



ONLINE SERVICES

Tentative Rulings

DEPARTMENT SEC LAW AND MOTION RULINGS

DEPARTMENT SE-C LAW & MOTION PROCEDURES ARE AS FOLLOWS:

APPEARANCES:

The Court will hear oral arguments on all matters at 1:30 p.m. If all counsel intend to submit on the Tentative Order and do not want oral argument, please advise the clerk, in Department “C”, by calling (562-345-3702). If all sides submit on the Tentative Order and the clerk is so advised, the Tentative Order will become the final order of the court and the prevailing party shall give written Notice of Ruling per CRC 3.1312.

If the Moving and Responding parties do not agree to submit on the Tentative Order, the motion will be called as calendared for hearing. There is no need to contact Department “C”, as the matter will remain on calendar for hearing.

If the Moving party does not call Department “C” to submit on the Tentative Order and there is no appearance by any party, then the motion(s), at the Court’s discretion, may be taken off calendar without ruling on the motion(s).

ORDERS:

The minute order reflecting the Court’s Order will constitute the final Order. No additional orders should be submitted to the Court for signature unless required by law or by the Court. Prevailing party shall give written Notice of Ruling per CRC 3.1312.

Minute orders, which constitute the final Order of the Court, will only be sent to the parties, via U.S. mail or facsimile, for the following: OSC re: sanctions, OSC re: contempt or matters taken under submission after oral arguments or briefing. Counsel or parties may request copies of all other minute orders/final orders either at the clerk’s office or in writing. If a request is in writing, a self-addressed stamped envelope and the appropriate fee for copies shall be submitted.

Case Number: VC065240 **Hearing Date:** May 26, 2016 **Dept:** SEC

AMERICAN BANKCARD SERVICES, INC. v. LIU

CASE NO.: VC065240

HEARING: 05/26/16

#8

TENTATIVE ORDER

I. Defendants LONG LIU's special motion to strike is DENIED.

II. Defendant CASIO SHYN's special motion to strike is DENIED.

C.C.P. § 425.16.

Plaintiffs AMERICAN BANKCARD SERVICES, INC. ("ABS") and its principal CUI CUI LI were defendants in the underlying lawsuit (Haiting Wang v. American Bank Card Serv., N.A., case number BC568797). After that matter was dismissed, they brought the subject malicious prosecution action against the moving defendants. Defendants LIU dba The Long Liu Firm and SHYN are the attorneys who represented plaintiff Wang in the underlying action.

The underlying action

In January 2015, plaintiff Haiting ("Heidi") Wang filed her complaint alleging a sole cause of action for defamation against her former employer ABS and her boss Li. Motion, Exh. 9 (complaint). While her motion for leave to file an amended pleading was pending, plaintiff dismissed the action. See Plaintiff's RJN, Exh. W, X.

Allegations

ABS sells credit card processing services and equipment as an agent for non-party North American Bancard ("NAB"). Plaintiff Wang began working for ABS as a customer service representative in mid-July 2014. On October 1, plaintiff arrived at work & learned Ms. Li made disparaging remarks about plaintiff. Specifically, Li stated that plaintiff took her cell phone, and that plaintiff is not a hardworking employee. Later, Li found the phone in her own vehicle.

Plaintiff Wang alleged those statements harmed her reputation and made her appear to be a thief. She further alleged that Li made the accusation to create a pretext and an ostensible reason to fire plaintiff. Plaintiff alleges she was fired a few days later. Plaintiff contends that Li wanted to fire her due to plaintiff's questioning the company's over-charging fees and "cutting and pasting original signatures to different agreements."

Plaintiffs' malicious prosecution claim

The complaint was filed in December 2015 and the operative First Amended Complaint was filed on February 8, 2016. Therein, plaintiffs allege that after Wang ended her employment, she immediately consulted with defendant Liu. In October and December 2014, Liu sent ABS letters accusing it of fraud and threatening to file suit of ABS did not pay Wang damages. FAC, ¶¶5, 7. In January 2015, Liu filed the underlying complaint for defamation on behalf of Wang.

In August 2015, defendant Liu filed a motion for leave to amend in the underlying action to add additional causes of action. Thereafter, on October 13, 2015, defendant Liu filed a Substitution of Attorney designating co-defendant Casio Shyn as plaintiff's new counsel. FAC, ¶10. Shyn also wrote ABS's counsel letters, indicating that if the matter did not settle, ABS may be sued by its parent company or by its customers in a class action for its alleged fraud. FAC, ¶¶13, 16. ABS and Li refused to settle. ¶17. Thereafter, plaintiff filed a request for dismissal without prejudice (before the amended pleading was filed). ¶20.

Plaintiffs allege there was no probable cause for the prior action, as its actions regarding billing its customers were in accordance with the written agreements. FAC, ¶¶27, 28. Additionally, plaintiffs allege that Wang's deposition testimony indicated that she lacked requisite knowledge on that topic (early termination fees) and had little information to support her defamation claim. ¶¶30, 34-36. Plaintiffs allege that the defendant attorneys knew the charges of criminal conduct were fabricated and acted with malice in prosecuting the underlying action and by making threats regarding settlement. ¶¶39, 48-51. Plaintiffs seek damages for the alleged malicious prosecution.

Defendants seek an order striking the complaint under the anti-SLAPP statute.

Standard on an anti-SLAPP motion

The anti-SLAPP statute was designed to prevent lawsuits designed to chill the exercise of one's First Amendment rights by providing the defendant an opportunity to challenge the merits of the pleading at the outset of the litigation through a special motion to strike. Defendant may challenge a cause of action "arising from any act in furtherance of the person's [constitutional] right to petition or free speech...in connection with a public issue." See C.C.P. § 425.16(b)(1), (e). That cause of action will be stricken unless "plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *Id.* The analysis is thus two-pronged: (1) whether the cause of action arises from protected activity, and, if so, (2) whether plaintiff can produce sufficient evidence to establish a probability of prevailing.

Defendant's burden--protected activity

The question of whether a particular cause of action arises out of a protected activity is often a complex one. Here, plaintiff alleges a sole cause of action for malicious prosecution. By definition, the cause of action arises from a party's right to petition. See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 85.

The statutory categories of protected activity includes "any written or oral statement or writing made before a legislative, executive or judicial proceeding, or any other official proceeding as authorized by law." C.C.P. §425.16(e)(1). It protects attorney's petitioning conduct in prior litigation. *White v. Lieberman* (2002) 103 Cal.App.4th 210. Defendants made the threshold showing, which plaintiffs concede.

Plaintiffs' burden--Probability of prevailing

To state a claim for malicious prosecution, a plaintiff must establish the prior action (1) was initiated by or at the direction of defendant and legally terminated in plaintiff's favor, (2) was brought without probable cause, and (3) was initiated with malice. *Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740. Continuing to prosecute a case without probable cause may also support a malicious prosecution cause of action. *Zamos v. Stroud* (2004) 32 Cal.4th 958.

Favorable termination

Wang filed a voluntary dismissal without prejudice on November 13, 2015. RJN, Exh. Z. Defendants argue that because the dismissal did not relate to the merits of the action, plaintiffs cannot establish favorable termination. See generally *Robbins v. Blecher* (1997) 52 Cal.App.4th 886.

According to her declaration, the matter was dismissed "pursuant to [her] own instruction." Wang decl., ¶11 (Liu Motion, Exh, 3). Defendant Shyn (whose motion was filed a month after Liu's motion) submitted a substantially more detailed declaration from Wang but she does not provide any further explanation as to why she elected to dismiss the case. Defendants argue it was for financial reasons.

Plaintiffs argue that a voluntary dismissal is presumed to be one on the merits. *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385; *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800. Here, they argue, the dismissal came just after Wang was deposed, when it was clear that she did not possess factual support for her claims. Cf. *Contemporary Serv. Corp. v. Staff Pro, Inc.* (2007) 152 Cal.App.4th 1043 (no inference that the dismissal was on the merits where it was entered before plaintiff's deposition and before rejected settlement demands).

Where there is a conflict as to the circumstances of the termination, the determination of the reasons underlying the dismissal is a question of fact. *Sycamore*, supra at 1399 (citations omitted).

Plaintiffs here have supported their argument that the dismissal reflected a lack of merit of the underlying defamation claim, and thus have proffered sufficient evidence as to that element of their malicious prosecution cause of action.

Lack of probable cause

Probable cause is determined by the reasonableness of the prosecution of the action using an objective standard. *Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1271. The standard is low—to find a lack of probable cause, the Court must determine that no reasonable lawyer would prosecute the action. See *Vanzant v. DaimlerChrysler Corp.* (2002) 96 Cal.App.4th 1283.

Here, defendants argue that they were properly relying on the information they received from their client Wang. *Morrison v. Goldstein* (2002) 101 Cal.App.4th 613, 625-26; Shyn decl. Wang told counsel that she was accused of stealing the company cell phone and that other employees heard the false accusation, thereby causing harm to her reputation. Additionally, Wang told counsel that she believed the accusation was a pretext for firing her because she began to question ABS's business practices. Defendant Lui argues that information was sufficient to establish probable cause for the defamation claim. Defendant Shyn, who represented plaintiff for approximately one month, relied on the same information.

Plaintiffs proffered evidence from Wang's co-workers who were present at the time of the alleged slander and who testify that Li never accused Wang of "stealing" the cell phone. See Decl. of defendant Li; Decl. of Jerry Zhang; decl. of Nancy Mo. That evidence is relevant to whether Wang herself had probable cause, but it not particularly probative as to the moving defendants' assessment of the case.

There is no evidence that defendant attorneys had actual knowledge that there were witnesses contradicting the alleged defamation at the time the case was filed by defendant Liu or while it was being prosecuted by defendant Shyn. However, as noted by plaintiffs, an attorney (including one who associates into an active case) has a duty to independently investigate and research the validity of the claims. *Cole v. Patricia A. Meyer & Assoc., APC* (2012) 206 Cal.App.4th 1095, 1118-20.

Plaintiffs argue that it became clear during deposition that Wang lacked personal knowledge to support her claims and that she did not have responsive answers to many of the basic questions

posed. Defendants counter by noting that Wang did not understand many of the questions, despite the use of a Mandarin interpreter during the deposition. It does not appear Wang or the attorney defendants took any steps to review or correct the deposition transcript. Additionally, plaintiff abandoned her motion to amend the pleading and instead dismissed the case.

Finally, plaintiffs question whether the defamation case was legally tenable, as there is no corroborating evidence that Li accused Wang of taking the phone or whether such a statement equates to an accusation of theft. See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260.

While defendants have proffered evidence defending their prosecution of the underlying action, the Court finds that plaintiffs have made the minimal showing required to support the element of a lack of probable cause. *Cole, supra*.

Malice

In order to establish malice, plaintiffs must prove that Liu and Shyn intended to cause them injury. See *Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 495. Both defendants deny that they acted with malice.

Shyn submitted his own declaration attesting that he had no prior relationship with plaintiffs and no basis for animosity. He asserts that he acted in a professional manner with respect to his representation of Wang and did not financially profit from that representation.

With respect to Shyn, plaintiffs cite the letters he sent to counsel demanding settlement and threatening to expose ABS's "illegal business practices" and to file a class action lawsuit. Opp., Exh. D. Plaintiffs also note defendants' settlement demands occurred the day before, the day after and one week after Wang's deposition. Plaintiffs argue the evidence suggests an improper purpose, from which malice can be inferred. See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522.

As to defendant Liu, plaintiffs cite to his October and December 2014 letters wherein he threatened to expose plaintiffs' "fraud and forgery" if they did not settle. Opp., Exh. R, U. That evidence is sufficient to suggest an improper purpose and thus provide prima facie proof on the element of malice.

Accepting plaintiffs' evidence as true and without weighing the comparative value of the parties' competing evidence, the Court concludes that plaintiffs have met their burden of establishing a probability of prevailing on their malicious prosecution claim. See *Soukup, supra* at 291. Defendants' motions to strike are denied.

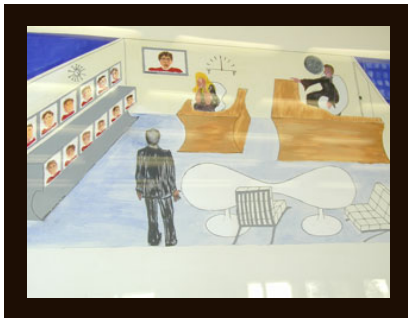
Evidentiary objections

The Court considered the evidentiary objections in reaching the conclusions herein. It will provide rulings to the counsel at the time of the hearing.

Format of papers

Counsel are instructed to follow the California Rules of Court as they pertain to the format of papers filed. Exhibits must be tabbed. C.R.C. 3.1110(f). Counsel are also expected to use the appropriate font size and spacing between lines (so that there are no more than 28 per page). See C.R.C. 2.104, 2.105, 2.107, 2.108.

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