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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SHABTAI MALACKY,

Plaintiff and Appellant,

v.

AMERICAN EXPRESS COMPANY et al.,

Defendants and Respondents.

B229511

(Los Angeles County
Super. Ct. No. BC429127)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Teresa Sanchez-Gordon, Judge. Affirmed.

Sina Law Group and Reza Sina for Plaintiff and Appellant.

Palmer, Lombardi & Donohue, E. Scott Palmer, Brett D. Watson and Russell G.
Gomm for Defendants and Respondents.

Appellant Shabtai Malacky, known as Nir Malki (Malki), was arrested for criminal fraud involving credit cards issued by American Express Bank, FSB, erroneously sued as American Express Company. Following his acquittal in the criminal proceedings, Malki filed suit against American Express Company and its investigator, Russell Young (collectively, Amex), for initially reporting the fraud to police, which caused a criminal prosecution to be initiated against him that terminated in his favor. Amex's special motion to strike the complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16)¹ was granted because all the causes of action alleged in his complaint except for the malicious prosecution cause of action were barred by the litigation privilege (Civ. Code, § 47, subd. (b)). The malicious prosecution cause of action also was stricken because Malki did not introduce any evidence to establish that there was a probability he would prevail on this claim. Malki challenges the trial court's order granting the special motion to strike the malicious prosecution cause of action, and its decision to deny relief in a subsequent motion to permit him to file a declaration that tracked the allegations in his complaint. We affirm.

BACKGROUND

1. *Allegations in the Complaint*

In 1995, Amex filed a police report stating that Malki defrauded Amex by obtaining five separate credit cards in his name and using the credit cards to purchase motorcycles and valuable metal coins. Checks for payment on the credit cards were sent to Amex but were drawn on closed bank accounts or accounts with insufficient funds. Malki alleges his brother, now deceased, made some of these purchases, and that Malki was the victim of identity theft. An arrest warrant was issued in 1995, but Malki was out of the country. Malki was not arrested by the Los Angeles Police Department (LAPD) until February 2008.

¹ Unless stated otherwise, all statutory references are to the Code of Civil Procedure.

As part of the criminal proceedings, Amex's investigator testified that Amex sustained losses of approximately \$886,000. The amount of the losses, however, allegedly did not exceed \$300,000.

Malki was acquitted of the criminal charges.

To support his cause of action for malicious prosecution,² Malki alleges that Amex did not have probable cause to file the police report and did not honestly, reasonably, and in good faith report the crime because: (1) Amex allegedly claimed to have sustained \$880,000 in losses, but the loss was actually \$300,000; (2) Amex did not conduct an adequate investigation to uncover identity theft, which would have included comparing the original credit card application, the credit card receipts and signatures, and the signatures of the checks submitted for credit card payments; (3) Amex had no evidence to connect the checks to Malki; and (4) Amex had no evidence that Malki ever applied for these credit cards.

2. Special Motion to Strike the Malicious Prosecution Cause of Action

In support of the special motion to strike, Amex submitted the declaration of James M. Belna, deputy district attorney with the Los Angeles County District Attorney's Office, who supervised Malki's prosecution and trial. Belna stated Malki's prosecution "was instituted based on information received from the Los Angeles Police Department as a result of its investigation of Mr. Malki's suspected fraudulent activities. That information included information presented by American Express, but also information from other financial institutions regarding a suspected check-kiting scheme by Mr. Malki."

Young, a senior special agent with American Express Global Security, stated in his declaration that in 1995 he investigated suspected fraudulent activity involving Malki's credit card accounts. Young reported the information to the LAPD, which included "the identity of Mr. Malki, the transactions at issue on the credit card accounts,

² The complaint also alleged causes of action for false arrest and imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress. As noted, Malki does not challenge the trial court's order striking these causes of action.

and the suspected fraudulent checks that were sent to American Express as payment on Mr. Malki's accounts." Young was subpoenaed and testified as a witness for the prosecution in the criminal proceedings.

In his declaration, Young stated: "I reported the aforementioned information to the Los Angeles Police Department and testified at the aforementioned trial because based on my investigation, I had reason to believe that Mr. Malki may have been engaged in fraudulent conduct. . . . I did not perform any of the aforementioned activities out of any malice or ill will against Mr. Malki."

Malki filed a brief opposing the special motion to strike, but did not submit any evidence. At the hearing, Malki's attorney stated that based upon the language in section 425.16, subdivision (b)(2), he believed the court was required to assume the truth of the allegations in Malki's complaint. Additionally, counsel attempted to offer Malki's declaration, which tracked verbatim the allegations in the complaint, with the exception that the word "plaintiff" was replaced with "I." The trial court rejected the proffer.

The trial court granted the special motion to strike the malicious prosecution cause of action because Malki failed to meet his burden of establishing a probability of prevailing on the merits. Thus, the trial court dismissed the action in its entirety.

In a subsequent motion, the trial court awarded Amex attorney fees.

3. Malki's Motion for Clarification and Reconsideration Denied

Malki's counsel asked the court to reconsider its order after accepting and reviewing Malki's declaration. In the alternative, Malki moved for reconsideration based upon new and different facts (§ 1008), or for relief from the dismissal based upon counsel's excusable neglect (§ 473, subd. (b)).

The trial court denied the motion on all grounds, reasoning that Malki's counsel made a tactical decision not to submit evidence in opposition to the special motion to strike, and thus there was no excusable neglect under section 473, or grounds for reconsideration under section 1008. The trial court further noted that even if it had considered the declaration, its ruling would not change because the statements in Malki's declaration "address the evidence plaintiff had in support of his position that he was not

guilty of the [criminal] charges,” and did not establish that Amex (through Young) made “false reports with malice.” Judgment was entered, and this appeal followed.

DISCUSSION

1. *The Trial Court Properly Granted the Special Motion to Strike the Malicious Prosecution Cause of Action*

A cause of action is subject to a special motion to strike if the defendant, in this case Amex, shows that the cause of action arises from an act in furtherance of its constitutional right of petition or free speech in connection with a public issue and the plaintiff (Malki) fails to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1);³ *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) On appeal, we independently review both of these determinations. (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 883.)

The first prong of the section 425.16 analysis is not at issue. Malki concedes that Amex’s conduct from which the malicious prosecution cause of action arose was activity in furtherance of Amex’s exercise of free speech in connection with a public issue within the meaning of section 425.16. (See *Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1447.) Accordingly, in order to avoid dismissal of the malicious prosecution cause of action under section 425.16, Malki bore the burden of demonstrating a probability that he would prevail on that particular claim.

In order to establish the probability of prevailing on the merits of a malicious prosecution claim, Malki must show that the claim is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in his favor. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714.) To determine the question of potential merit, we consider the pleadings and evidentiary submissions of both the

³ Section 425.16, subdivision (b)(1) states in relevant part: “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 Constitution or the 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.”

plaintiff and the defendant (§ 425.16, subd. (b)(2); *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) In doing so, we do not weigh the evidence. (*Wilson v. Parker, Covert & Chidester, supra*, at p. 821.) Instead, we accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated the evidence submitted by the plaintiff as a matter of law. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

The prima facie showing of merit must be made with evidence that is admissible at trial. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289.) Unverified allegations in the pleadings do not suffice. (*Ibid.*) There is a split of authority, however, on whether a trial court may consider verified pleadings in assessing the probability of prevailing on the merits. (Compare *Salma v. Capon, supra*, at pp. 1289-1290 & fn. 6 [section 425.16 permits a trial court to consider verified allegations based on the personal knowledge of the pleader] with *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710, disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7 [a party may not rely on verified pleadings to make the evidentiary showing under section 425.16].) Even assuming verified allegations based on personal knowledge satisfy the evidentiary requirements, Malki has not made the requisite showing.

a. *Effect of Malki's Failure to Submit Evidence*

Malki relied on his unverified pleading to oppose the special motion to strike and did not produce any evidence to establish the merit of his malicious prosecution claim. He contends the trial court erred in concluding that he could not rely on his unverified pleadings because section 425.16, subdivision (b)(2) states that the allegations in the pleading are assumed to be true, similar to the standard of review on a demurrer. Section 425.16, subdivision (b)(2) does not employ this standard; the trial court committed no error.

Section 425.16, subdivision (b)(2) states the court shall consider the pleadings when determining the probability that plaintiff will prevail on the claim, not the pleadings are deemed true for purposes of that determination. To establish a probability that the plaintiff will prevail on the claim, the plaintiff must submit evidence admissible at trial.

As stated in *Salma v. Capon, supra*, 161 Cal.App.4th at page 1290, verified allegations based upon the personal knowledge of the pleader may fit this criterion. Unverified allegations not based upon personal knowledge, as presented throughout Malki's complaint, do not satisfy the required evidentiary showing. Malki misreads the cases, which state that the court may not weigh the credibility or strength of the evidence. These cases do not state that the submission of evidence is optional, or to be considered only after considering the pleadings.⁴ Without the submission of any admissible evidence, Malki failed to make a showing of the probability that he would prevail on the merits of his malicious prosecution claim.

b. *Malki Cannot Prevail on a Malicious Prosecution Claim*

Malki also contends the trial court erred by failing to consider his declaration because it established the probability of prevailing on the merits of his claim. As previously noted, the trial court did not permit Malki to file the declaration, however the trial court read the declaration and concluded it addressed his defense to the criminal charges. Upon our independent review, we also conclude the declaration does not present evidence to establish the probability of prevailing on the merits.

Since Malki's claim is based upon an underlying criminal proceeding, to prevail on a malicious prosecution claim, he must show Amex initiated or procured the arrest of another under lawful process, but from malicious motives and without probable cause, and the prosecution terminated in his favor. (5 Witkin, Summary of Cal. Law (10th ed.

⁴ Malki relies on *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264 for the proposition that the facts alleged in a complaint are accepted as true when conducting a section 425.16 analysis. That case, however, stands for the proposition that for purposes of determining the probability of prevailing on the merits, the trial court does not resolve factual disputes or make credibility determinations. (*Hylton v. Frank E. Rogozienski, Inc., supra*, at p. 1267, fn. 2.) *Hylton* cited *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733, which stated: "[I]t is not our task to resolve factual disputes or make credibility determinations on [defendant's] section 425.16 motion; we accept plaintiffs' evidence as true for purposes of our analysis." Indeed, in the footnote cited by Malki, the *Hylton* court explained that the court only considers the defendant's evidence to the extent it defeats as a matter of law the evidence submitted by the plaintiff. (*Hylton v. Frank E. Rogozienski, Inc., supra*, at p. 1267, fn. 2.)

2005) Torts, § 475, pp. 701-702; see also *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720; *Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1330.) “Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime.” (*Sullivan v. County of Los Angeles, supra*, at p. 720.) Upon informing law enforcement, if an independent investigation is conducted and the prosecutor decides whether and what charges to prosecute, a private person cannot be held liable for malicious prosecution. (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 898.)

Before addressing lack of evidence to establish a malicious motive or lack of probable cause, Amex presented evidence to support its independent investigation defense. LAPD conducted its own investigation after Amex reported credit card fraud to the LAPD, which included Malki’s name, the transactions at issue on the credit card accounts, and the fraudulent checks.⁵ Based upon the LAPD investigation, the district attorney instituted criminal proceedings. While Malki attacks the district attorney’s declaration discussing the investigation, particularly the absence of any specific information related to the alleged amount of the fraud Amex reported, Malki’s declaration presented no contrary evidence to contest this defense. The cases Malki relies on are distinguishable. (See *Centers v. Dollar Markets* (1950) 99 Cal.App.2d 534, 539 [deputy city prosecutor filed complaint at request of the complaining party]; *Sandoval v.*

⁵ Malki repeatedly argues that Amex overestimated the loss. Although not clear in the complaint (and Malki’s declaration), it appears that Young testified in the criminal proceedings that the loss was approximately \$886,000, when it allegedly was only \$300,000. According to the complaint, this error caused bail to be set at \$1 million, and Malki spent six months in county jail until bail was reduced. His six-month stay in county jail is part of his malicious prosecution claim. In a somewhat analogous situation, the court in *Sullivan v. County of Los Angeles, supra*, 12 Cal.3d 710, noted that “[n]o case has predicated a finding of malicious prosecution on the holding of a person in jail beyond his term or beyond the completion of all criminal proceedings against him.” (*Id.* at p. 720.) Malki has no authority to premise his malicious prosecution claim on his six-month incarceration in which he could not post bail.

Southern Cal. Enterprises, Inc. (1950) 98 Cal.App.2d 240, 244 [complaining party’s representations resulted in plaintiff’s arrest and prosecution].) Thus, the independent investigation defense defeats Malki’s malicious prosecution claim as a matter of law.

Malki also has not presented evidence to show malicious motive or lack of probable cause. The absence of either element is fatal to his claim.

Malicious motive is an essential element of a malicious prosecution claim. “The ‘malice’ element . . . relates to the *subjective intent or purpose* with which the defendant acted The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive. . . .” (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494.) Thus, the showing must establish an “intentionally wrongful purpose of injuring another person.” (*Id.* at p. 499.)

Malki’s declaration does not show that Amex made a false report to the LAPD with ill will or any other ulterior motive. His declaration reiterates allegations that he believed that Amex (through Young’s testimony) overestimated the loss, based upon evidence obtained during the criminal proceedings. Additionally, Malki’s declaration states he was the victim of identity theft, but he refers to evidence presented in the criminal trial that established his defense. When Amex reported the loss, the evidence unequivocally establishes the credit cards in question were issued to Malki, and the payments were made from closed bank accounts or bank accounts with insufficient funds.

We also find unpersuasive Malki’s contention he has shown malice because Amex overestimated the loss, which prevented him from posting bail. Amex played no part in requesting or setting bail, and Malki has no personal knowledge of the factors that were considered when requesting bail. Moreover, as previously noted, a malicious prosecution claim cannot be premised on a six-month incarceration simply because Malki could not post bail. (See *Sullivan v. County of Los Angeles*, *supra*, 12 Cal.3d at p. 720.) Malki’s additional arguments undercut his position because they are not based upon Amex’s subjective belief. Thus, Malki has failed to present any admissible evidence of malicious motive.

Malki also has failed to present evidence to show Amex lacked probable cause to report the credit card fraud scheme to the LAPD. Where, as here, the claim for malicious prosecution is based upon the initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for Amex to suspect that Malki had committed a crime. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 878, 885.) When there is no dispute concerning the existence of the facts relied upon to show probable cause, the question of whether these facts establish probable cause is a legal question. (*Id.* at p. 881.)

In this case, it is undisputed that the credit cards were issued to Malki, and that Amex had sustained a loss based upon the fraudulent use of these cards. It was reasonable for Amex to report the fraud. Malki's arguments to the contrary are unavailing, and his declaration establishes his defense to the criminal charges, not whether at the time Amex initially reported the fraud to the LAPD it was objectively reasonable to believe that Malki had committed credit card fraud. Evidence of Malki's acquittal is not relevant to Amex's objective belief at the time it reported the credit card fraud to LAPD. (5 Witkin, Summary of Cal. Law, *supra*, Torts, § 484, p. 709 ["acquittal at the trial is not . . . prima facie evidence of lack of probable cause . . ."].) Likewise, Malki's attack on Amex's investigation is irrelevant. (See *Ecker v. Raging Waters Group, Inc.*, *supra*, 87 Cal.App.4th at p. 1331.) We also find inapposite Malki's authorities that discuss lack of probable cause in entirely different factual scenarios. Malki presented no evidence to show lack of probable cause. Thus, the malicious prosecution cause of action was properly stricken because Malki's declaration did not establish the probability of prevailing on the merits of the malicious prosecution claim.

2. *The Trial Court Did Not Abuse its Discretion in Denying Malki's Motions*

Malki contends the trial court abused its discretion in denying the request to consider his declaration, and later denying his motion for reconsideration and to set aside the judgment based upon excusable neglect. The trial court's denial of Malki's motions is reviewed for an abuse of discretion. (*Zamora v. Clayborn Contracting Group, Inc.*

(2002) 28 Cal.4th 249, 257-258; *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.)

There was no abuse of discretion.

A party seeking reconsideration under section 1008 must provide new or different facts. (§ 1008, subd. (a).) The “new” facts in Malki’s declaration were taken verbatim from the allegations in his complaint. Malki’s counsel’s explanation for failing to submit the declaration in opposition to the special motion to strike was based upon a misreading of section 425.16, subdivision (b)(2). Thus, the trial court considered this a tactical decision on counsel’s part, not new facts. The trial court was within its discretion to deny the motion, and this court cannot substitute its discretion for the trial court’s discretion.

Malki also seeks relief under the discretionary provision of section 473, subdivision (b), based upon his counsel’s mistaken interpretation of section 425.16, subdivision (b)(2).⁶ A court may relieve a party or his or her legal representative from a judgment, dismissal, or order, taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Failure to properly advance an argument is not excusable. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 684.) It was within the trial court’s discretion to conclude the tactical decision not to submit evidence to oppose the special motion to strike was inexcusable neglect. There was no abuse of discretion.

⁶ Malki’s reliance on cases addressing the mandatory provisions in section 473, subdivision (b) is misplaced, and we reject those arguments based upon that authority.

DISPOSITION

The judgment is affirmed. Amex is awarded costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.