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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOHN HOFER,

Plaintiff and Respondent,

v.

LISA HOFER,

Defendant and Appellant.

2d Civil No. B232537
(Super. Ct. No. 56-2010-00387289-
CU-NP-VTA)
(Ventura County)

Defendant Lisa Hofer (Lisa) appeals an order denying her special motion to strike (Code Civ. Proc., § 425.16 [anti-SLAPP]), a malicious prosecution action filed by plaintiff John Hofer (John).¹ John alleged that Lisa had maliciously filed a false police report claiming that he physically assaulted her. Lisa claimed that John's action arose from her protected activity of reporting a crime and was absolutely privileged. We conclude, among other things, that: 1) the trial court did not err by denying the anti-SLAPP motion; 2) the litigation privilege (Civ. Code, § 47) does not bar a malicious prosecution action based on the filing of a false crime report to law enforcement; 3) John met his burden to present facts, which if believed by a trier of fact, demonstrated a reasonable probability of prevailing on his malicious prosecution claim; and 4) the family law exception to malicious prosecution does not apply in this case. We affirm.

¹ We shall refer to the parties by their first names, not from disrespect but to ease the reader's task.

FACTS

John and Lisa were married. In January 2009, John filed for dissolution of their marriage. John and Lisa continued to reside in the same house. Each of them had their "own private spaces" at that residence.

On May 25, 2010, Lisa made a 911 call and told police that John had physically assaulted her, scratched her arm, and she was bleeding. She claimed that John had grabbed her around her neck with both of his hands.

John told the police officer who arrived at the residence that they had a "verbal argument," but "there had been no physical altercation." John was arrested and taken into custody. He was charged with violating Penal Code section 273.5. The police took photographs of Lisa's injuries.

Robert Sandbach, John's criminal defense lawyer, retained a forensic pathologist to determine "whether the injuries depicted in" those photographs "were consistent with" the account Lisa gave to police about how she received those injuries. The pathologist prepared a report and concluded that the injuries to Lisa's arm "were self-inflicted." They were not caused by John's fingernails as alleged by Lisa. They were the result of Lisa using "a thin sharp object." The injuries to her neck were not consistent with someone grabbing her around that area. The blood spatter evidence also contradicted the story Lisa gave to police.

Sandbach sent a letter to the prosecutor asking for a dismissal of the criminal charges. He submitted investigation reports, which included the findings of the pathologist and interviews conducted by a private investigator. Sandbach claimed this evidence demonstrated John's innocence and proved that Lisa had made a false crime report to police.

In June 2010, Lisa contacted the prosecutor and asked that the district attorney's office "drop the charges" against John.

On December 9, 2010, the prosecutor moved the court to dismiss the case pursuant to Penal Code section 1385 in the "[i]nterest of justice." The court granted the motion.

John filed a malicious prosecution action against Lisa alleging that she "falsely accused [him] of violating Section 273.5 of [the] California Penal Code" Lisa filed an anti-SLAPP motion claiming that her statements to police were "privileged."

The trial court denied the motion. It found: 1) the litigation privilege (Civ. Code, § 47), which protects a party's statements concerning litigation, did not bar a cause of action for malicious prosecution; and 2) John's evidence met his burden to defeat an anti-SLAPP motion.

DISCUSSION

The Anti-SLAPP Motion

Lisa claims the trial court erred by denying her anti-SLAPP motion. We disagree.

"The Legislature enacted the anti-SLAPP statute to address the societal ills caused by meritless lawsuits that are filed to chill the exercise of First Amendment rights." (*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 702.) The anti-SLAPP statute authorizes a defendant to file a special motion to strike meritless causes of action that threaten these rights at the earliest stage of the trial court proceedings.

"The statute requires two steps for striking a cause of action." (*Lefebvre v. Lefebvre, supra*, 199 Cal.App.4th at p. 702.) In the first prong, "the court is tasked with determining whether the defendant has made a threshold showing that the challenged cause of action is one "arising from protected activity."" (*Ibid.*) If the defendant makes such a showing, the court proceeds to the second prong to "determine whether the plaintiff has demonstrated a "probability of prevailing" on his or her claim." (*Ibid.*) If the plaintiff makes such a showing, the anti-SLAPP motion must be denied.

"An appellate court reviews an order denying an anti-SLAPP motion under the de novo standard of review." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 444.)

A "cause of action for malicious prosecution is recognized as being susceptible to an anti-SLAPP motion." (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570.)

The First Anti-SLAPP Prong

Lisa claims she made a sufficient showing to meet the first prong of her anti-SLAPP motion. To prevail on this first step, a defendant must show that the plaintiff's cause of action "is actually *based on* conduct in the exercise of" protected activity. (*Lefebvre v. Lefebvre, supra*, 199 Cal.App.4th at p. 702.)

In John's cause of action for malicious prosecution, he alleged Lisa "caused a criminal complaint . . . to be filed with the Ventura County District Attorney," which "falsely accused [him] of violating Section 273.5 of [the] California Penal Code, a misdemeanor."

Lisa contends that her right to make a criminal complaint against John was absolutely privileged and could not be the subject of tort litigation under the litigation privilege provided in Civil Code section 47.

There is a privilege to make communications in judicial proceedings and "in any . . . official proceeding authorized by law." (Civ. Code, § 47, subd. (b).) This litigation privilege protects a defendant from being sued on a variety of tort causes of action for allegedly making false complaints to public authorities that result in litigation against a plaintiff. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 215.) But there is a major exception to this rule. The litigation privilege does not apply to bar "malicious prosecution actions." (*Id.* at p. 216.) There are strong policy reasons for this exception to the general rule of absolute privilege. "Malicious prosecution actions are permitted because '[t]he policy of encouraging free access to the courts . . . is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied.'" (*Ibid.*)

John claims his action was not directed at Lisa's free speech rights or other protected activity. He contends it was based solely on her conduct of making a false criminal complaint against him.

John is correct that the basis of his action was not that Lisa contacted the police, but rather that she made false allegations against him to law enforcement. "Filing a false criminal complaint is an illegal activity, not a constitutionally protected exercise

of the right of petition or free speech" (*Lefebvre v. Lefebvre, supra*, 199 Cal.App.4th at p. 706.) Consequently, a defendant who engages in that type of conduct cannot prevail on the first prong of the anti-SLAPP motion. (*Ibid.*) "To the extent [John] alleges criminal conduct, there is no protected activity as defined by the anti-SLAPP statute." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP, supra*, 193 Cal.App.4th at p. 445.) "Neither the federal nor the state *constitutional* right of petition or free speech encompasses a right to file a false criminal report." (*Lefebvre*, at p. 703.) "Moreover, by its very terms, section 425.16 does not apply to activity that is not in furtherance of the constitutional rights of free speech or petition and this would necessarily include illegal activity that falls outside protected speech and petition rights." (*Id.* at p. 705.)

Lisa contends that John's reliance on the *Lefebvre* case is misplaced because there the defendant admitted she made a false police report. She argues that the Court of Appeal could conclude such actions were not protected as a matter of law. She claims that here, by contrast, whether she made a false report is a disputed factual issue, and the trial court erred by not dismissing John's action at the first anti-SLAPP prong stage.

But "[a] showing that a defendant did not do an alleged activity is not a showing that the alleged activity is a protected activity." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP, supra*, 193 Cal.App.4th at p. 446.) "[Lisa's] argument that [her] evidence showed [she] did not do the acts [John] alleges [she] did is more suited to the second step of an anti-SLAPP motion." (*Ibid.*)

Moreover, even where a defendant makes a sufficient showing on the first prong, dismissal is not appropriate unless the plaintiff is unable to meet his or her burden on the second anti-SLAPP prong. (*Lefebvre v. Lefebvre, supra*, 199 Cal.App.4th at p. 702.)

The Second Anti-SLAPP Prong

John claims he presented sufficient evidence to show a reasonable probability of prevailing on the merits of his malicious prosecution action. We agree.

To meet the second anti-SLAPP prong, "a plaintiff must show that he or she has 'a reasonable probability of prevailing, not prevailing by a preponderance of the evidence. For this reason, a court must apply a "summary-judgment-like" test [citation], accepting as true the evidence favorable to the plaintiff and evaluating the defendant's evidence only to determine whether the defendant has defeated the plaintiff's evidence as a matter of law.'" (*Lefebvre v. Lefebvre, supra*, 199 Cal.App.4th at p. 702.) "'A court may not weigh credibility or compare the weight of the evidence. The court's single task is to determine whether the plaintiff has made a prima facie showing of facts supporting his or her cause of action.'" (*Ibid.*)

Malicious Prosecution Elements

To prevail on a cause of action for malicious prosecution, John had to prove that Lisa initiated criminal proceedings against him and proof of: "(1) termination of the criminal proceedings in [his] favor, (2) want of probable cause, and (3) malice on the part of defendant[]." (*Centers v. Dollar Markets* (1950) 99 Cal.App.2d 534, 540.)

The decision to prosecute John, according to Lisa, was exclusively made by the district attorney. But a person may be liable for malicious prosecution ""if he [or she] was instrumental in setting the law in motion and caused the prosecution to proceed."" (*Centers v. Dollar Markets, supra*, 99 Cal.App.2d at p. 544.) Evidence supporting such a showing may include the defendant's act of calling the police and presenting false, incriminating allegations. (*Sandoval v. Southern California Enterprises, Inc.* (1950) 98 Cal.App.2d 240, 248.) John's evidence showed that Lisa called the police and her false allegations of physical violence constituted the basis for the criminal charge against him.

Showing on Lack of Probable Cause and Malice

Lisa claims John did not make a sufficient showing that she lacked probable cause or acted with malice in reporting him to law enforcement. But "[o]ne who knowingly presses a baseless criminal charge acts without probable cause and is guilty of malice as a matter of law." (*Rupp v. Summerfield* (1958) 161 Cal.App.2d 657, 666; see also *Jackson v. Beckham* (1963) 217 Cal.App.2d 264, 272; *White v. Brinkman*

(1937) 23 Cal.App.2d 307, 312.) For a malicious prosecution cause of action, malice does not require a showing "of anger or vindictiveness." (*Jackson*, at p. 272.) It "may be inferred from all the circumstances in the case" or from "want of probable cause." (*Id.* at p. 273.)

In his declaration in opposition to the motion, John said Lisa's statements to the police in her 911 call were false, "contrived and fabricated." He said he did not assault, strike or "physically harm" Lisa. He had only a "verbal argument" with her. John said that "[d]uring the course" of that exchange, Lisa was "angry" and "hostile." He tried to avoid "any further confrontation." He went into the bedroom, and then he heard Lisa "screaming and shouting words to the effect that [he] was hurting her" While he was in the bedroom, Lisa made a 911 call. John said Lisa made the false police report for the motive "to advance her interests" in pending "divorce proceedings."

John claimed there was independent evidence showing Lisa knowingly made a false crime report. He produced the declaration of Harry Bonnell, M.D., a forensic pathologist. Bonnell said Lisa's claim that John scratched her on her forearms with his fingernails was false. The scratches were "straight, narrow injuries." He said the "narrowness of those injuries indicates that they were inflicted by a thin sharp object." He concluded that those wounds were "self inflicted" by Lisa. Lisa's claim that John had grabbed her around the neck was not consistent with the "sparing of skin folds on the left side and the complete sparing on the front of the neck" Other physical evidence contradicted the claims Lisa made to the police. Bonnell said the blood spatter at the scene was not consistent "with a wound being inflicted by someone having their arms grabbed or scratched."

William Reinhart, a private investigator, interviewed John and Lisa's son. He told Reinhardt "he has '*never*' seen or heard of his father or mother become physical with one another." Lilian Brownstein, a housekeeper at the Hofer household, told Reinhardt that Lisa showed her scratch marks on her arm and said John inflicted them with his fingernails. Brownstein "questioned" that claim because John "keeps his fingernails trimmed very short," and Brownstein "had never seen or heard of [John] being

physical in any manner towards [Lisa], or anyone else." Lisa responded, "You . . . would be better off not to say anything!" (Italics omitted.)

John presented documents to support his claim that Lisa had made a prior false allegation against him to police in 2009. In that incident, Lisa claimed John pushed her into a wall. But a police investigation report concluded that there was no violence.

John's evidence supported reasonable inferences that: 1) Lisa was angry at John, 2) she used self-inflicted injuries to support a knowingly false crime report to law enforcement, 3) her motive was to advance her interest in a civil case, and 4) she had made a prior false crime report against him. If believed by a trier of fact, this would support findings of lack of probable cause and malice. (*Jackson v. Beckham, supra*, 217 Cal.App.2d at pp. 272-273.) The existence of conflicting evidence does not change the result at this stage of the case. (*Lefebvre v. Lefebvre, supra*, 199 Cal.App.4th at p. 702.)

Favorable Termination

Lisa argues that John did not meet his burden to show there was a favorable termination of the criminal charge against him. She notes that a court never ruled on the merits of the criminal case. She claims the district attorney's decision to dismiss the case cannot support a claim of favorable termination.

But "[i]t is not essential to maintenance of an action for malicious prosecution that the prior proceeding was favorably terminated following trial on the merits." (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.) Examples of favorable pretrial terminations of criminal actions include cases where the dismissal "reflects the opinion of the prosecuting party that, if pursued, the action would result in a decision in favor of the defendant, as *where the district attorney seeks dismissal of the prosecution of a criminal action for lack of evidence . . .*" (*Ibid.*, italics added.)

Lisa notes that the district attorney moved to dismiss the criminal case "pursuant to" Penal Code section 1385 in the "[i]nterest of justice" on December 9,

2010.² She claims such dismissals are not always because of lack of sufficient evidence, and consequently they do not necessarily qualify as favorable terminations. As a general proposition, that is correct.

But here John presented evidence showing the dismissal was because of lack of evidence. In his declaration, Sandbach said the criminal case was dismissed because of the information he submitted to the prosecutor showing the "lack of merit of the criminal case." In his letter to the deputy district attorney, Sandbach sought a dismissal based on his claim that the information in the investigation reports and the forensic pathologist's findings proved that "John Hofer is factually innocent." He said the prosecutor's dismissal "in the interest of justice *was based* upon the information [he] provided to the District Attorney's office" (Italics added.) If believed by a trier of fact, Sandbach's testimony at trial, consistent with his declaration, could support a finding of favorable termination.

In addition, Lisa requested the prosecutor to "drop the charges" against John in June 2010. "Where a criminal proceeding has been terminated . . . by a dismissal . . . based on some act chargeable to the complainant, as his . . . withdrawal or abandonment of his prosecution, --a foundation in this respect has been laid for an action of malicious prosecution." (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 151-152.)

The Family Law Exception

Lisa claims "malicious prosecution cannot, as a matter of law, be pursued in relation to family law proceedings." (Boldface omitted.) She argues that this case falls within this rule.

John disagrees and claims the family law exception shields parties in family law actions from malicious prosecution actions for the motions they file in the family law

² John moved to augment the record and requested us to include a tape and transcript of that December 9th hearing (motion to augment, exhibits C & D). We deny this request because these documents were not presented to the trial court in the anti-SLAPP proceeding. But we grant the remaining portion of that motion with respect to exhibits A and B.

court. He claims it does not shield a party who files a false police report which initiates a criminal prosecution. We agree.

Lisa cites *Bidna v. Rosen* (1993) 19 Cal.App.4th 27 and *Siam v. Kizilbash*, *supra*, 130 Cal.App.4th 1563. In *Bidna*, the Court of Appeal held "no malicious prosecution action may arise out of unsuccessful family law motions or OSC's." (*Id.* at p. 37.)

In *Siam*, the Court of Appeal held that "a cause of action for malicious prosecution may not be based upon an unsuccessful civil harassment petition." (*Siam v. Kizilbash*, *supra*, 130 Cal.App.4th at p. 1567.) It noted that such a petition (Code Civ. Proc., § 527.6) is a special proceeding commonly used in family law cases for "quick relief" to harassment victims. (*Siam*, at p. 1573.) "Like a small claims action, a section 527.6 petition is designed to be processed simply and expeditiously." (*Ibid.*) The court concluded, "Permitting a malicious prosecution claim to follow an unsuccessful section 527.6 petition would frustrate this streamlined procedure." (*Ibid.*) It noted that, "[a]s a result of this expedited process a defendant is not usually likely to incur substantial legal fees. There is *no risk of incarceration . . .*" (*Ibid.*, italics added.)

But *Bidna* and *Siam* are distinguishable because John did not file a malicious prosecution action in response to a family law OSC or a Code of Civil Procedure section 527.6 petition. He filed it because Lisa's *crime report* to law enforcement *initiated a criminal prosecution*. As John notes, he did "not allege that any family law motion, OSC, or other proceeding in the family law court was instituted by [Lisa] maliciously." In his complaint, he alleged that because of her false allegations to law enforcement, he was "detained in custody," "charged" and "arraigned."

The policy of precluding a malicious prosecution cause of action for family law actions extends to a party's filings within the family law court and a "defendant's conduct within the dissolution action." (*Begier v. Strom* (1996) 46 Cal.App.4th 877, 885.) It does not shield those who make false police reports against their spouses. (*Lefebvre v. Lefebvre*, *supra*, 199 Cal.App.4th at pp. 703-704.) Nor does it interfere with

the longstanding right of criminal defendants who have been falsely accused to pursue malicious prosecution actions.

We have reviewed Lisa's remaining contentions and conclude she has not shown error.

The order is affirmed. Costs on appeal are awarded in favor of respondent John Hofer.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Mark Borrell, Judge
Superior Court County of Ventura

Goldenring & Prosser, Peter A. Goldenring, Edwin S. Clark for Defendant
and Appellant.

Granowitz, White and Weber, Richard A. Granowitz, Steven R. Weber for
Plaintiff and Respondent.