

PROFESSIONAL LIABILITY UPDATE

ANTI-SLAPP
ABUSE OF PROCESS
MALICIOUS PROSECUTION

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***JSJ Ltd. Partnership v. Mehrban* 2012 WL 1739865**

The Second District holds that an abuse of process and malicious prosecution complaint premised on the filing of a second disability rights lawsuit is constitutionally protected activity under the anti-SLAPP statute. An abuse of process claim is barred by the litigation privilege. A voluntary dismissal after a demurrer is sustained with leave to amend on the basis of res judicata is not a favorable termination on the merits for purposes of malicious prosecution.

Morse Mehrban filed two disability rights lawsuits against JSJ Limited Partnership alleging that a restaurant property was inaccessible. The first lawsuit was resolved in JSJ's favor after a court trial. JSJ's demur to the second lawsuit on the basis of *res judicata* was granted with leave to amend. Mehrban's client dismissed the second lawsuit without prejudice.

JSJ sued Mehrban and his client for abuse of process, alleging the facts in the two lawsuits contradicted each other and the voluntary dismissal was based on the court's ruling on demurrer. JSJ also pled malicious prosecution asserting the second lawsuit had no merit and was filed without probable cause.

Mehrban filed a special motion to strike under California's Anti-Strategic Lawsuit Against Public Participation statute (anti-SLAPP), C.C.P. § 425.16. He argued his acts were constitutionally protected activity;

the abuse of process claim was barred by the litigation privilege; and that the voluntary dismissal was not a favorable termination on the merits for purposes of malicious prosecution. The trial court denied the motion without stating its rationale.

The Court of Appeal noted that the anti-SLAPP statute requires a two-step analysis. First, the court determines whether the defendant has met a burden to show that the challenged cause of action is one arising from constitutionally protected activity. If so, the plaintiff must demonstrate a probability of prevailing on the claim by showing the complaint is legally sufficient and buttressed by a *prima facie* showing of admissible facts sufficient to support a favorable judgment. The court does not weigh the evidence, but determines whether the evidence is sufficient to support a judgment as a matter of law, as on a motion for summary judgment.

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Mehrban established his conduct was constitutionally protected. Filing a lawsuit is an act in furtherance of the constitutional right of petition, regardless of subjective intent of the attorney filing the lawsuit or whether it has merit.

Abuse of process requires proof that a defendant contemplated an ulterior motive in using the process, and committed a willful act in the use of the process not proper in the regular conduct of the proceedings.

The litigation privilege under Civil Code § 47 is an absolute privilege barring all tort causes of action except a claim of malicious prosecution. JSJ could not establish a probability of prevailing on the abuse of process claim because the litigation privilege was a substantive defense. The court rejected JSJ's argument that the litigation privilege did not apply because Mehrban's actions were non-communicative conduct not covered by the privilege. Filing a lawsuit is a privileged, communicative act.

Mehrban's allegedly improper motive of "extorting" a settlement did not eviscerate the privilege. Filing or maintaining a lawsuit for an improper purpose is not a proper basis for an abuse of process action.

Malicious prosecution requires the plaintiff to demonstrate that the prior action was commenced by or at the direction of the defendant; was pursued to a legal termination in the plaintiff's favor; was brought without probable cause; and was initiated with malice.

The favorable termination element demonstrates the plaintiff's innocence. When a termination is by means other than

trial, it must nonetheless reflect on the merits of the case and thus the plaintiff's innocence. The court must examine a voluntary dismissal to determine whether it reflects on the merits.

The question was whether the trial court's *res judicata* determination was substantive, bearing on the merits of the claim, or procedural, not reflecting the merits. The court held that for purposes of the malicious prosecution favorable termination requirement, *res judicata*, like the statute of limitations, is a "technical" defense not on the merits. *Res judicata* does not determine the actual innocence of the Plaintiff; it derives from a need for finality.

Favorable termination is not to be confused with a separate malicious prosecution element, lack of probable cause. An action may lack probable cause because it is subject to an absolute procedural defense. Nonetheless a malicious prosecution plaintiff must still show a favorable termination on the merits. For example, a party forced to defend an action barred by the statute of limitations can only maintain a malicious prosecution claim if he waives the procedural defense and obtains a favorable judgment on the merits.

Comment: The anti-SLAPP statute is a powerful tool for early termination of third party claims against attorneys. This case also illustrates the considerable hurdles to successful abuse of process and malicious prosecution claims.