ROY AL FINANCE & LOAN COMPANY et al., Plaintiffs and Appellants, v. RASTEGAR & MATERN, etc., et al., Defendants and Respondents.

B150292

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

2003 Cal. App. Unpub. LEXIS 12162

December 30, 2003, Filed

PRIOR HISTORY: APPEAL from an order of the Superior Court of Los Angeles County, James R. Dunn, Judge. Los Angeles County Super. Ct. No. BC231638.

DISPOSITION: Affirmed.

COUNSEL: Westrup, Klick & Associates and R. Duane Westrup for Plaintiffs and Appellants.

Law Offices of Martin L. Horwitz and Martin L. Horwitz for Defendants and Respondents.

JUDGES: KLEIN, P.J. We concur: KITCHING, J., ALDRICH, J.

OPINION BY: KLEIN

OPINION

Plaintiffs and appellants Roy Al Finance & Loan Company, formerly known as Royal Thrift & Loan Company (hereafter, Royal), and John Tonoyan (Tonoyan) appeal an order granting a motion by defendants and respondents Rastegar & Matern, Matthew J. Matern, Paul J. Weiner, and Julia Vaynerov (collectively, the attorney defendants) to strike their malicious prosecution complaint pursuant to *Code of Civil Procedure section 425.16*, the anti-SLAPP **[*2]** statute. [1] [2] [3]

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

2 SLAPP is an acronym for Strategic Lawsuit Against Public Participation. (*Navellier v. Sletten (2002) 29 Cal.4th 82, 85, fn. 1.*)

3 An order granting a special motion to strike is appealable. (*§§ 425.16, subd. (j)*, *904.1*.)

The essential issue presented is whether Royal and Tonoyan made an adequate showing that their malicious prosecution action against the attorney defendants has merit.

We conclude Royal and Tonoyan failed to make a sufficient prima facie showing that the attorney defendants initiated the underlying action with malice. Therefore, the trial court properly granted the attorney defendants' special motion to strike the instant complaint. The order granting the motion to strike the malicious prosecution complaint is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The underlying transaction.*

In 1994, Bernice Prescott (Prescott) [4] entered **[*3]** into a written agreement with First Choice Financial (First Choice), an independent mortgage broker, to secure a loan on her home. Scott Stuart (Stuart), an employee of First Choice, met with Prescott and subsequently submitted loan documents for Prescott to various lenders, including Royal Thrift & Loan Co., predecessor to Roy Al. In early 1995, Royal made the loan.

4 Prescott is not a party to this appeal.

Prescott made a few monthly payments and then sought legal counsel. Her attorneys initially filed a complaint with the California Department of Real Estate, which was resolved in favor of First Choice.

2. *The underlying lawsuit against Royal and Tonoyan.*

On September 12, 1996, the attorney defendants, on behalf of Prescott, filed suit against First Choice, Stuart, Royal and others for fraud, rescission, declaratory and injunctive relief, seeking damages and rescission of the

loan transaction agreement between Prescott and Royal. [5] Tonoyan, a stockholder of the holding company for Royal, was subsequently **[*4]** added as a Doe defendant. Prescott alleged that she was fraudulently induced to enter into the loan agreement and that Stuart was an agent for Royal.

5 First Choice and Stuart eventually entered into a settlement agreement with Prescott.

a. *The denial of a motion by Royal for summary judgment.*

In July 1997, Royal filed a motion for summary judgment on the ground that its moving papers established as matter of law that Stuart was *not* its agent under any theory of agency recognized under California or federal law.

In resisting the summary judgment motion, Prescott filed an opposing declaration asserting "I was approached by . . . Stuart who stated he was a loan broker and agent for Royal," and that "Stuart was the only representative that I ever met with in person regarding the aforementioned loan."

On October 7, 1997, the trial court denied Royal's motion for summary judgment and the matter proceed to trial.

b. *Trial concludes with a grant of nonsuit in favor of Tonoyan and Royal.*

Trial commenced **[*5]** on July 14, 1998. Following opening statement, the trial court granted nonsuit in favor of Tonoyan, ruling: " . . . the initial opening statements made, there is nothing that even mentions this person of any liability whatsoever. [P] Then they went to reask to reopen. And all they did is a statement as to alter ego and nothing else. And there is no alter ego pled. They showed no other form of liability by any opening statement or otherwise."

Prescott, who was a witness at trial, did not recall filing a complaint against Stuart with the Department of Real Estate, and denied signing the complaint which referred to Stuart as "employed by First Choice Financial Services."

The trial court expressed great frustration at Prescott's testimony, stating "I've tried as high as 45 jury trials in one year. . . . And I have never, never heard anything as outrageous as this case factually. [P] . . . [P] . . . Counsel, when somebody sits here and I can look at that and know that that's patently untrue, I do not have to sit here and have the taxpayer's money come out for somebody running a lot of expenses of this court sitting down there and there is no question . . . whose signatures those **[*6]** are."

After Prescott completed her case in chief and rested, the trial court granted Royal's motion for nonsuit. With respect to agency, the trial court found "First, plaintiff herself signed an agency agreement here identified setting forth who the agent was . . . . [P] . . . P] . . . the only evidence here [was] that she was an agent or First Choice was her agent. There is nothing here to the contrary." As for any alleged fraud, "there is nothing here that shows if there was fraud. Fraud is highly speculative at this time. But I am not deciding fraud. All I'm deciding is if there was, certainly Royal had no knowledge of it. And Royal certainly didn't ratify anything other than their own actions. That is all they ratified. You don't ratify the action to somebody else by enforcing a note."

The trial court added: "If you go through the record . . . . And I tried a lot of cases in my life. But this is probably the greatest attempt to stretch facts that I ever heard of. . . . And they have had every effort to show fraud. They have had every effort to show agency. And it is just plain not there."

Prescott appealed. (No. B125854.) Prescott failed to pay the fee for the reporter's **[*7]** transcript and the appeal was dismissed.

3. *The instant action.*

On June 13, 2000, Royal and Tonoyan filed a complaint for malicious prosecution against Prescott and her attorneys, the attorney defendants herein. [6] The complaint pled in relevant part: Royal and Tonoyan obtained a favorable termination of the underlying action, which concluded in a judgment of nonsuit in their favor. The attorney defendants lacked probable cause to include Royal and Tonoyan as defendants in the underlying action. They knew that Royal was an independent corporation and made the loan to Prescott based upon information provided by First Choice and Prescott; further, Tonoyan was merely a stockholder of the holding company for Royal, and there was no allegation of alter ego. In addition, the attorney defendants acted maliciously in bringing the action against Royal and Tonoyan for the improper purpose of obtaining a settlement which had no relationship to the merits of the claim.

6 An attorney is liable for malicious prosecution for " 'prosecuting a claim which a reasonable lawyer would not regard as tenable . . . .' " (*Norton v. Hines (1975) 49 Cal. App. 3d 917, 924, 123 Cal. Rptr. 237*, italics omitted.)

[*8] On October 23, 2000, the attorney defendants filed a special motion to strike pursuant to *section 425.16*. On January 19, 2001, the matter came on for hearing. The trial court explained it was "having trouble with the analytical basis for applying the [SLAPP] statute to . . . a malicious prosecution case." The trial court then continued the hearing to enable the parties to file

supplemental briefs on the threshold issue of the applicability of the SLAPP statute to a cause of action for malicious prosecution.

On February 21, 2001, the trial court granted the special motion to strike. The trial court ruled that the cause of action for malicious prosecution was subject to scrutiny under *section 425.16*. With respect to the issue of probable cause by the attorney defendants to bring the underlying action, the trial court ruled that pursuant to *Roberts v. Sentry Life Insurance (1999) 76 Cal.App.4th 375*, the denial of Royal's motion for summary judgment in the underlying action was sufficient to establish there was probable cause to sue, thus barring the malicious prosecution suit.

On March 22, 2001, the trial court entered an order granting the attorney defendants' special **[*9]** motion to strike. Royal and Tonoyan filed a timely notice of appeal from that order.

CONTENTIONS

Royal and Tonoyan contend the trial court erred in granting the special motion to strike because they met their burden of establishing a probability of prevailing on their malicious prosecution claim.

DISCUSSION

1. *The remedy of a special motion to strike under section 425.16*.

The purpose underlying *section 425.16* is set forth in the anti-SLAPP statute, which states: "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." (*§ 425.16, subd. (a)*.)

To meet this concern, the statute provides that 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 **[*10]** 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)*.)

That determination is made on the basis of the pleadings, as well as supporting and opposing affidavits stating the facts upon which the liability or defense is based. (*§ 425.16, subd. (b)(2)*.) Once it has been determined there is a probability the plaintiff will prevail, that determination is inadmissible at any later stage of the case and does not affect the applicable burden or degree of proof. (*§ 425.16, subd. (b)(3)*.)

Thus, *section 425.16* is analogous to other statutes requiring the plaintiff to make a threshold showing, which are aimed at eliminating meritless litigation at an early stage. (*Robertson v. Rodriguez (1995) 36 Cal.App.4th 347, 355*; see, e.g., § 425.13 [punitive damages claim against health care provider]; § 425.14 [punitive damages claim against a religious corporation]; *Civ. Code, § 1714.10* [cause of action against attorney for civil conspiracy with **[*11]** a client].)

Section 425.16 does not impair the right to a trial by jury because the trial court does not weigh the evidence in ruling on the motion, but merely determines whether a prima facie showing has been made which would warrant the claim going forward. (*Robertson v. Rodriguez, supra, 36 Cal.App.4th at p. 356, fn. 3*.) Whether or not the evidence is in conflict, if the plaintiff has presented a sufficient pleading and has presented evidence showing that a prima facie case will be established at trial, the plaintiff is entitled to proceed. (*Id., at pp. 355-356*.)

2. *Burdens of proof and standard of review*.

We "summarize a court's task in ruling on an anti-SLAPP motion to strike as follows. *Section 425.16, subdivision (b)(1)* requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California **[*12]** Constitution in connection with a public issue,' as defined in the statute. (*§ 425.16, subd. (b)(1)*.) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under *section 425.16, subdivision (b)(2)*, the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67*.)

In other words, "the moving defendant's burden is to show the challenged cause of action 'arises' from protected activity. [Citations.] Once [but only if] it is demonstrated the cause of action *arises* from the exercise of the defendant's free expression or petition rights, then the burden shifts to the plaintiff to show a probability of prevailing in the litigation." (*Shekhter v. Financial Indemnity Co. (2001) 89 Cal.App.4th 141, 151*.)

We review the trial court's rulings on a SLAPP motion under a de novo standard and conduct an independent review. (*ComputerXpress, Inc. v. Jackson*

(2001) 93 Cal.App.4th 993, 999.) **[*13]**

3. *The attorney defendants, in moving to strike, met their burden of showing the challenged cause of action arose from protected activity*.

As indicated, in terms of the threshold issue, a moving defendant's burden is to show the challenged cause of action arises from protected activity. (*Shekhter v. Financial Indemnity Co., supra, 89 Cal.App.4th at p. 151*.) It is now established that a cause of action for malicious prosecution (against a litigant as well as the litigant's attorneys) is subject to anti-SLAPP scrutiny under *section 425.16*. (*Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal.4th 728, 732*.) The parties are in agreement that Royal and Tonoyan's malicious prosecution suit was subject to anti-SLAPP scrutiny. [7]

> 7 On September 10, 2002, this court, on its own motion, took the instant appeal off calendar pending the Supreme Court's resolution of *Jarrow*. On August 18, 2003, the Supreme Court issued *Jarrow*, which held that a malicious prosecution action is subject to anti-SLAPP scrutiny. Promptly upon the issuance of *Jarrow*, we notified the parties, gave them the opportunity to file supplemental letter briefs, and placed the matter back on calendar.

[*14] 4. *Royal and Tonoyan failed to meet their burden of establishing a probability of prevailing on their malicious prosecution claim*.

Because the attorney defendants met their initial burden of showing the malicious prosecution claim was subject to scrutiny under *section 425.16*, the burden shifted to Royal and Tonoyan, as the plaintiffs herein, to establish a probability of prevailing in the litigation. (*Equilon Enterprises, supra, 29 Cal.4th at p. 67*.) To "satisfy this prong, the plaintiff must 'state [] and substantiate[] a legally sufficient claim.' [Citation.] 'Put another way, 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." ' [Citation.]" (*Jarrow Formulas, Inc., supra, 31 Cal.4th at p. 741*.) As discussed below, when analyzed in this manner, the trial court's ruling granting the anti-SLAPP motion was correct.

a. *Elements of the tort*.

In an action for malicious prosecution, the plaintiff must establish the prior underlying action (1) was commenced by or **[*15]** at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. (*Crowley v. Katleman (1994) 8 Cal.4th 666, 676*; *Bertero v. National General Corp. (1974) 13 Cal.3d 43, 50, 118 Cal. Rptr. 184*.)

b. *Royal and Tonoyan obtained a favorable termination of the underlying action*.

As indicated, in the underlying case, Tonoyan obtained nonsuit following opening statement, and Royal obtained nonsuit after Prescott completed her case in chief and rested.

It is "not essential to maintenance of an action for malicious prosecution that the prior proceeding was favorably terminated following trial on the merits. However, termination *must reflect on the merits of the underlying action*. [Citation.]" (*Lackner v. LaCroix (1979) 25 Cal.3d 747, 750*, italics added.) The attorney defendants contend the grant of nonsuit as to both Royal and Tonoyan was on procedural grounds which did not reflect on the merits. The argument is meritless.

Section 581c, subdivision (c) provides: "If the [nonsuit] motion is granted, unless the court in **[*16]** its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits."

Beyond that, the trial court's ruling in the underlying action indicates it granted nonsuit based on Prescott's inability to make out a case against either Royal or Tonoyan. With respect to Tonoyan, the trial court ruled that Prescott had failed even to articulate any basis for holding him liable. As for Royal, the trial court found Prescott had failed to show it was liable under an agency theory, or that it had engaged in any fraud.

We conclude the grant of nonsuit in favor of Tonoyan and Royal in the underlying action was a judgment on the merits and is deemed a favorable termination for purposes of their subsequent malicious prosecution action.

c. *Royal and Tonoyan made a sufficient prima facie showing the attorney defendants lacked probable cause to commence the underlying action against them*.

(1) *The lack of probable cause to bring suit against Royal*.

In the underlying action, in taking the case away from the jury and granting nonsuit in favor of Royal, the trial court ruled Prescott had every opportunity to show fraud and agency, but "it is just plain **[*17]** not there." The trial court's ruling in the underlying case there was no factual basis for holding Royal liable supports an inference the attorney defendants brought a claim against Royal which was not legally tenable.

The attorney defendants emphasize that in the underlying case, Prescott successfully opposed a motion by Royal for summary judgment, and the denial of summary judgment establishes that Prescott's action against Royal was legally tenable. The attorney

defendants invoke *Roberts v. Sentry Life Insurance, supra, 76 Cal.App.4th 375*, which "concluded that denial of defendant's summary judgment in an earlier case *normally* establishes there was probable cause to sue, thus barring a later malicious prosecution suit." (*Id., at p. 384*, italics added.) [8]

8 Tonoyan was named as a Doe defendant shortly before trial and was not a party at the time of the summary judgment motion.

However, *Roberts* added, "We say 'normally' rather than 'conclusively' because there may **[*18]** be situations where denial of summary judgment should not irrefutably establish probable cause. For example, *if denial of summary judgment was induced by materially false facts submitted in opposition*, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence." (*Roberts v. Sentry Life Insurance, supra, 76 Cal.App.4th at p. 384*, italics added.)

Here, the latter aspect of *Roberts* is applicable.

As indicated, in the underlying action Royal moved for summary judgment on the ground that Stuart was *not* its agent. In resisting the summary judgment motion, Prescott filed an opposing declaration asserting "I was approached by . . . Stuart who stated that he was a loan broker and agent for Royal . . . ." The trial court denied summary judgment, allowing the underlying action to proceed to trial.

However, at trial, after hearing Prescott's live testimony, the trial court granted nonsuit, finding an absence of any evidence to support Prescott's claim that Stuart acted as an agent for Royal. The clear implication of this ruling is that Prescott filed a false declaration in her opposition to Royal's motion **[*19]** for summary judgment. Accordingly, the fact that Royal's motion for summary judgment in the underlying action was denied does not show Prescott or her counsel had probable cause to sue Royal.

In sum, the record presented shows Prescott failed in the underlying action to present any evidence to show Stuart or First Choice acted as Royal's agent, or that Royal engaged in any fraud. Therefore, we conclude that in the instant case, Royal made a sufficient prima facie showing the attorney defendants lacked probable cause to bring the underlying suit against Royal.

(2) *The lack of probable cause to sue Tonoyan*.

As indicated, the trial court granted nonsuit in favor of Tonoyan following opening statement, observing "the initial opening statements made, there is nothing that even mentions this person of any liability whatsoever. [P] Then they went to reask to reopen. And all they did is a statement as to alter ego and nothing else. And there is no alter ego pled. They showed no other form of liability by any opening statement or otherwise."

Thus, in the underlying case Prescott's counsel failed to articulate a cognizable theory for including Tonoyan as a defendant. Therefore, we **[*20]** conclude that in the instant case, Tonoyan made a sufficient prima facie showing the attorney defendants lacked probable cause to bring the underlying suit against him.

d. *Royal and Tonoyan failed to made a sufficient prima facie showing the attorney defendants acted with malice.*

As explained, Royal and Tonoyan each made a sufficient showing the attorney defendants lacked probable cause to commence the underlying action against them. The remaining issue is whether, in commencing the underlying action, the attorney defendants acted with malice.

The malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose, such as where the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim. (*Albertson v. Raboff (1956) 46 Cal.2d 375, 383*.) Malice may be inferred from a lack of probable cause (*Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 192-193, 156 Cal. Rptr. 745*; *Grindle v. Lorbeer (1987) 196 Cal. App. 3d 1461, 1465, 242 Cal. Rptr. 562*), **[*21]** but the lack of probable cause must be supplemented by other, additional evidence. (*Downey Venture v. LMI Ins. Co. (1998) 66 Cal.App.4th 478, 498*.)

As this court explained in *Downey Venture,* "merely because the prior action lacked legal tenability, as measured objectively (i.e., by the standard of whether any reasonable attorney would have thought the claim tenable [see *Sheldon Appel* [*Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 254 Cal. Rptr. 336,]* 885-886]), *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective malicious state of mind. In other words, the presence of malice must be established by other, additional evidence. [P] . . . That evidence must include proof of either actual hostility or ill will on the part of the defendant or a subjective intent to deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant. (See *Albertson v. Raboff, supra, 46 Cal.2d at p. 383*.) In other words, in California, the commission of the tort of malicious prosecution requires a **[*22]** showing of an unsuccessful prosecution of a criminal or civil action, which any reasonable attorney would regard as totally and completely without merit (*Sheldon Appel, supra,* 47 Cal.3d at p. 885), *for the intentionally wrongful purpose of injuring another person*." (*Downey Venture,*

supra, 66 Cal.App.4th at pp. 498-499, final italics added, fn. omitted.)

As discussed in the preceding section, Royal and Tonoyan made a sufficient prima facie showing the attorney defendants lacked *probable cause* to include them in the action. However, the lack of probable cause, standing alone, is insufficient to give rise to an inference of malice. (*Downey Venture, supra, 66 Cal.App.4th at p. 498*.) Royal and Tonoyan contend they were included as defendants in the underlying action solely for the purpose of forcing a settlement which had no relation to the merits of Prescott's claim, but the assertion rests on speculation. Further, at oral argument herein, appellants' counsel conceded the dearth of evidence in the record with respect to the issue of malice. We conclude Royal and Tonoyan failed to made a sufficient prima facie showing with respect **[*23]** to the essential element of malice. Therefore, the trial court properly granted the attorney defendants' special motion to strike.

DISPOSITION

The order granting the attorney defendants' special motion to strike is affirmed. The parties shall bear their respective costs on appeal.

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.