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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

STEPHEN W. BERGER et al.,

Plaintiffs and Respondents,

v.

PETER DOBIAS,

Defendant and Appellant.

B182072

(Los Angeles County
Super. Ct. No. BC320288)

APPEAL from an order of the Superior Court of Los Angeles County, David A. Workman, Judge. Reversed with directions.

Law Office of James J. Moneer and James J. Moneer for Defendant and Appellant.

Law Offices of Stephen W. Berger and Stephen W. Berger for Plaintiffs and Respondents.

Plaintiffs sued defendant for malicious prosecution and abuse of process arising out of a civil suit for assault and a petition for an injunction prohibiting harassment (Code Civ. Proc., § 527.6; all further statutory references are to the Code of Civil Procedure unless otherwise indicated). Defendant filed a special motion to strike, contending the

action was a SLAPP (strategic lawsuit against public participation) (§ 425.16). The trial court denied the motion. Defendant appealed.

We conclude that the anti-SLAPP motion should have been granted because plaintiffs did not demonstrate a reasonable probability of prevailing on their claims. The malicious prosecution claim based on the assault suit lacks merit because the suit was instituted and maintained on the advice of counsel. A second malicious prosecution claim, based on the civil harassment petition, is without merit because such a petition, which provides a simple and expeditious remedy for harassment, cannot give rise to liability for malicious prosecution as a matter of law. And the abuse of process claim, which is also based on the civil harassment petition, fails because it does not allege that process was misused, only that the petition was brought without sufficient cause. Accordingly, we reverse.

I BACKGROUND

The following allegations and facts are taken from the complaint and the evidence submitted on the anti-SLAPP motion.

A. Complaint

The complaint alleges as follows. In previous litigation, Peter Dobias filed a civil action against Shannon Tang, his ex-girlfriend and the mother of his daughter (*Dobias v. Tang* (Super. Ct. Orange County, 2001, No. 01NL14900)), alleging causes of action for assault, battery, libel, slander, and intentional infliction of emotional distress (*Dobias* assault action). Dobias knew that the action was brought without probable cause, with malice, and for an improper purpose, namely, to obtain a collateral advantage in separate custody proceedings between Dobias and Tang involving their daughter (*Tang v. Dobias* (Super. Ct. Orange County, No. 99P000965)) (*Tang* custody proceeding).

In 2003, the *Dobias* assault action was tried to the bench in Orange County Superior Court. The trial judge found in Dobias's favor on the assault claim but concluded he did not suffer any damage or injury. The trial judge found in Tang's favor on the other claims, stating that Dobias had not proved any damage or injury on the

battery claim; the defamation claims (based on allegedly false police reports) failed because Dobias did not establish that the statements at issue were made with malice; and outrageous conduct was not shown on the intentional infliction claim. Judgment was so entered.

Attorney Stephen Berger, whose office is in Orange County, represented Tang in the *Dobias* assault action and the *Tang* custody proceeding. On Friday, December 5, 2003, in connection with Berger's representation of Tang, Dobias physically assaulted and battered Berger at the Orange County courthouse without provocation or justification.

On Monday, December 8, 2003, Dobias, a resident of Los Angeles County, filed a "Petition for Injunction Prohibiting Harassment" against Berger in the Van Nuys courthouse of the Los Angeles County Superior Court, alleging Berger had attacked him the previous Friday (*Dobias v. Berger* (Super. Ct. L.A. County, 2003, No. LS012019)) (*Dobias* harassment petition). Dobias knew that his petition was filed without probable cause, with malice, and for an improper purpose, namely, to interfere with Berger's legal representation of Tang in the *Tang* custody proceeding. At an initial hearing, the trial judge denied Dobias's request for a temporary restraining order and, at a subsequent hearing, denied an injunction. Berger's request for attorney fees was denied.

On August 19, 2004, Berger and Tang (plaintiffs) filed this action against Dobias in which Berger alleged (1) malicious prosecution based on the *Dobias* harassment petition and (2) abuse of process based on the *Dobias* harassment petition, while Tang alleged malicious prosecution based on the *Dobias* assault action.

B. Anti-SLAPP Motion

On December 27, 2004, Dobias filed an anti-SLAPP motion, arguing that (1) plaintiffs were not likely to prevail on the malicious prosecution claims because he relied on the advice of counsel in instituting the *Dobias* assault action and the *Dobias* harassment petition, and (2) the abuse of process claim lacked merit because it did not allege any misuse of the legal process, and, in addition, the claim was barred by the litigation privilege (Civ. Code, § 47, subd. (b)).

In support, Dobias filed a declaration, setting forth four pages of “facts” that supported the *Dobias* assault action. He described various alleged incidents involving Tang, stating she had become violent toward him on one occasion when he showed up with a video camera, had made false police reports about him, and had left obscene messages on his voice mail. Dobias stated he had disclosed these incidents to his attorney, Theodore Dikmen, before filing the assault action, and Dikmen believed Dobias had meritorious claims against Tang for assault, battery, libel, slander, and intentional infliction of emotional distress. Dikmen drafted and filed the complaint and represented Dobias at trial. Dobias relied in good faith on Dikmen’s advice.

Dikmen himself filed a declaration in support of the motion, stating: (1) Dobias consulted with him about the incidents involving Tang; (2) Dobias told him the underlying “facts” and presented documentary, videotape, and audiotape evidence; (3) Dikmen concluded that Dobias had meritorious claims against Tang; (4) Dikmen drafted and filed the complaint in the action and tried the case; (5) at trial, Dikmen offered evidence that Tang had engaged in all of the wrongful conduct alleged in the complaint; (6) probable cause existed as to all of Dobias’s causes of action; (7) Dikmen had no reason to doubt that Dobias relied in good faith on his advice in bringing and maintaining the action; and (8) Dikmen had read the declaration Dobias filed in support of the anti-SLAPP motion, and its contents were true and correct.

Dobias also submitted a declaration from the attorney who represented him in the *Tang* custody proceeding, Robin Lozoya, who stated that she was present with Dobias at the Orange County courthouse when the altercation took place between Dobias and Berger, and she had advised Dobias to seek a restraining order against Berger.

Dobias’s moving papers included the documents filed in conjunction with the *Dobias* harassment petition, showing that Dobias’s address was in Woodland Hills, California, and that he filed the action in the Van Nuys courthouse of the Los Angeles County Superior Court because “defendant has caused physical or emotional injury to plaintiff in this county.” The petition requested an order that Berger stay 100 yards away from Dobias’s residence. Berger filed an objection to venue, stating that his office was in

Orange County, and the physical altercation occurred in the courthouse there. The Los Angeles County Superior Court heard the petition notwithstanding Berger's venue objection.

In opposition to the anti-SLAPP motion, Tang and Berger filed their own declarations. Tang stated Dobias had raped her, violated the court order governing custody of their child, hit her, spat at her, and mistreated her in other ways. She denied that the police reports were false. Berger's declaration stated that the assertions made against him in the *Dobias* harassment petition were false, and *Dobias* had attacked *him*. Berger also questioned whether Dobias had told Attorney Dikmen the "facts" before filing the *Dobias* assault action and pointed out that Dobias was self-represented in that case for about seven months — after it was filed and before it was tried. In response, Dobias filed objections to portions of the plaintiffs' declarations.

In their points and authorities, Tang and Berger argued (1) their claims did not arise from Dobias's constitutionally protected speech or communications but from a physical attack on Berger and conduct that violated the custody order, (2) Dobias's defense of advice of counsel created questions of fact for the jury to resolve, and (3) Berger's abuse of process claim had merit because, among other things, the *Dobias* harassment petition was filed in the wrong venue (Los Angeles County instead of Orange County).

After hearing argument on the motion, the trial court took the matter under submission. Later, by minute order, it denied the motion, ruling that the anti-SLAPP statute applied to plaintiffs' claims, but plaintiffs were reasonably likely to prevail at trial because plaintiffs' declarations showed that the assaults alleged by Dobias "never occurred," there was "no basis whatsoever for [his] underlying legal actions," and the defense of advice of counsel was "unavailable where there is bad faith or withholding of facts from the attorney," namely, the evidence showed that Dobias knew the assaults never happened. Dobias appealed.

II DISCUSSION

The anti-SLAPP statute protects defendants from interference with the valid exercise of their constitutional rights, particularly the right of freedom of speech and the right to petition the government for the redress of grievances. (See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 862–864 & fn. 4, criticized on another point in *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 477–478; *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1448.)

“[S]ection 425.16 requires that a [trial] court engage in a two-step process when determining whether a defendant’s anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one ‘arising from’ protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) We review the trial court’s decision de novo. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

“In making its determination, the trial court is required to consider the pleadings and the supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 646, citations and italics omitted, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.) “[T]he [trial] court’s determination of the motion cannot involve a weighing of evidence.” (*Id.* at p. 654.)

“It is recognized, with the requirement that the court consider the pleadings and affidavits of the parties, the test is similar to the standard applied to evidentiary showings in summary judgment motions pursuant to Code of Civil Procedure section 437c and requires that the showing be made by competent admissible evidence within the personal knowledge of the declarant. . . . Averments on information and belief are insufficient. . . . As in a motion for summary judgment, the pleadings frame the issues to be decided. . . . [¶] . . .

“. . . Generally, a party cannot simply rely on the allegations in its own pleadings, even if verified, to make the evidentiary showing required in the summary judgment context or similar motions The same rule applies to motions under [the anti-SLAPP statute]. Here, like motions under Code of Civil Procedure section 437c, the pleadings merely frame the issues to be decided. . . . ‘An assessment of the probability of prevailing on the claim looks to trial, and the evidence that will be presented at that time. . . . Such evidence must be admissible. . . .’” (*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at pp. 654–656, citations, italics, and fn. omitted.)¹

Turning to the language of the anti-SLAPP statute, “[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 or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).)

“As used in [the statute], ‘*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; (3) any written or oral statement or writing made in a

¹ The trial court did not rule on Dobias’s objections to plaintiffs’ evidence. Dobias has filed a request for judicial notice with this court, asking us to judicially notice a declaration stating that his attorney requested a ruling on the objections at the hearing. We deny the request. Nor was it sufficient that Dobias’s written objections, filed five days before the hearing, contained a request on page 11 that the trial court rule on them. Dobias had to request a ruling at the hearing. His objections are therefore waived. (See *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710, cited with approval in *Flatley v. Mauro* (2006) 39 Cal.4th 299, 306, fn. 6.)

place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e), italics added.)

Here, by their very nature, plaintiffs’ claims — malicious prosecution and abuse of process — are based on Dobias’s filing and pursuit of civil litigation, specifically, the *Dobias* assault action and the *Dobias* harassment petition. The anti-SLAPP statute (§ 425.16, subd. (e)(1), (2)) therefore applies to this case. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 736–741 & fn. 6 [section 425.16 applies to malicious prosecution claims]; *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570 (*Siam*) [section 425.16 applies to abuse of process claims]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [activity protected by section 425.16 includes filing litigation].)

The burden thus shifted to plaintiffs, and they had to — in the words of the statute — “establish[] that there is a probability that [they] will prevail on [their] claim[s].” (§ 425.16, subd. (b)(1).) The term “probability” is synonymous with “reasonable probability.” (*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 238.) Put another way, the anti-SLAPP statute required plaintiffs to “make a prima facie showing of facts which would, if proved at trial, support a judgment in [their] favor.” (*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at p. 646; accord, *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1417.) As we explain, they failed in this respect.

A. Tang’s Malicious Prosecution Claim

To prevail on her cause of action for malicious prosecution, Tang must prove that she was previously sued on a claim that was brought without probable cause, initiated with malice, and pursued to a termination in her favor. (See *Slaney v. Ranger Ins. Co.* (2004) 115 Cal.App.4th 306, 318.)

“A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also

aware of evidence that will weigh against the claim. Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious.” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 822.)

“[P]robable cause is determined objectively, i.e., without reference to whether the attorney bringing the prior action believed the case was tenable . . . , and . . . the standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal . . . , i.e., probable cause exists if ‘any reasonable attorney would have thought the claim tenable.’ . . . This rather lenient standard for bringing a civil action reflects ‘the important public policy of avoiding the chilling of novel or debatable legal claims.’ . . . Attorneys and litigants . . . “have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win” . . . Only those actions that “‘any reasonable attorney would agree [are] totally and completely without merit’” may form the basis for a malicious prosecution suit.” (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 817, citations omitted.)

“Reliance upon the advice of counsel, in good faith and after full disclosure of the facts, customarily establishes probable cause. . . . ‘Probable cause may be established by the defendants in a malicious institution proceeding when they prove that they have in good faith consulted a lawyer, have stated all the facts to him, have been advised by the lawyer that they have a good cause of action and have honestly acted upon the advice of the lawyer.’” (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556, citations omitted.)

In light of the evidence in support of Dobias’s defense of advice of counsel, Tang is not reasonably likely to prevail on her malicious prosecution claim. Together, Dobias’s and Dikmen’s declarations indicate that Dobias consulted Dikmen before filing suit, Dobias disclosed the facts and evidence to Dikmen, the facts were true and accurate, Dikmen believed Dobias had meritorious claims, Dikmen drafted and filed the complaint, Dikmen presented evidence at trial supporting *all* of the wrongful conduct alleged in the

complaint, and Dobias relied in good faith on Dikmen’s advice in bringing and maintaining the action.

Unlike Berger and Tang, Dikmen was present during *both* his initial consultation with Dobias *and* the trial, so he heard the evidence from both sides. Given this knowledge, Dikmen was in a unique position when he signed his supporting declaration to know whether Dobias had truthfully disclosed the facts to him *before* the assault action was filed. According to Dikmen’s declaration, Dobias did so.

And the judgment itself states that Tang assaulted Dobias, notwithstanding that the trial judge did not award even nominal damages. On the other claims in the assault action, Dobias’s proof simply came up short. In particular, he failed to prove damage on the battery claim; failed to prove malice on the defamation claims; and Tang’s conduct was not sufficiently outrageous to prove intentional infliction of emotional distress.

In these circumstances, Tang is not reasonably likely to prevail at trial given Dobias’s defense that he relied in good faith on the advice of counsel in bringing the assault action after making a full disclosure of the facts to his lawyer.²

B. Berger’s Malicious Prosecution Claim

Berger rests his malicious prosecution action on the *Dobias* harassment petition. In fairness to the trial court, when it ruled on Dobias’s anti-SLAPP motion, it did not have the benefit of *Siam, supra*, 130 Cal.App.4th 1563, which subsequently held that “the unsuccessful filing of a petition for an injunction under section 527.6 may not form the basis for a malicious prosecution action” (130 Cal.App.4th at p. 1574).

² In pursuing the defamation claims in his 2001 assault action, Dobias relied on *Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476, which held that false police reports were subject to the *qualified* privilege of Civil Code section 47, subdivision (c) but could otherwise support a defamation claim. In 2004, the California Supreme Court overruled *Fenelon*, holding that false police reports are subject to the *absolute* privilege of Civil Code section 47, subdivision (b) and are actionable only if a plaintiff can satisfy the elements of a malicious prosecution claim. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 355, 366–369.)

Applying *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, the court in *Siam* noted that civil harassment litigation has a unique propensity for bitterness that makes it difficult to distinguish a malicious petition from a nonmalicious one, a court can discourage frivolous tactics by awarding attorney fees, civil harassment litigation often requires a special sensitivity and flexibility in crafting remedies, and the proceedings on a petition are designed to provide a simple and expeditious means to settle disputes without resort to counsel. (*Siam, supra*, 130 Cal.App.4th at pp. 1571–1572.)

Siam acknowledged that its holding would deprive civil harassment defendants of a tort remedy but noted that “the harm should be fairly minimal”: “As a result of [the] expedited process [in civil harassment proceedings] a defendant is not usually likely to incur substantial legal fees. There is no risk of incarceration or financial ruin. At worst, he or she will simply be ordered to stop doing something. And to the extent the defendant has grievances of his or her own, section 527.6 expressly permits a cross-complaint.” (130 Cal.App.4th at p. 1573.) The court also noted that the possibility of a malicious prosecution claim might dissuade victims of serious harassment from seeking relief. (*Ibid.*)

Similarly, courts have held that malicious prosecution claims cannot be based on small claims actions (*Pace v. Hillcrest Motor Co.* (1980) 101 Cal.App.3d 476, 478–479) or motions or orders to show cause in family law proceedings (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 29–30, 35–39).

Recently, in *Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, the court applied *Siam* in concluding that an unsuccessful petition under the Workplace Violence Safety Act (§ 527.8) cannot support a malicious prosecution claim. The act permits an employer to seek injunctive relief to prevent an individual from subjecting an employee to threats and acts of violence at the workplace. Noting the similarities between the civil harassment statute (§ 527.6) and the act (§ 527.8), the court stated: “We agree with the *Siam* court’s analysis and, by parity of reasoning, hold that petitions under the Workplace Violence Safety Act do not provide a basis for malicious prosecution actions.” (143 Cal.App.4th at p. 1424.)

Berger urges us to create an “attorney exception” to *Siam*, but he offers no persuasive reasons for doing so. We therefore conclude that he cannot base a malicious prosecution claim on the *Dobias* harassment petition.

C. Berger’s Abuse of Process Claim

“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. . . . It has been ‘interpreted broadly to encompass the entire range of “procedures” incident to litigation.’ . . .

“‘[T]he essence of the tort [is] . . . misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.’ . . . 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.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056, citations omitted.)

In his abuse of process claim, Berger merely alleges that *Dobias* pursued a meritless harassment petition against him and filed it in the wrong courthouse. “Although initiating a meritless claim for an improper purpose can expose a party to damages for malicious prosecution, the mere initiation of a lawsuit, even for an improper purpose, does not support a claim for abuse of process. . . . Similarly, although continued prosecution of a claim after it becomes apparent the claim is meritless can expose a party to damages for malicious prosecution . . . , the ‘mere . . . maintenance of a lawsuit — even for an improper purpose — is not a proper basis for an abuse of process action.’” (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 520.)

“‘Process is action taken pursuant to judicial authority. . . . [¶] Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. . . . The gist of the tort is the improper use of the process *after it is issued.*’” (*Siam, supra*, 130 Cal.App.4th at p. 1579.)

No misuse is alleged here. As for Berger's venue objection, Dobias was permitted to file the harassment petition in the county where he suffered physical *or* emotional injury. Dobias listed his address in Woodland Hills, filed the petition in the nearby Van Nuys courthouse, and sought an order to keep Berger away from his home. Nothing required that the petition be filed in Orange County, where the altercation occurred or Berger had his office. Further, Berger raised the venue objection in the harassment proceedings, and the trial judge overruled it, implicitly or otherwise. Berger is therefore estopped from asserting that venue was improper.³

In sum, this action is covered by the anti-SLAPP statute (§ 425.16), and plaintiffs have not demonstrated a reasonable probability of prevailing on their claims. It follows that the anti-SLAPP motion should have been granted. The trial court's order is reversed.

³ We do not reach Dobias's contention that the abuse of process claim is barred by the litigation privilege (Civ. Code, § 47, subd. (b)).

III
DISPOSITION

The order is reversed. Appellant is entitled to costs on appeal. The matter is remanded to the trial court with directions to grant the special motion to strike as to the entire complaint, to determine attorney fees and costs, and to conduct further proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

I concur:

ROTHSCHILD, J.

I concur in the judgment only.

VOGEL, J.