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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CONSTANTINO NOVAL,

Plaintiff and Appellant,

v.

LOUISA MORITZ,

Defendant and Respondent.

B217223

(Los Angeles County
Super. Ct. No. SC092340)

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Affirmed.

The Altman Law Group, Bryan C. Altman and Jason L. Weisberg for Plaintiff and Appellant.

Law Offices of Jon H. Freis, John H. Freis; Law Offices of Richard D. Farkas, Richard D. Farkas; and Louisa Moritz, in pro. per., for Defendant and Respondent.

Constantino Noval appeals from the dismissal of his action for malicious prosecution and slander of title against the attorney who represented members of his family in litigation against him concerning ownership of real property. The dismissal occurred after respondent's demurrer was sustained for failure to state a cause of action. He contends the trial court erred in finding that dismissal of the underlying action for lack of standing was not a favorable termination, as required for the malicious prosecution cause of action. He also argues that the litigation privilege of Civil Code section 47 does not provide a defense to the slander of title cause of action because it is based on an illegal act—recording a lis pendens in furtherance of attempted extortion.

We conclude that the dismissal of the underlying action based on lack of standing does not constitute a favorable termination that can support Constantino's cause of action for malicious prosecution. We also conclude that the litigation privilege barred his cause of action for slander of title. We find no basis for reversal and affirm.

FACTUAL AND PROCEDURAL SUMMARY

This case arises in the context of a convoluted family dispute over property rights. We take our factual summary from the allegations of the first amended complaint, the charging pleading. “When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) . . . [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] . . . The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

The first amended complaint alleges that appellant Constantino Noval owned a condominium in Marina del Rey. The condominium had been occupied by Constantino's nephew, Victor Noval.¹ In April 2006, Constantino brought a forcible detainer action against Victor to evict him ("the detainer action," Super. Ct. L.A. County No. SC089359). Victor was represented in the detainer action by respondent Louisa Moritz. The trial court granted judgment to Constantino in June 2006, and a writ of possession was issued in July 2006.

In April 2006, two days after Constantino filed the detainer action, Moritz filed a verified civil action in Los Angeles Superior Court (No. SC089394) on behalf of "Brother's Irrevocable Trust, a Trust dated May 27, 2003, a California Trust by TANIA NOVAL, and TANIA NOVAL, as Trustee of the Brothers Irrevocable Trust, and as Assignee and Guardian *Ad Litem* of the Beneficiaries of the Brother's Irrevocable Trust" against Constantino and Nino Noval, Tania's aunt. We are informed that Tania Noval is Victor's sister and Constantino's niece. The complaint alleged causes of action for fraud, breach of fiduciary duty, breach of contract, tortious breach of covenant of good faith and fair dealing, negligent misrepresentation, unjust enrichment, conversion, civil conspiracy to defraud, accounting and for injunctive relief. We refer to this as the fraud action. In the verification, Tania identifies herself as trustee and a beneficiary of the Trust.

Constantino alleges that when the fraud action was filed, Moritz possessed actual knowledge that Tania was not the trustee of the Brother's Trust and was not the guardian ad litem of purported minor beneficiaries of the trust. Moritz is alleged to have knowingly misrepresented Tania's status to the court. Moritz filed a notice of lis pendens regarding the condominium and six other parcels of real property. Concurrently she filed a petition for confirmation of rescission of appointment of successor trustee in probate (Super. Ct. L.A. County No. SP-006830) alleging that Tania was *not* the trustee of the Brother's Irrevocable Trust.

¹ We refer to members of the Noval family by their first names to avoid confusion.

Constantino's demurrer to the fraud action was sustained on August 18, 2006. He alleges the demurrer was "grounded solely upon Tania Noval's lack of legal capacity to sue because Tania Noval was, in fact, not the Trustee of the Trust nor Guardian *Ad Litem* for the beneficiaries of the Trust." His motion to expunge the *lis pendens* also was granted. The trial court took judicial notice of Tania's petition for removal of the trustee in the concurrent probate action, which asserted that Yana Henriks, rather than Tania, was the trustee of the Brother's trust, and sought Henriks' removal as trustee. Tania was found to lack standing to act on behalf of the trust. This was based on her admission that she was not the trustee of the Brothers trust and her failure to demonstrate either that Henriks was removed by the probate court or that she was reinstated as trustee. The trial court noted that the trust instrument prohibits Tania's reinstatement. Constantino's demurrer to the fraud action was sustained with 20 days leave to amend. The court stated that the action could proceed if Tania became trustee, or if Henriks substituted into the action as plaintiff. The parties state that Tania dismissed the fraud action rather than file an amended complaint, but neither provides a citation to the record on appeal.

Constantino filed this action for malicious prosecution, abuse of process, and slander of title against Moritz in January 2007. The first amended complaint deleted the cause of action for abuse of process. Moritz demurred on the grounds that Constantino could not establish the necessary element of a favorable termination of the previous action, an element of his cause of action for malicious prosecution, and that the cause of action for slander of title is barred by the litigation privilege. (Civ. Code, § 47.)

Constantino opposed the demurrer.

Moritz's demurrer was sustained without leave to amend. The court ruled that dismissal of an action for lack of standing, a jurisdictional defect, does not constitute a favorable termination for purposes of a malicious prosecution action, citing *Hudis v Crawford* (2005) 125 Cal.App.4th 1586 (*Hudis*). The cause of action for slander of title was barred by the litigation privilege because recording a *lis pendens* is treated as a publication in a judicial proceeding even if the defendant acted with actual malice.

Constantino's first amended complaint was dismissed, judgment of dismissal was entered, and this timely appeal followed.

DISCUSSION

I

Constantino argues that Tania's dismissal of the underlying fraud action was a termination in his favor, as required for the malicious prosecution cause of action.²

“The first element of a malicious prosecution cause of action is that the underlying case must have been terminated in favor of the malicious prosecution plaintiff. The basis of the favorable termination element is that the resolution of the underlying case must have tended to indicate the malicious prosecution plaintiff's innocence. [Citations.] When prior proceedings are terminated by means other than a trial, the termination must reflect on the merits of the case and the malicious prosecution plaintiff's innocence of the misconduct alleged in the underlying lawsuit.’ (*HMS Capital[, Inc. v. Lawyers Title Co.* (2004)] 118 Cal.App.4th [204,] 214.) If the evidence of the circumstances of the termination is conflicted, “the determination of the reasons underlying the dismissal is a question of fact.” (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399.)” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 217.)

The Supreme Court has drawn a distinction between a technical or procedural termination, as opposed to a substantive termination on the merits that reflects on the innocence or lack of responsibility of the defendant. (*Casa Herrera, supra*, 32 Cal.4th at p. 342.) It explained that a technical or procedural termination is not a favorable outcome for purposes of a malicious prosecution claim. Examples include dismissals on statute of limitations grounds, pursuant to settlement, or on the ground of laches. (*Ibid.*)

² The elements of a cause of action for malicious prosecution are (1) “that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in . . . plaintiff's favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].” [Citation.]” (*Casa Herrera, Inc. v. Beydown* (2004) 32 Cal.4th 336, 341 (*Casa Herrera*).)

In *Casa Herrera*, the court concluded that a dismissal based on application of the parol evidence rule, a substantive rule of contract law, is a termination on the merits for the purposes of the malicious prosecution rule. (32 Cal.4th at pp. 344-348.) The court distinguished *Robbins v. Blecher* (1997) 52 Cal.App.4th 886 (*Robbins*). “In *Robbins*, the defendants in the malicious prosecution action had filed an alter ego action against the plaintiffs in the malicious prosecution action after obtaining an antitrust judgment against a corporation owned by the plaintiffs.” (*Casa Herrera, supra*, 32 Cal.4th at p. 347.) When the antitrust judgment in *Robbins* was reversed on appeal, the defendants voluntarily dismissed the alter ego action as moot. In the resulting malicious prosecution action, the plaintiff contended that dismissal of the alter ego action constituted a favorable termination because the defendants could no longer establish a necessary element in light of the antitrust action reversal. (*Robbins, supra*, 52 Cal.App.4th at p. 894.) The *Robbins* court held that there was no favorable termination because the dismissal was on technical grounds rather than on the merits.

In *Casa Herrera*, the Supreme Court described the dismissal in *Robbins* as necessitated by a loss of standing: “[T]he defendants voluntarily dismissed the action because they ‘had simply *lost standing* to pursue’ the alter ego action. [Citation.] Thus, in dismissing the action, the defendants had not conceded that the plaintiffs ‘had done nothing wrong; they had merely conceded that’ they ‘[were] no longer in a position to complain of [plaintiffs’] wrongdoing.’ [Citation.] *Unlike the dismissal in Robbins, the Court of Appeal in the underlying action in this case did not rely on a technical or procedural defense like lack of standing.* Instead, the court applied a substantive rule of contract law and resolved the action on its merits.” (*Casa Herrera, supra*, 32 Cal.4th at p. 348, second italics added.)

In our case, the trial court relied on *Hudis, supra*, 125 Cal.App.4th 1586, which involved a technical termination of the underlying action on standing grounds. *Hudis* was an action for malicious prosecution brought by the conservator and attorney of a decedent against her nieces and nephews and their attorney arising out of an underlying elder abuse action. That action was dismissed by the trial court on the ground that the

nieces and nephew lacked standing because they were not successors in interest as required by the elder abuse law.

Citing the *Casa Herrera* court's discussion of *Robbins, supra*, 52 Cal.App.4th 886, the *Hudis* court held that dismissal for lack of standing is not a favorable termination on the merits for purposes of a malicious prosecution action. (125 Cal.App.4th at pp. 1591-1592.) The court emphasized that the defect in the underlying elder abuse action was in the plaintiffs' standing, a jurisdictional ground. A dismissal for lack of jurisdiction does not constitute a favorable termination for purposes of a malicious prosecution action. (*Hudis, supra*, at p. 1592.) The merits of the allegations of elder abuse were never considered and were not related to the reasons for dismissal of the action. (*Ibid.*)

Constantino attempts to distinguish *Hudis, supra*, 125 Cal.App.4th 1586, on the ground that in his case, the fraud action and lis pendens were part of an extortion scheme by Moritz. We do not agree. Constantino contends that the purposes of maintaining the extortionate fraud action were achieved when Victor was evicted from the condominium, and thus that action was dismissed as unnecessary. But the trial court sustained Constantino's demurrer because Tania lacked standing to bring it on behalf of the trust or the beneficiaries since she was neither the trustee nor guardian ad litem. The merits of the multiple causes of action in that action were not considered. This was a technical termination not addressing the merits, as was *Hudis, supra*, 125 Cal.App.4th at page 1592.

Constantino cites a number of cases for the basic proposition that a plaintiff's voluntary dismissal of a civil action may constitute a favorable termination for purposes of bringing a malicious prosecution action. But on examination, these cases do not require reversal of the ruling on the demurrer. In *Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, a malicious prosecution complaint alleged the underlying case was dismissed because it was premature. The Court of Appeal held that the complaint could be interpreted "in only one way" in light of this allegation and therefore "no assumptions need be made in order to evaluate the reasons for the voluntary dismissal." (*Id.* at

p. 1856.) It concluded that the underlying action was dismissed solely because of a technical defect which prevented the plaintiff from going forward. Since the termination did not reflect on the merits of the action, the favorable termination element of the malicious prosecution cause of action could not be established. (*Ibid.*)

Fuentes v. Berry (1995) 38 Cal.App.4th 1800, cited by Constantino, also is distinguishable. That case involved a malicious prosecution lawsuit in which the underlying action was dismissed following a settlement. The court acknowledged the general rule that a dismissal resulting from a settlement does not constitute a favorable termination, but that a unilateral voluntary dismissal is generally considered a favorable termination. (*Id.* at p. 1808.) It reversed summary judgment on the issue of favorable termination in light of conflicting evidence as to whether dismissal of the malicious prosecution plaintiffs from the underlying case was a condition of settling that action. There was no technical defect which prevented the underlying case from going forward.

Finally, Constantino relies on *MacDonald v. Joslyn* (1969) 275 Cal.App.2d 282. In that case, the court observed that a voluntary dismissal of a civil action ordinarily is not a dismissal on technical grounds and therefore may constitute a favorable termination which will support an action for malicious prosecution. (*Id.* at p. 289.) No standing or other technical defect was presented in that case.

Here, the trial court ruled that Tania lacked standing to pursue the fraud action against Constantino on behalf of the trust and its beneficiaries. It stated that the action could be pursued only if Tania established that she had been reinstated as trustee or if the actual trustee substituted in as plaintiff. In the face of this ruling, Moritz dismissed the action. This constituted a technical dismissal of the action, which does not constitute a favorable termination which would support Constantino's malicious prosecution action. The demurrer was properly sustained without leave to amend as to this cause of action.

II

Constantino's second cause of action against Moritz was for slander of title, based on the allegedly bad faith filing of the *lis pendens* in the underlying fraud action. He alleged that Moritz knowingly claimed the trust had an interest in the condominium and

other properties owned by Constantino, although there was no property in the trust res, and that Moritz knew Tania was neither the trustee of the trust nor guardian ad litem for the beneficiaries.³ Constantino argues the trial court erred in sustaining Moritz's demurrer on the ground that the filing of the lis pendens in the underlying fraud action was absolutely privileged under Civil Code section 47.

““A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice.” [Citation.]’ [Citation.]” (*Park 100 Investment Group II, LLC v. Ryan* (2009) 180 Cal.App.4th 795, 807.) Civil Code section 47, subdivision (b) provides an absolute privilege for a publication filed in a judicial proceeding. The Legislature has limited the circumstances in which a recorded lis pendens is privileged under this statute: “A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.” (Civ. Code, § 47, subd. (b)(4).) “[I]f the pleading filed by the claimant in the underlying action does not allege a real property claim, or the alleged claim lacks evidentiary merit, the lis pendens, in addition to being subject to expungement, is not privileged. (See Cal. Lis Pendens Practice [(Cont.Ed.Bar 2d ed. 2001)] § 2.8, pp. 36-37; 5 Miller & Starr, Cal. Real Estate[, *supra*,] § 11:45, pp. 115-119; Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2002) ¶ 11:608, p. 11-99.)’ (*Palmer v. Zaklama* [(2003) 109 Cal.App.4th 1367,] 1380.)” (*Park 100 Investment Group II, LLC v. Ryan, supra*, 180 Cal.App.4th at p. 813.) It follows that a lis pendens which is not privileged may be the basis for an action for slander of title. (*Palmer v. Zaklama, supra*, 109 Cal.App.4th at p. 1380.)

³ The elements of a cause of action for slander of title are “(1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.” (*Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1051.)

“[T]he litigation privilege is absolute and applies regardless of malice. [Citation.] Moreover, ‘[i]n furtherance of the public policy purposes it is designed to serve, the privilege prescribed by section 47(2) has been given broad application.’ (*Id.* at p. 211.)” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063.) In *Park 100 Investment Group II, LLC v. Ryan, supra*, 180 Cal.App.4th 813, a lis pendens alleged a real property claim and was found privileged. The court held that it could not be the basis for a slander of title cause of action even if filed with malice. (*Ibid.*)

Based on his claim that Moritz filed the lis pendens in an effort to extort him, Constantino argues Moritz cannot invoke the litigation privilege, citing *Flatley v. Mauro* (2006) 39 Cal.4th 299. In that case, the issue was whether a prelitigation communication, which amounted to criminal extortion as a matter of law, was privileged for purposes of the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) The Supreme Court distinguished the purposes of the anti-SLAPP statute and Civil Code section 47: “The litigation privilege embodied in Civil Code section 47, subdivision (b) serves broad goals of guaranteeing access to the judicial process, promoting the zealous representation by counsel of their clients, and reinforcing the traditional function of the trial as the engine for the determination of truth.” (*Id.* at p. 324.)

In light of these goals, the *Flatley* court recognized that illegal conduct may be shielded by the privilege: “Applying the litigation privilege to some forms of unlawful litigation-related activity may advance those broad goals notwithstanding the ‘occasional unfair result’ in an individual case. (*Silberg v. Anderson* [(1990)] 50 Cal.3d [205,] 214; *Doctors’ Co. Ins. Services v. Superior Court* [(1990)] 225 Cal.App.3d [1284,] 1300 [the litigation privilege applies to subornation of perjury because ‘it is in the nature of a statutory privilege that it must deny a civil recovery for immediate wrongs—sometimes even serious and troubling ones—in order to accomplish what the Legislature perceives as a greater good’].)” (39 Cal.4th at p. 324.) In contrast, Code of Civil Procedure section 425.16 was found not to protect activity that, because it is illegal, is not in furtherance of constitutionally protected speech or petition rights. (*Ibid.*)

The gravamen of Constantino’s slander of title cause of action is that Moritz filed the lis pendens for malicious purposes. But “[t]he litigation privilege . . . provides that a ‘publication or broadcast’ made as part of a ‘judicial proceeding’ is privileged. *This privilege is absolute in nature, applying ‘to all publications, irrespective of their maliciousness.’*” (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241, italics added.)

Moritz satisfied the requirements of Civil Code section 47, subdivision (b)(4) for application of the absolute privilege. In order to constitute a privileged publication, the lis pendens must identify an action previously filed with a court “which affects the title or right of possession of real property” (Civ. Code, § 47, subd. (b)(4).) The lis pendens identified the fraud action filed by Moritz. This action alleged that Constantino held the condominium and the other parcels listed in the lis pendens in constructive trust because they were to be purchased to establish the res of a trust which would benefit the children of Victor and Tania. Allegedly, Constantino took money designated for that purpose, did not establish the trust, and then purchased the seven properties for himself using the money that was to purchase property for the trust. The fraud action sought injunctive relief to restrain Constantino from filing evictions, deeds of trust, or conveyances of the properties.

Moritz demonstrated that the slander of title action is barred by the litigation privilege under Civil Code section 47, subdivision (b)(4). The demurrer was properly sustained on that ground.

DISPOSITION

The order of dismissal is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.