



DeLuise v. DeLuise

2008 | Cited 0 times | California Court of Appeal | April 28, 2008

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Brigitte DeLuise, attorney Steven Zelig and his firm Zelig & Associates appeal the denial of their two special motions to strike¹ Dom DeLuise's action for malicious prosecution against them. Defendants principally contend that Dom DeLuise cannot establish a reasonable probability that he will prevail on the merits. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action arises out of the marital dissolution proceedings of Dom DeLuise's son David, who was married to defendant Brigitte DeLuise. David DeLuise commenced dissolution proceedings against Brigitte DeLuise on August 29, 2003, and on January 20, 2004, Brigitte DeLuise commenced an action against Dom DeLuise and his business manager, Page and Ma Business Management (the underlying action). The underlying action claimed that Dom DeLuise promised Brigitte DeLuise various things during her marriage to David DeLuise, including real property in which the couple resided during their marriage. After Brigitte DeLuise failed to amend two causes of action in her complaint in the underlying action after demurrers were sustained, and dismissed the remainder of her action without prejudice while Dom DeLuise's summary motion against her was pending, Dom DeLuise commenced this action for malicious prosecution.²

1. The Underlying Action

Sometime in 1993, Dom and his wife Carol permitted his son David and his then future wife Brigitte to stay, rent-free, in Dom and Carol's Malibu beach house. In late 1993, Dom and Carol helped David and Brigitte move into an apartment in the San Fernando Valley on which Dom and Carol paid the rent. In January 1994, the apartment building was destroyed in the Northridge Earthquake and David and Brigitte moved into Dom and Carol's Pacific Palisades house.

In March 1994, Dom and Carol purchased a condominium at 1817 Selby Avenue in West Los Angeles. At all times, they have maintained ownership of the condominium. Dom and Carol intended that David and Brigitte would stay at the Selby Avenue property, rent-free, while they saved enough to



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buy a home. At no time did Dom tell David or Brigitte that the property was theirs or that Dom would make a gift of it to them.

David and Brigitte married in October 1995. David and Brigitte lived at the Selby Avenue property for six years until they purchased a home of their own on Olive Drive in West Hollywood. David and Brigitte separated in August 2003. During their dissolution proceedings, neither David nor Brigitte listed the Selby Avenue property as either a separate or a community asset.

On January 20, 2004, Brigitte filed a complaint against Dom, his family trust, and his business managers Page and Ma. Brigitte claimed that Dom attempted to interfere with her assets held in trust or managed by Page and Ma, and that Dom and Carol had given or promised to give her and David the Selby Avenue property. The complaint asserted 10 causes of action, seven of which were alleged against Dom: fraud, negligent misrepresentation, declaratory relief, intentional interference with contractual relations, negligent interference with contractual relations, intentional infliction of emotional distress, and unfair business practices.³ Brigitte claimed \$240 million in damages.

After a series of demurrers, the trial court twice sustained Dom's demurrer to Brigitte's claim for unfair business practices without leave to amend. Brigitte filed a second amended complaint; the trial court sustained the demurrer with leave to amend the claims against Dom for intentional interference with contractual relations. Brigitte did not amend her second amended complaint with respect to these two claims.

Discovery ensued, during which Dom asserts Brigitte was unable to produce any evidence of wrongful conduct.

On November 11, 2005, Dom filed a motion for summary judgment or in the alternative summary adjudication on the remaining claims against him, arguing that Brigitte could not identify any assets interfered with, wrongful conduct, or damages. Instead of opposing the motion, Brigitte filed a request for dismissal without prejudice of the remaining claims against Dom, Carol, and their family trust.

2. The Malicious Prosecution Action

On May 26, 2006, Dom filed his action for malicious prosecution against Brigitte and her attorney Steven Zelig and Zelig & Associates.⁴ Dom alleged that the underlying action arose out of Brigitte's attempt to obtain leverage in her concurrent dissolution proceedings. In particular, he alleged that Brigitte claimed he acted to deprive her of her share in certain community assets held in trust by Page and Ma, but never described the existence of any disputed asset or act of interference in discovery or pleadings in the underlying action; her claim for damages demonstrated defendants' bad faith in bringing the underlying action; and after 21 months of discovery, defendants failed to produce evidence supporting their allegations of disputed assets or acts of interference by plaintiff.



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Plaintiff alleged favorable termination in defendants' failure to amend the two causes of action to which the trial court sustained plaintiff's demurrer, and Brigitte's dismissal of the remaining claims while Dom's unopposed summary judgment motion was pending.

On June 9, 2006, defendants propounded discovery in the form of special and form interrogatories. Among other things, they sought information concerning Dom's emotional distress damages and other damages. Dom's responses to the form interrogatories consisted mainly of objections or negative responses. Dom's response to special interrogatory No. 88, which requested him to "[s]tate all facts which support the allegation that you suffered 'emotional distress' as alleged in paragraph 35 of the complaint herein," does not address emotional distress damages, but sets forth Dom's contentions concerning Brigitte's failure to identify or produce evidence in support of her claims in the underlying action. Dom produced redacted copies of cancelled checks to show payments made to his attorneys.

On August 16, 2006, Zelig and Zelig & Associates filed a special motion to strike, contending Dom could not establish a reasonable probability of prevailing on the merits in his malicious prosecution action. They argued Dom could not establish the underlying action was favorably terminated because Brigitte dismissed her complaint in order to secure "peace in the family;" the underlying action was filed with probable cause and without malice; Dom could not establish damages; and Dom failed to comply with the requirements of Civil Code section 1714.10.⁵ In his declaration attached to the motion, Zelig stated that prior to commencing the underlying action, he met with counsel for Dom's business managers and wrote counsel to attempt to get documentation to support Brigitte's claims and to depose Dom in order to evaluate their claims, but Dom objected to all such discovery requests. Zelig asserted that he amended the complaint in an attempt to be more specific, but he had to avoid raising "sensitive" and "dicey" issues regarding Dom. "The Court can trust me when I say that if I had wanted to say negative, but truthful, things about Dom DeLuise, that were highly relevant to Brigitte DeLuise's claim that Dom DeLuise defrauded her and his motivation thereof, I could have alleged some very vivid and shocking facts." Although Brigitte determined to dismiss the complaint without prejudice, it was capable of being refiled because the statute of limitations had not expired. Zelig denied bearing any ill will or malice towards Dom.

In opposition, Dom argued that Brigitte's dismissal and her failure to amend after the demurrers were sustained demonstrate there was a termination on the merits. Further, he contended the action was instituted without probable cause because Zelig, in spite of his attempts to obtain pre-filing discovery, did not have any factual basis to conclude that Dom had engaged in unlawful business practices, interfered with plaintiff's contractual relations, or committed any other wrong against Brigitte. Finally, Dom argued that the underlying action was instituted with malice because defendants lacked probable cause; they maintained the action even after failing to discover any factual support; and their claims for damages and threats to publicize certain "intimate details" about Dom bore no relevance to any of the claims asserted.



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Brigitte filed a special motion to strike, also alleging that Dom could not establish the action was favorably terminated because she dismissed the matter in the interest of "peace" for the family and had re-filed her lawsuit; and she had probable cause because Dom failed to participate in the pre-litigation discovery requested and she relied upon her counsel in bringing the action. In her declaration, Brigitte stated she dismissed her lawsuit in the interests of family harmony and that she and Zelig did not intend to embarrass Dom; rather, they went "out of [their] way" not "to include [in the complaint] a large number of highly embarrassing facts" that could have been included if it had been their intent to embarrass him. She stated she prosecuted the action based upon Zelig's advice.

Dom opposed, contending that Brigitte could not establish the advice of counsel defense because she had not specified facts that were disclosed to counsel or that her claim regarding the Selby Avenue property was truthful and made in good faith. Further, Dom contended the failure to amend and dismissal constituted a favorable termination, and malice was established by Brigitte's knowledge that Dom had not engaged in any unlawful business practices, although she continued to maintain the action even after she was unable to discover any evidence.

Defendants' combined reply asserted that Dom's responses contained unsupported factual assertions which were improper and irrelevant; Dom failed to participate in their pre-litigation discovery; and defendants had established the advice of counsel defense. In support defendants submitted plaintiff's interrogatory responses.

At the hearing on the motion, the court stated it was inclined to find plaintiff had shown there was a likelihood of prevailing on the merits. The trial court denied the motions.

DISCUSSION

Defendants principally argue (1) plaintiff cannot establish favorable termination of the underlying action, lack of probable cause, or malice; (2) plaintiff cannot establish damages; (3) plaintiff failed to comply with Civil Code section 1710.14; and (4) Brigitte established the advice of counsel defense.

I. STANDARD OF REVIEW

In ruling on a special motion to strike brought under section 425.16,⁶ the trial court must engage in a two-step process. First, the court must determine whether defendant has made a threshold showing that the challenged cause of action arises from a protected activity. Second, if the defendant makes this showing, the trial court determines whether the plaintiff has established a probability of prevailing on the claim. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733 (*Jarrow Formulas*).) The burden is on the defendant on the first prong to show the action is within the statute; if such showing is made, the burden shifts to the plaintiff to establish the probability of prevailing. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.)



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In making these determinations, the trial court considers the pleadings, and supporting and opposing affidavits. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) We review the trial court's ruling on the motion to strike independently under a de novo standard. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) We do not weigh credibility, but accept as true the evidence favorable to plaintiff and evaluate the defendant's evidence only to determine whether it defeats the plaintiff's evidence as a matter of law. (*Id.* at p. 326.)

II. MALICIOUS PROSECUTION

A malicious prosecution action is subject to a motion to strike because the underlying action in every malicious prosecution case is a resort to the judicial branch.⁷

(*Jarrow Formulas, supra*, 31 Cal.4th at p. 735.) Thus, Dom must show a reasonable probability of prevailing on the merits. To do so in this case, he must show the prior action was (1) brought by the defendants and resulted in a favorable termination for Dom; (2) initiated or continued without probable cause; and (3) initiated with malice. (*Zamos v. Stroud* (2006) 32 Cal.4th 958, 965.)

A. Favorable Termination

To establish favorable termination, the plaintiff need not show the action was favorably terminated following a trial; instead, the termination must reflect on the merits of the underlying action. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.) While the fact a party has prevailed "is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits -- reflecting on neither innocence of nor responsibility for the alleged misconduct -- the termination is not favorable in the sense it would support a subsequent action for malicious prosecution." (*Id.* at p. 751.) There must be a favorable termination of the entire action. (*Friedberg v. Cox* (1987) 197 Cal.App.3d 381, 386-387.)

Although a voluntary dismissal of the underlying action is usually considered a favorable termination of the action for purposes of a malicious prosecution action, in some instances the dismissal may be attributable to a factor other than the plaintiff's implicit concession as to the merits of the action. "'Where the evidence conflicts as to the real motive for the voluntary dismissal of the underlying action, the question of favorable termination is to be resolved by the jury.' [Citations.]" (*Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 583.)

Here, Dom alleged that Brigitte's failure to amend her two claims, and her voluntary dismissal of the remaining claims, reflects on the lack of merit to her action. She contends that she dismissed the action because she wanted peace in the family. Because we cannot weigh the evidence in evaluating a special motion to strike, we conclude that plaintiff has established this factor for purposes of the motion. Brigitte's assertion does not dispose of Dom's claim as a matter of law; rather, whether or not Brigitte's assertion is true is a question for the jury. Further, defendants assert that Brigitte's



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re-filing of her action negates any prior favorable termination. However, her motivation in dismissing the underlying action may be different than her motivation in re-filing her lawsuit, and thus does not dispose of as a matter of law of this element of a malicious prosecution claim.

B. Probable Cause

Whether probable cause exists in the commencement or maintenance of a lawsuit is evaluated under an objective standard. Probable cause will be found where "any reasonable attorney would have thought the claim tenable." (Sheldon Appel v. Albert & Olier (1989) 47 Cal.3d 863, 878, 886.) The reasonable attorney standard of probable cause recognizes that "[c]ounsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win" (Id. at p. 885.) 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 (2004) 28 Cal.4th 811, 817.)

Here, Dom has made a sufficient showing of no probable cause, while Brigitte's only asserted defense fails. Dom's assertion that Brigitte's lawsuit was based upon a claim to real property made without any factual basis rests on affidavits both Dom and his son David submitted showing that Brigitte was never promised any ownership interest in the Selby Avenue property. Further, Dom argues that Brigitte never produced any discovery to establish that Dom interfered with her contractual interests. Zelig's attempts at prelitigation discovery, and Dom's refusal to participate, do not establish as a matter of law that defendants acted with probable cause: Dom was not required to participate in discovery prior to the commencement of Brigitte's lawsuit. Further, defendants' attempts to excuse their lack of evidence or specificity in the underlying complaint because they did not want to expose family secrets does not withstand scrutiny in light of the nature of Brigitte's allegations that she was deprived of property or had her business contracts interfered with. The family secrets to which defendants allude are not relevant to the torts alleged.

A party may rely on the advice of counsel defense to a malicious prosecution claim if that party has fully and truthfully disclosed the relevant facts to counsel and has acted in good faith. (Bertero v. National General Corp. (1974) 13 Cal.3d 43, 53-54.) However, "if the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, that defense fails." The party must seek counsel's advice in good faith and not as a "mere cloak" to protect against suit. (Ibid.)

Although the determination of whether probable cause exists is a question of law for the trial court, the underlying facts are subject to jury determination. (Sangster v. Paetkau (1998) 68 Cal.App.4th 151, 164-165.) Here, at best, Brigitte's allegations raise a dispute regarding the factual issues underpinning the defense, because the nature and scope of the disclosures made and her good faith in doing so set forth in her declaration are not sufficiently specific. She does not set forth the facts disclosed to Zelig; instead, Brigitte's declaration states that she was "unsophisticated" in legal matters; at all time



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she relied on Zelig's advice; that she provided him with a "complete and truthful statement of the facts as far as I knew and understood them;" and Zelig made it clear to her that he believed she had viable claims.

C. Malice

The element of malice is determined under a subjective test, and is a question of fact to be determined by the jury. Malice cannot be shown solely by an absence of probable cause, but factors establishing malice include the defendant's subjective belief in the validity of the claim and in the case of an attorney, the extent of the attorney's research and investigation. Malice also consists of ill-will and hostility, and exists where the prior lawsuit was instituted primarily for an improper purpose. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 675.) "Typically -- since it is rare that there will be a 'smoking gun' admission of improper motive -- malice is established by circumstantial evidence and inferences drawn from the evidence.'" (*Ibid.*)

Dom has produced evidence showing that Brigitte commenced her action for a wrongful purpose to obtain leverage in her dissolution proceedings, and he has argued that her excessively high damages demand by itself evidences defendants' ill will and bad faith in bringing the underlying action. Defendants have not rebutted this showing; their conclusory assertions that they lack malice are insufficiently specific to serve as a basis to grant their motion.

D. Damages

Defendants contend that plaintiff has failed to establish, through his discovery responses, entitlement to emotional distress damages or special damages in the form of attorneys' fees; that because of his inadequate responses, he would be precluded from offering proof of damage at trial; and he failed to request a specific amount of damages in his prayer. Defendants complain that the redacted checks attached only show that the DeLuise family trust paid attorneys' fees to Dom's attorneys. These arguments are without merit.

In an action for malicious prosecution, a plaintiff is entitled to damages for attorneys' fees and court costs incurred in defending the prior action; compensation for emotional distress, impairment to reputation; loss of time, and injury to the plaintiff's credit or business. (See *Bertero v. National General Corp.*, supra, 13 Cal.3d at pp. 61-62.) In opposing the motions to strike, Dom is not required to prove his damages with certainty, but is required to produce enough evidence to establish a reasonable probability of⁸ establishing such damages at trial. The checks produced show they were made payable to Dom's attorneys, and bear the visible signature of Dom DeLuise. Further, the bills were accompanied by a schedule showing the amount of time the attorneys spent on the underlying action. Dom has asserted that the legal services paid for were rendered on his behalf in defending the case. Moreover, the discovery responses placed before the court by Brigitte demonstrated Dom's assertion of emotional distress.



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Finally, although section 425.10, subdivision (a)(2) requires a statement of the amount of money damages demanded, the omission of such amount from Dom's prayer for relief does not render his damages claim insufficient as a matter of law for purposes of defendant's motion to strike. An improper prayer is irrelevant for determining the sufficiency of the cause of action pleaded (*Gomez v. Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921, 925), and an improper prayer is properly the subject of a motion to strike material from the complaint pursuant to section 436, not a special motion to strike under section 425.16.

E. Civil Code Section 1714.10 Does Not Apply

Defendants contend plaintiff failed to comply with Civil Code section 1714.10 pertaining to actions alleging conspiracy claims against an attorney. This contention is without merit, as the complaint did not allege any conspiracy.

III. PLAINTIFF'S REQUEST FOR ATTORNEYS' FEES

Dom contends the trial court erred in failing to grant his motion for attorneys' fees in connection with defendants' motions to strike, and that he was entitled to such fees because defendants' motions were frivolous and filed for the sole purpose of delay. We do not consider this matter because an order declining to award attorneys' fees to a plaintiff who successfully opposes a motion to strike is not immediately appealable. (*Doe v. Luster* (2006) 145 Cal.App.4th 139, 150.) Such order would be appealable in connection with an appeal from a final judgment in the matter. (See *American Humane Assn. v. Los Angeles Times Communications* (2001) 92 Cal.App.4th 1095, 1102-1103.)

DISPOSITION

The order of the superior court is affirmed. Respondent is to recover his costs on appeal.

We concur: PERLUSS, P. J., WOODS, J.

1. All statutory references herein, unless otherwise noted, are to the Code of Civil Procedure. Section 425.16 is known as the "anti-SLAPP" statute and motions brought pursuant to section 425.16 are often referred to as anti-SLAPP motions. (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 407, fn.1.)

2. To avoid confusion and because many of the parties share the same last name, where appropriate we refer to such parties by their first names.

3. Brigitte's original complaint in the underlying action is not part of the record on appeal. Defendants cite to her second complaint, filed June 23, 2006, after the commencement of Dom's malicious prosecution action, which alleged claims against Dom for fraud (first cause of action), negligent misrepresentation (second cause of action), declaratory relief (third cause of action), intentional interference with contractual relations (fourth cause of action), intentional infliction of



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emotional distress (fifth cause of action), unfair business practices (sixth cause of action).

4. In addition to their motions to strike, the record indicates defendants filed demurrers and motions for judgment on the pleadings.

5. Section 1714.10, subdivision (a) provides in relevant part: "No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action."

6. Section 425.16 provides in relevant part 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 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).)

7. Dom asserts that defendants' conduct amounted to extortion and was not shielded by the litigation privilege, taking it outside the ambit of section 425.16. (See *Flatley v. Mauro*, supra, 39 Cal.4th at pp. 328-332 [extortion not act in furtherance of constitutional right to free speech].) We need not decide this issue, because we conclude that Dom has established a reasonable probability of prevailing on the merits.

8. Emphasizing that case law generally defines the plaintiff's burden in establishing a cause of action for the malicious prosecution of a civil proceeding as "'plead[ing] and prov[ing] the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]'" (e.g., *Crowley v. Katleman* (1994) 8 Cal.4th 666, 675), Dom asserts he was not obligated to present any evidence he was actually injured by Brigitte's pursuit of the underlying action as part of his showing of a probability of prevailing on the merits. Although California does not require the plaintiff demonstrate some "special injury" beyond that ordinarily incurred in defending a lawsuit in order to prevail in a malicious prosecution action (see *Sheldon Appel Co. v. Albert & Oliker*, supra, 47 Cal.3d at p. 872 [discussing special injury requirement in other jurisdictions]), harm to the plaintiff, as well as proof defendant's conduct was a substantial factor in causing that harm, are very much elements of the tort. (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 ["The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records"]; see *Bertero v. National General Corp.*, supra, 13 Cal.3d at pp. 50-51 ["The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees [citations], compensation for injury to reputation or impairment of his social and business standing in the community [citations], and for mental or emotional distress [citation]."]; see generally



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Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1501 [wrongful use of civil proceedings].)

