

~~TENTATIVE RULING~~

Dept. F-49
Calendar # 1
Date: 2/25/16
Case #BC578939

**SPECIAL MOTION TO STRIKE
(Anti-SLAPP - CCP 425.16)**

MOVING PARTY: D Deborah Klar
RESPONDING PARTY: P David Sear

RELIEF REQUESTED: An order, pursuant to CCP 425.16: (1) to strike the complaint for malicious prosecution filed by RP; and (2) for an award of attorneys' fees and costs against RP.

RULING: The motion is denied.

MP's Request for Judicial Notice is granted.

In ruling on a special motion to strike, the court must first determine whether the subject claim(s) arise from protected activity. CCP 425.16(b)(1). If the D meets his/her burden of establishing that the cause(s) of action arises from protected activity, the burden shifts to P to establish that he/she has a probability of prevailing on the cause(s) of action. Id.

RP does not dispute that a malicious prosecution action implicates protected activity and, therefore, the burden has shifted to him to establish a prima facie case. (See Opp. p.4:13-18 citing Kleveland (2013) 215 CA4th 534, 546. In ruling on a special motion to strike, the court must accept as true the evidence favorable to the P. HMS Capital, Inc. (2004) 118 CA4th 204, 212. Further, RP need only establish that his claim has "minimal merit" to avoid being stricken as a strategic lawsuit against public participation (SLAPP). Soukup (2006) 39 C4th 260, 291; Kleveland, supra at 548.

To prevail on a malicious prosecution cause of action, the P must establish: (1) the lawsuit, commenced at D's direction, resulted in a judgment in favor of P, (2) D did not have probable cause to commence the lawsuit, and (3) the lawsuit was initiated with malice. See Citi-Wide Preferred Couriers, Inc. (2003) 114 CA4th 906, 911.

Here, there is no dispute that the first element is satisfied based on the Judgment entered in favor of RP in the underlying Terner action. Even if MP had probable cause to initiate the underlying action against RP, there is sufficient evidence to support a finding that probable cause ceased once RP presented MP with evidence to support the conclusion that he was not a proper D in the underlying case. See Kleveland, supra at 551; (Birdt Declaration and exhibits attached thereto). A lack of probable cause may be sufficient to support a finding that the underlying Terner action was initiated with malice. See Soukup (2006) 39 C4th 260, 292.

Based on the foregoing, RP has met his burden of establishing that his claim for malicious prosecution has “minimal merit.”

MP’s claim that RP is not the real party in interest in this action is not sufficiently supported by the fact that a motion for attorney’s fees in the underlying action was denied.

MP’s 20 evidentiary objections to the declaration of Jonathan Birdt are overruled.