained defendants' objections.

We also understand Oshidary to base his abuse of process cause of action on his claim that the Jamshidi Trust litigated false claims in the FINRA arbitration. He has no probability of prevailing on that abuse of process claim. "[T]he mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action. [Citations.]" (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169.)

Oshidary also contends that he has a probability of prevailing on his abuse of process claim because Mrs. Jamshidi testified falsely during the FINRA arbitration that Dr. Jamshidi was incapable of giving competent testimony and that she had a community interest in Dr. Jamshidi's BCT investment. Even assuming that there is evidentiary support for this contention, it is insufficient because Mrs. Jamshidi's testimony is protected by the litigation privilege.

The litigation privilege is codified in Civil Code section 47: "'[a] privileged publication or broadcast is one made . . . [i]n any . . . judicial proceeding . . .'" (§ 47, subd. (b).)" (*Rusheen, supra*, 37 Cal.4th at p. 1057.) "That statute bars tort actions based on privileged communications, with the exception of a cause of action for malicious

prosecution. [Citation.]” (*Mulder v. Pilot Air Freight* (2004) 32 Cal.4th 384, 387.) Moreover, “the litigation privilege of section 47(b)(2) applies to statements made in a private, contractual arbitration proceeding.” (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 649.)

For these reasons, we determine that Oshidary has not shown that he has a probability of prevailing on his cause of action for abuse of process. Having determined that Oshidary has not shown a probability of prevailing on either his malicious prosecution cause of action or his abuse of process cause of action, we conclude that the trial court did not err in granting defendants’ special motion to strike the complaint under section 425.16.

E. Attorney’s Fees

Finally, we consider the request of Mrs. Jamshidi and the Jamshidi Trust for an award of attorney’s fees and costs on appeal as the prevailing defendants.

Section 425.16, subdivision (c)(1) provides that a defendant who prevails on a special motion to strike is “entitled to recover his or her attorney’s fees and costs.”¹² The California Supreme Court has therefore instructed that “any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131) Although the prevailing defendant is entitled to

¹² Section 425.16, subdivision (c) provides: “(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5. [¶] (2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney’s fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney’s fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.5.”

attorney's fees, the amount of the fee award is left to the trial court's discretion. (*Id.* at p. 1134.) Recoverable attorney's fees under section 425.16, subdivision (c) also include those incurred on appeal. (*Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 461; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.)

Since we have concluded that the trial court did not err in granting the special motion to strike the complaint, we determine that Mrs. Jamshidi and the Jamshidi Trust are the prevailing defendants in this matter and are entitled to an award of attorney's fees on appeal pursuant to section 425.16, subdivision (c)(1), with the amount to be determined by the trial court in the exercise of its discretion.

IV. DISPOSITION

The September 10, 2012 order granting the Code of Civil Procedure section 426.16 special motion to strike the complaint is affirmed. Respondents shall recover costs and attorney's fees on appeal in an amount to be determined by the trial court.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

GROVER, J.