Century Crowell Cmtys., L.P. v. Greenblatt

Court of Appeal of California, Fourth Appellate District, Division Two

September 28, 2011, Filed

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Reporter
2011 Cal. App. Unpub. LEXIS 7307 *; 2011 WL 4479213

CENTURY CROWELL COMMUNITIES, L.P., Plaintiff and Respondent, v. FREDRIC J. GREENBLATT, Defendant and Appellant.

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Prior History: [*1] APPEAL from the Superior Court of Riverside County. Super.Ct.No. RIC523226. Sharon J. Waters, Judge.

Disposition: Affirmed.

Core Terms

malice, anti-SLAPP, probable cause, underlying action, damages, lawsuit, discovery, extortion, malicious prosecution action, trial court, merits, termination, settlement, prosecute, summary judgment motion, malicious prosecution, summary judgment, cause of action, Communities, proceedings, commencing, initiated, contends, perjury, pleaded, underlying lawsuit, declarations, prevailing, attorneys, infer

Counsel: Gregory L. Young and Robert A. Sternberg; Greenblatt & Associates, Fredric J. Greenblatt and Lisa Loveridge, for Defendant and Appellant.

Best Best & Krieger, Victor L. Wolf and Jerry R. Dagrella for Plaintiff and Respondent.

Judges: HOLLENHORST, Acting P. J.; RICHLI, J., KING, J. concurred.

Opinion by: HOLLENHORST

Opinion

I. INTRODUCTION

Defendant and appellant Fredric J. Greenblatt appeals from the trial court's denial of his special motion to strike under California's anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc.,[1] § 425.16). Greenblatt contends (1) he met his burden of establishing that the malicious prosecution action brought by plaintiff and respondent Century Crowell Communities, L.P. (Century) arose from his furtherance of rights of petition or free speech, and (2) Century failed to meet its burden of establishing a probability of prevailing on the merits of its claim, because (a) Century cannot establish a favorable termination of the underlying lawsuit; (b) Century cannot establish a lack of probable cause for commencing the underlying lawsuit; (c) Century has [*2] not pled malice and cannot demonstrate a probability of prevailing on the issue of malice in commencing the underlying lawsuit; and (d) the allegations of Century's complaint, even if true, do not support a malicious prosecution lawsuit. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

A. The Underlying Action

In August 2005, Greenblatt, as attorney for the other defendants in Century's malicious prosecution action,[2] filed a complaint in the underlying action, *Ramirez v. Century Crowell Communities, et al.,* Riverside Superior Court case No. INC052721 (hereinafter, the *Ramirez*

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] The other defendants were not parties to the anti-SLAPP motion and are not parties to this appeal.

action)[3] against Century and 28 of its agents, employees, and affiliate entities alleging causes of action for restraint of trade, unfair competition, racketeering, breach of fiduciary duty, and negligence.

In March 2006, Century filed a motion for summary judgment or summary adjudication on the first amended complaint as to certain of the plaintiffs in the *Ramirez* action on the ground, among others, that the plaintiffs had not met their burden of establishing damages, which they were required to do because of factually devoid discovery responses on the issue of damages. In June 2006, Greenblatt filed a motion for summary judgment or summary judgment on the second amended complaint as to certain plaintiffs in the *Ramirez* action. The trial court denied the motions.[4]

In August 2006, Greenblatt filed a fourth amended complaint in the *Ramirez* action. Century filed a motion for summary judgment on that complaint. The trial court granted the motion on the ground that the *Ramirez* plaintiffs had failed to meet their burden of offering evidence of damages.

B. The Current Action

On March 19, 2009, Century filed a complaint alleging malicious prosecution against Greenblatt and the plaintiffs in the *Ramirez* action. Century alleged [*4] that in August 2005, Greenblatt had filed the *Ramirez* action as the plaintiffs' attorney in that action. Century alleged it had incurred fees and costs on behalf of itself and its employees and agents in defending that action. Century alleged that Greenblatt and the other defendants had no basis or evidence to support their claims in the *Ramirez* action, but instead had unreasonably relied on representations made to them by one Michael Wayne Petersen, a convicted felon who solicited lawsuits on behalf of Greenblatt. Century alleged the defendants had conspired with Petersen to orchestrate the *Ramirez* action as a shakedown suit to extort money from Century, and that in doing so, the defendants "mounted an aggressive campaign of 'mad dog litigation tactics,' stonewalling legitimate discovery demands, fabricating evidence, concealing evidence, bribing witnesses, suborning perjury, and making false and fraudulent misrepresentations to the Court." More specifically, Century alleged the defendants had (1) conspired to bribe or entice homeowners to participate in the *Ramirez* action and had offered false assurances that they would not be liable for costs or fees even if they lost that action; [*5] (2) conspired to defame Century and its agents and employees to coerce Century to pay a nuisance settlement; (3) threatened Century with endless and costly litigation and public exposure of defamatory claims to shake down Century for money; and (4) threatened Century with criminal prosecution to pressure it into a settlement.

Greenblatt filed an anti-SLAPP motion in 2009. He filed a declaration in support of the motion and raised arguments substantially similar to those he raises in this appeal.

Century filed an opposition to the anti-SLAPP motion, supported by declarations and other evidence. Greenblatt filed a reply and objections to evidence. Following a hearing, on December 8, 2009, the trial court denied the motion.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Anti-SLAPP Motions

Courts construe the anti-SLAPP statute broadly to protect the constitutional rights of petition and free speech. (§ 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199.) In ruling on an anti-SLAPP motion, the trial court conducts a two-part analysis: The moving party bears the initial burden of establishing [*6] a prima facie case that the plaintiff's cause of action arose from the defendant's actions in the furtherance of the rights of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) If the moving party meets that burden, the burden shifts to the plaintiff to establish a probability that he or she will prevail on the merits. (§ 425.16, subd. (b)(1); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 314 (*Flatley*).)

"'Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We

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[3] **1** In our opinion in *Ramirez v. Century Crowell Communities* (Aug. 28, 2007, E040425 [nonpub. opn.]), we affirmed the trial court's denial of the motion of the plaintiffs therein to disqualify Century's [*3] counsel.

[4] The record on appeal does not include the various amended complaints, the demurrers to those complaints, or the motions for summary judgment in the *Ramirez* action.

consider "the pleadings, and supporting and opposing affidavits upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, . . . [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citation.]" (*Flatley, supra,* 39 Cal.4th at pp. 325-326.) The plaintiff's evidence must be sufficient to support a judgment in its favor if credited at trial. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 845.)

B. [*7] **Greenblatt's Burden**

Greenblatt contends he met his burden of establishing that Century's malicious prosecution action arose from his furtherance of rights of petition or free speech. (§ 425.16, subd. (b)(1).) It is generally recognized that a malicious prosecution action falls within the purview of the anti-SLAPP statute, because such an action arises from an underlying lawsuit or petition to the judicial branch. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.)

Century argues, however, that Greenblatt's actions in the underlying action amounted to crimes of extortion, perjury, and subornation of perjury, and the anti-SLAPP statute does not protect criminal conduct. (*Flatley, supra,* 39 Cal.4th at pp. 328-333 & fn. 16 [criminal extortion engaged in during litigation is not protected speech, and the record established criminal extortion as a matter of law under "the specific and extreme circumstances" of the case].)

1. Additional Background

In September 2004, Greenblatt's firm sent a letter to the co-owner of Century, indicating that Greenblatt's firm had been retained to represent Petersen in a dispute arising from the cancellation of Petersen's reservation to buy [*8] a home in one of Century's housing developments. The letter accused Century of discriminating against Petersen on the basis of his sexual preference and further stated, "If Mr. Petersen's . . . rights are not restored by no later than 12 noon on Friday, October 1, 2004, we will immediately file suit. . . . . This is not intended as an idle threat. This is not intended as a threat at all, but simply a preview of what will occur if your illegal conduct continues."

In October 2004, after Century cancelled Petersen's friend's reservation to purchase a home, Petersen sent a letter to the co-owner of Century and other Century business associates; the letter was cross-copied to Greenblatt. The letter stated: "**You have now made this a very personal matter to me.** [¶] I intend to immediately file litigation against [Century and other entities]." (Bolding in original.) Petersen asserted that Century was violating fugitive dust mitigation requirements and that he had videotaped those violations and planned to notify city officials of the violations. Petersen continued: "It is my belief that the . . . conduct and failures to act on the parts of your respective companies has not only affected myself [*9] but has also affected residents and other potential home buyers at your various developments. I have talked with several of these residents who have verified your companies [*sic*] unethical conduct and unfair business practices." Petersen stated he planned to inform residents of each Century community of the litigation he planned to file so they could "participate if they feel they have been subjected to unfair business practices and restraint of trade by your companies . . . ." He continued, "So that there is no misconception on your parts that this is just a woofing and barking letter, let me tell you a little about myself and my company. I have acted as litigation coordinator for several large, complex litigation lawsuits throughout southern California." After listing a number of cases, he stated, "Might want to have your attorneys check into these cases, they can be verified through the court web site. [¶] In each of the foregoing cases, they started small, with just a few individuals pursuing their rights. In the end, each case had over a hundred Plaintiffs and in each case the Plaintiffs prevailed for total settlements in the millions of dollars." The letter concluded, "[Y]ou [*10] may want to make sure to put down a $100,000.00 retainer with your attorneys, that should cover the first year of litigation. And based upon your companys [*sic*] intentional and punitive conduct, your insurance company may defend under a reservation of rights but they will not pay on any settlement. [¶] I look forward to the coming years of litigating with your respective companys [*sic*] and 'bringing them to justice,' so to speak."

Petersen thereafter filed a lawsuit against Century in propria persona, alleging his reservation was unfairly cancelled. In July 2005, the trial court dismissed the case on a motion for judgment on the pleadings.

Meanwhile, Petersen solicited potential plaintiffs to bring claims against Century. He used a solicitation letter that

assured the potential plaintiffs they "would not be liable for any costs or fees" if they lost any lawsuit against Century. In August 2005, Greenblatt filed the complaint in the *Ramirez* action, listing 42 homeowners as plaintiffs.

As discovery proceeded in the *Ramirez* action, several of the plaintiffs provided declarations stating that Greenblatt had them sign verification forms that referred to various discovery requests without ever [*11] showing them the discovery requests or the responses thereto.

2. Analysis

The criminal conduct at issue in *Flatley* was extortion, which the California Supreme Court found had been established as a matter of law under "the specific and extreme circumstances" of the case. (*Flatley, supra,* 39 Cal.4th at p. 332 & fn. 16.) Those circumstances included the lawyer's sending a letter to an entertainer threatening to publicly accuse him of rape and other unspecified immigration and tax offenses unless he paid money to the lawyer's client. (*Id.* at p. 330.) The letter was followed by telephone calls repeating the threats to go public unless the entertainer settled. (*Id.* at pp. 329-330.) The court cautioned, however, that its opinion "should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion. [Citation.]" (*Id.* at p. 332, fn. 16.)

Century asserts that Greenblatt's conduct in the *Ramirez* action constituted extortion so as to bring the case within *Flatley.* However, the specific [*12] conduct Century has identified as extortionate was primarily that of Petersen, and was largely in connection with Petersen's own earlier action against Century, which Petersen filed in propria persona. Moreover, unlike in *Flatley,* in which the attorney repeatedly threatened to "'go public'" with a rape allegation unless the plaintiff paid a monetary settlement of "a minimum of $1 million" (*Flatley, supra,* 39 Cal.4th at p. 330), Century has not identified any settlement demands made in the *Ramirez* case. The court in *Flatley* held that "where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Flatley, supra,* at p. 320.) The circumstances here are not so "specific and extreme" (*Id.* at p. 332 & fn. 16) as to allow us to hold that Greenblatt's conduct amounted [*13] to criminal extortion as a matter of law.

Century further asserts that Greenblatt committed perjury and suborned perjury in the underlying action, and perjury is not a protected form of speech. Our Supreme Court has not addressed whether the filing of perjured declarations is the type of conduct that would come under *Flatley.* In *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, an attorney filed allegedly perjured declarations of service to obtain a default judgment. After the default judgment was reversed, the defendant filed a cross-complaint for abuse of process against the attorney. The trial court granted the attorney's special motion to strike, and the Supreme Court affirmed. (*Id.* at pp. 1053-1054, 1065.) On appeal, the Court impliedly found that the defendant had met its burden under the first part of the anti-SLAPP analysis, and the Court then focused on the second prong, finding that the defendant had failed to show the likelihood of success on the merits. (*Id.* at p. 1056.)

In *Flatley,* the defendant had argued that the protection of speech and petition under the first part of the anti-SLAPP analysis was co-extensive with the litigation privilege in Civil Code section 47. Thus, the defendant [*14] argued, fraudulent communications and perjured testimony that are protected under Civil Code section 47 are also protected under the anti-SLAPP statute. The Supreme Court acknowledged that the Civil Code section 47 protection for fraudulent communications and perjured testimony bars all tort actions except for malicious prosecution, but that extortion threats were not protected under the anti-SLAPP statute, because "the litigation privilege and the anti-SLAPP statute are substantively different statutes that serve quite different purposes . . . ." (*Flatley, supra,* 39 Cal.4th at pp. 322, 325-327.) The *Flatley* court further noted that the litigation privilege *is* relevant to the second prong of the anti-SLAPP analysis. (*Flatley, supra,* at p. 323.) We will therefore assume for purposes of argument only that Greenblatt has met the first prong of the anti-SLAPP test.

C. Century's Burdens

To succeed in a malicious prosecution action, "'a plaintiff must prove that the underlying action was (1) terminated in the plaintiff's favor, (2) prosecuted without probable cause, and (3) initiated with malice.' [Citation.]" (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 448 (*Antounian*).) [*15] Greenblatt contends Century failed to meet its burden of establishing a probability of prevailing on the merits of its claim, because (a) Century cannot establish a favorable termination of the underlying lawsuit; (b) Century cannot establish a lack of probable cause in commencing the underlying lawsuit; (c) Century has not pled malice and cannot demonstrate a probability of prevailing on the issue of malice in commencing the *Ramirez* lawsuit; and (d) the allegations of Century's complaint, even if true, do not support a malicious prosecution lawsuit.

1. Favorable Termination of Underlying Action

An essential element of a cause of action for malicious prosecution is that the underlying action was terminated on the merits in the current plaintiff's favor. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 217 (*Daniels*).) Here, the *Ramirez* action was dismissed following the trial court's granting of a motion for summary judgment. In ruling on that motion, the trial court concluded the burden of proving damages had shifted to the plaintiffs, because their discovery responses had been factually devoid, and the plaintiffs had failed to offer any evidence to meet that burden. In their opposition [*16] to the motion, the plaintiffs merely argued they were damaged because they paid fees to Century Preferred Mortgage which they would not have paid had they not been forced to use that company. The trial court observed, "Yet this argument proves too much—plaintiffs must not only prove that they paid money to Century Preferred Mortgage but that they would not have had to pay the same amount to another mortgage company if they had used different financing, that is, plaintiffs must show that they were harmed by defendants' allegedly unlawful conduct. Similarly, plaintiffs argue that they were required to pay exorbitant prices for some options. Yet the only evidence they offer is that they paid the prices and that the prices were marked up 30% to 100% over the wholesale level. They offer no evidence that such markups from the wholesale level were greater than they would have been without being tied to the purchase of the homes. Thus, plaintiffs have not shown that there is a triable issue of fact as to whether they were damaged by defendants' allegedly wrongful conduct." The trial court therefore granted the motion for summary judgment. Greenblatt contends, "It simply cannot be said that [*17] the granting of CENTURY's summary judgment motion on the issue of damages was a favorable termination of the action on its[] merits."

However, damages are an element of the causes of action the plaintiffs in the *Ramirez* action pleaded: restraint of trade/unfair competition (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 542 [because an antitrust violation is a species of tort, the plaintiff must prove pecuniary damages resulting from the alleged unlawful act]); breach of fiduciary duty (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101 [the absence of the element of damage proximately caused by the breach is fatal to a cause of action for breach of fiduciary duty], superseded by statute on another ground as stated in *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 396); and negligence (*Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1541 [damages is an element of a cause of action for negligence].) Summary judgment granted on the basis of the plaintiff's failure to establish a disputed issue of material fact as to an element of a claim is indisputably a termination on the merits. We therefore find no merit in Greenblatt's argument that the Ramirez [*18] action was not terminated in Century's favor.

2. Lack of Probable Cause

Greenblatt next contends Century cannot establish that he lacked probable cause in commencing the *Ramirez* action.

Whether the facts known to an attorney constituted probable cause to prosecute an action is a question of law. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 971 (*Zamos*).) More specifically, "'[t]he presence or absence of probable cause is viewed under an objective standard applied to the facts upon which the defendant acted in prosecuting the prior case. [Citation.] The test of determining probable cause is whether any reasonable attorney would have thought the claim to be tenable. [Citation.] . . . [¶] Hence, "probable cause to bring an action does not depend on it being meritorious, as such, but upon it being *arguably tenable,* i.e., not so completely lacking in merit that no reasonable attorney would have thought the claim tenable. [Citation.]"' [Citation.] Probable cause exists if the claim is legally sufficient and can be substantiated by competent evidence. [Citation.]" (*Antounian, supra,* 189 Cal.App.4th at p. 448-449.)

An attorney may be held liable for malicious prosecution not only for *initiating* the [*19] underlying action without probable cause but also for *continuing to maintain* the suit after learning it is meritless. (*Zamos, supra,* 32 Cal.4th at p. 969 ["Continuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset."].) A claim cannot be adjudged to have been reasonably prosecuted in the complete absence of evidence to support the claim, and probable cause must exist as to *each* claim prosecuted. (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596-597 [a litigant who successfully defended against two claims, only one of which was supported by probable cause, could maintain a malicious prosecution action on the second claim].)

Greenblatt argues that Century cannot meet its burden of showing lack of probable cause for commencing the *Ramirez* action because that action survived demurrers and an earlier motion for summary judgment. Under the interim adverse judgment rule, a victory in the lower court, including the denial of a defense motion for summary judgment on the grounds that a triable issue of fact exists, may provide persuasive evidence that the suit does not totally lack merit. [*20] "This finding (unless disregarded) compels conclusion that there is probable cause, because probable cause is lacking only in the *total absence* of merit.' [Citation.]" (*Antounian, supra,* 189 Cal.App.4th at p. 450.)

However, under the circumstances of this case, the principle announced in *Antounian* does not apply. First, the demurrers were brought by other defendants in the underlying action, not by Century. Second, the trial court's ruling on the first motion for summary judgment does not appear in the record,[5] and the trial court denied Century's second motion for summary judgment without prejudice, not on the merits, but on the basis that it was directed to a complaint that was no longer the operative pleading.

Moreover, the underlying action was based on the allegation that the plaintiff homebuyers [*21] had been forced to use Century's mortgage broker and flooring contractor as a condition to purchasing a home. However, certain named plaintiffs had not even used Century's mortgage broker or flooring contractor.

Probable cause must exist not only at the commencement of the action, but also at every stage thereafter, and on every claim asserted. (*Mabie v. Hyatt, supra,* 61 Cal.App.4th at pp. 596-597.) We conclude that in the complete absence of evidence of damages by the time of the dispositive motion for summary judgment, Greenblatt lacked probable cause for continuing the action.

3. Malice

a. Adequacy of pleading

Greenblatt contends Century did not adequately plead malice in its complaint for malicious prosecution.

"Malice means actual ill will or some improper purpose, whether express or implied. [Citations.]" (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1465-1466 (*Grindle*).) In *Albertson v. Raboff* (1956) 46 Cal.2d 375, superseded by statute on another ground as noted in *Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1379, the court held that suits brought with improper purposes include the following: "'[T]hose in which (1) the person initiating them does not believe that his claim [*22] may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.' [Citations.]" (*Albertson v. Raboff, supra,* at p. 383.)

In its complaint, Century alleged:

"10. The Ramirez Plaintiffs and their attorney acted without probable cause and with malice in filing, prosecuting and maintaining the Ramirez Action. The Ramirez Plaintiffs and their attorney knowingly and intentionally filed and pursued the Ramirez Action against Century and [others] . . . despite the fact and knowledge that no evidence existed to support their claims. The Ramirez Action was filed solely based upon the fact that Century was perceived as a 'deep pocket.' The Ramirez Plaintiffs and their attorney filed the Ramirez Action knowing that Century would value and seek to protect its reputation in the community and, hopefully, provide a quick and easy source of monetary

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[5] Greenblatt stated in his declaration that the trial court had issued a tentative decision to deny the motion on the ground there were triable issues as to whether Century had sufficient economic power to restrain trade as well as to damages and as to whether the houses and carpets were separate produces. However, the record does not include the trial court's final decision on the motion.

recovery.

"11. Each Ramirez Plaintiff had sued 28 agents, [*23] employees and business entities affiliated with Century including parties that had had no involvement in, and were completely far removed from, any aspect of that plaintiff's real estate transaction. The Ramirez Action was filed not because the Ramirez Plaintiffs intended to pursue any legitimate claims against Century and the 28 agents, employees and business entities, but rather to extort a settlement from Century based upon the cost of defending such a massive fraud and antitrust lawsuit, including the threat to reputation within the community. . . ."

In short, Century alleged the action was brought and maintained for an improper purpose. Thus, although Century did not expressly use the term malice, its complaint adequately pleaded that element of a malicious prosecution suit.

b. Section 128.5

Century pleaded that Greenblatt had engaged in "criminal, vexatious and abusive litigation tactics" in the underlying action that were designed "among other things, to inflict high litigation costs on Century in an attempt to extort nuisance money from it." Greenblatt argues that Century pleaded nothing more than discovery abuse, and with the Legislature's enactment of section 128.5, an action [*24] for malicious prosecution may not be based on discovery abuses because the statute provides another adequate remedy.

We first observe that section 128.5 does not even apply to cases filed on or after January 1, 1995; it has been superseded by section 128.7, which authorizes attorney fee awards as sanctions for the filing of improper signed pleadings. (*Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 812-819.) Moreover, our Supreme Court has specifically held that section 128.5 was not intended to and did not preclude an action for malicious prosecution. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 688-689.) The reasoning and analysis of that case are equally applicable to section 128.7. (See generally *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 82-83 [acknowledging that an attorney who files a lawsuit without an objective basis for believing it meritorious is subject not only to sanctions under section 128.7, subdivision (c), but also to disciplinary action, a motion to strike, or a malicious prosecution action].) Thus, we reject Greenblatt's argument that section 128.7 provided an exclusive remedy.

c. Adequacy of proof of malice

Greenblatt next contends Century cannot [*25] establish that the *Ramirez* action was motivated by malice.

The element of malice in a malicious prosecution action must be proved separately from the element of lack of probable cause, and the absence of probable cause does not, without more, establish malice. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498.) To establish malice, the plaintiff must prove "either actual hostility or ill will on the part of the defendant or a subjective intent to deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant. [Citation.]" (*Id.* at pp. 498-499.) Parties rarely admit their motives were improper; thus, malice is usually proved by circumstantial evidence and reasonable inferences drawn from the evidence. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 218.)

"[M]alice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause." (*Daniels, supra,* 182 Cal.App.4th at p. 226.) Thus, in *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, the court found malice when "abundant evidence" showed the defendant attorneys had continued to [*26] prosecute the underlying action for more than a year after becoming aware of the lack of facts to support their client's claims. (*Id.* at pp. 1407-1408.) The court stated, "Further, this case has a number of 'hallmark[s]' [citation] of a suit brought for an improper purpose. The [defendant] attorneys appear to have employed a 'shotgun' approach from the outset of the litigation, sending contingency fee agreements to potential plaintiffs whom they had never met and with whom they had never spoken, and naming all who responded to the solicitation letter in all counts of the complaint they filed against Sycamore Ridge—whether or not there was a factual basis for the claims. A reasonable inference based on the evidence is that [the claims of Powell, a plaintiff in the underlying action], which included 15 causes of action that had no support in fact, were brought for an improper purpose . . . . At a minimum, the record discloses that the [defendant] attorneys failed to conduct any reasonable investigation with regard to [that plaintiff's] complaints, and that they served a statement of damages on Sycamore Ridge that had no apparent basis in fact." (*Id.* at p. 1409.) The court concluded that [*27] one could infer malice if the defendants "knew the relevant facts and did not take

immediate steps to dismiss Powell's unmeritorious claims." And, "[i]f [attorney] defendants were not aware of the relevant facts because they failed to adequately familiarize themselves with the case before associating in as cocounsel, this would indicate a degree of indifference from which one could also infer malice. [Citation.]" (*Ibid.*) The record contains abundant evidence demonstrating similar conduct in the present case.

Moreover, in determining whether malice existed, the court may consider, among other things, the parties' prefiling behavior. (*Grindle, supra,* 196 Cal.App.3d at p. 1466.) Here, Petersen and Greenblatt's law firm sent letters to Century before the lawsuit, as described above in section II. Although those letters were not sent directly in connection with the *Ramirez* action, they closely preceded and set the tone for its filing.

Further, the record indicates Greenblatt falsified the signatures of many of the *Ramirez* plaintiffs on discovery responses. In fact, this court in its opinion in *Ramirez v. Century Crowell Communities, supra,* E040425, referred the matter to the California State [*28] Bar, which commenced proceedings against Greenblatt.[6] (See *In the Matter of Frederic J. Greenblatt,* State Bar, L.A. Dept., Nos. 07-O-12476 and 08-O-12263 (July 7, 2010).) On July 22, 2011, the State Bar imposed probation with no suspension as a result of those proceedings. (The State Bar of California <http://members.calbar.ca.gov/fal/ Member/Detail/92672> [as of Sept. 15, 2011].)

As the court in *Flatley* noted, conduct such as perjury is relevant to the determination of the second part of the anti-SLAPP analysis. (*Flatley, supra,* 39 Cal.4th at p. 323.) Malice is a logical inference from Greenblatt's [*29] conduct.

In opposing an anti-SLAPP motion, a plaintiff need establish only that a jury could find in its favor on the issue of malice through "'circumstantial evidence and inferences drawn from the evidence.'" (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 675.) We conclude that this record contains abundant evidence from which a trier of fact could reasonably infer malice on the part of Greenblatt in the prosecution of the *Ramirez* action.

IV. DISPOSITION

The judgment is affirmed. Costs are awarded to plaintiff and respondent.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

KING

J.

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[6] The allegations against Greenblatt in those proceedings were that he (1) violated California Rules of Professional Conduct, rule 1-320(B), by compensating Petersen for employment referral; (2) violated California Rules of Professional Conduct, rule 1-310, by forming a partnership with Petersen, a nonlawyer; and (3) violated Business and Professions Code section 6106 by requesting the *Ramirez* plaintiffs to sign undated blank discovery verification forms when the plaintiffs had not reviewed the discovery responses. (*In the Matter of Frederic J. Greenblatt, supra,* Nos. 07-O-12476 and 08-O-12263.)

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