LARRY L. CASTELANELLI et al., Plaintiffs and Appellants,

v.

THOMAS BECKER, Defendant and Respondent.

A117326

California Court of Appeal, First District, Second Division

January 10, 2008

NOT TO BE PUBLISHED

Humboldt County Super. Ct. No. DR050484

Haerle, Acting P.J.

I. INTRODUCTION

Appellants are the owners of real property in Shelter Cove, Humboldt County. Via a single cause of action in a first amended complaint, they sued respondent Becker, a Eureka attorney who represented the owner of property bordering on theirs, for "Slander on Title."[1] That cause of action was based on Becker's action, as attorney for his clients, in filing a lis pendens on appellants' property which action, they alleged, caused them to lose a sale of that property. The trial court sustained Becker's demurrer to that cause of action without leave to amend on the basis, inter alia, that Becker owed appellants no duty. We reverse.

II. FACTUAL AND PROCEDURAL BACKGROUND

On November 28, 2006, appellants Castelanelli and Bollinger, the alleged owners of Lot 5, Block 114, otherwise known as 495 Sea Court, in Shelter Cove, Humboldt County, filed a first amended and supplemental complaint against the owner of the neighboring lot and home, Kristine Mooney, and her "agent and partner" Shawn Mooney. The complaint alleged five causes of action, all five against both Mooneys and the fifth, for "Slander on Title" against both them and their then-attorney, respondent Becker.

In summary, the complaint alleges that on the border between appellants' lot, allegedly an unimproved one, and Kristine Mooney's lot, on which there is a residence, is "a large tree" which "curves from the bottom portion of its trunk toward [appellants'] property and takes up a significant portion of space on the subject property." The tree takes up so much space that, again allegedly, "the subject property cannot reasonably be developed as a residential property." Further, according to the amended complaint (1) the residence on Kristine Mooney's property "blocked light to the tree and caused the tree to grow almost exclusively over plaintiffs' subject property" and (2) Kristine Mooney "also trimmed the tree in such a manner or negligently maintained the tree in such a manner that contributed to the tree growing at an odd and unusual angle and taking over significant space on the subject property."

The complaint goes on to allege that the offending tree "constitutes a structure within the meaning of California's spite fence statute [citation] . . . and is maliciously maintained for the purpose of annoying the plaintiffs and in an attempt to gain ownership of plaintiffs' land at less than fair value." In addition, appellants allege that the defendants "engaged in a conspiracy concerning the facts and events described herein" and did so "with the knowledge and intent that such acts would damage plaintiffs."

After these introductory allegations, there follow four causes of action against the Mooneys: for nuisance, trespass, tortious interference with contractual relations, and tortious interference with economic relations. In the course of the allegations in those causes of action, appellants repeat that the Mooney defendants had been attempting to "purchase plaintiffs' property at below fair market value" and had "threatened legal action if plaintiffs trimmed the subject tree in order to make their property capable of being developed and sold." They go on to allege that, at some undisclosed point of time, they "had a valid and existing contract for the sale of the subject property with a third party . . . at full market value" but which was breached by that third party because of alleged conduct of the Mooneys.

Then comes the relevant fifth cause of action. It alleges that the defendants (now including respondent Becker) published "false statements" in an allegedly attached (but in fact unattached in the record before us) "Exhibit A" and in a lis pendens filed as to appellants' property. The filing of the lis pendens is the only act charged against Becker; it allegedly caused "*the second sale of the subject property to fail*." (Italics in original.)

The fifth cause of action continues by alleging that the "*recording and publishing of the lis pendens was not privileged as the defendants claims did not make a legitimate claim as to the title and the lis pendens did not identify an action that affected the right of possession or title to real property and defendants knew and intended that the lis pendens would cloud the title to plaintiffs' property*." (Italics in original.)

That cause of action concludes by alleging that appellants' "*motion to expunge the lis pendens was granted by the Court on the grounds that defendants' lis pendens does not affect the right of possession or title to*

the subject real property." (Italics in original.)

Becker filed a demurrer and motion to strike as to the fifth cause of action. Appellants responded to the demurrer and Becker replied to that opposition. The matter was argued before the superior court on February 13, 2007. The court sustained Becker's demurrer without leave to amend; a judgment to that effect was entered a month later. Appellants filed a timely notice of appeal.

III. DISCUSSION

The parties' briefs, although not the record provided us, make clear that, prior to appellants' present lawsuit, there was some "initial litigation" between the parties arising out of the first alleged failed sale of appellants' Shelter Cove lot. In that "initial litigation," respondent Becker was the attorney for the Mooneys, the defendants therein, and on their behalf filed a lis pendens on appellants' property, a lis pendens which was later expunged by another department of the superior court. The filing and subsequent expunging of the lis pendens, plus the alleged failed "second sale" of appellants' lot on account of the lis pendens, form the bases for appellants' fifth cause of action.

The trial court sustained Becker's demurrer without leave to amend on the basis that Becker, as the then-attorney for the Mooneys "would not have [a] duty . . . toward the plaintiffs." Otherwise, the court noted "any attorney then acting on behalf of a client may be subject to personal liability."

Appellants respond by arguing that "[a]ny immunity respondent would have must be found in Civil Code section 47." However, they continue, there is no such immunity because of the provision of Civil Code section 47, subdivision (b)(4) (section 47(b)(4)), which provides: "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."

Respondent Becker replies that nothing in his moving papers below relied upon section 47. Further, he maintains that, on this appeal, he is basically relying on the principle enunciated by the trial court that an attorney cannot be held liable for taking action in litigation on behalf of his or her clients because, among other reasons, of the lack of any duty owing from that attorney to the opposing parties.

Under well-established California law, it would appear that Becker is correct regarding his possible liability to appellants *for negligence*. The leading case on the subject of an attorney's liability for negligence to a party formerly (or even currently, presumably) adverse to him or her in earlier litigation is *Norton v. Hines* (1975) 49 Cal.App.3d 917 (*Norton*). There, Norton, a party who had successfully defended a prior lawsuit alleging inducement of breach of contract, returned to court and sued the plaintiff in the prior action (a person named Lind) for malicious prosecution. Norton's complaint also named Lind's attorneys in the prior action as defendants, but the cause of action asserted against the attorneys was for "professional negligence" and not malicious prosecution. The trial court in the second action sustained the defendant attorneys' demurrer without leave to amend, after Norton "specifically declined to amend his complaint to include [the defendant] attorneys in the . . . cause of action" for malicious prosecution (*id.* at p. 924) and entered a judgment of dismissal.

The Court of Appeal, recognizing that it was dealing with "a case of first impression" (*Norton, supra,* 49 Cal.App.3dat p. 919), affirmed that judgment. It held: "In the case at bar a former litigant is suing adverse counsel. Clearly, an adverse party is not an intended beneficiary of the adverse counsel's client. If a cause of action exists against attorneys for the reasons alleged here, it must be pleaded as an action for malicious prosecution. We see no reason to extend applicable law now found in cases involving attorneys and third parties when there is sound and recognized public policy for limiting the cause of action to malicious prosecution under the facts as pleaded by Norton. [¶] Malicious prosecution is a specific tort that developed in the criminal field out of a need to adjust two highly important social interests. The first is the interest of society in the efficient enforcement of the criminal law, which requires that private persons who aid in the enforcement of the law should be given an effective protection against the prejudice which is likely to arise from the termination of the prosecution in favor of the accused. The second is to protect the individual citizen against unjustifiable and oppressive litigation of criminal charges, which involves pecuniary loss, distress and loss of reputation. [Citation.] . . . The tort of malicious prosecution is designed to place restraint on a would-be plaintiff while furnishing protection to a wrongfully sued defendant. It naturally follows that the same general principles should apply to the attorney representing the litigant initiating the action. The attorney owes a duty to his client to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit. He is an advocate and an officer of the court. He is cognizant of the public policy that encourages his clients to solve their problems in a court of law. In our opinion, when representing his client in the initiation of a lawsuit, he should not be judged by a different standard. This is exactly the concept urged by Norton. His complaint verifies his belief that his only cause of action against Lind is for malicious prosecution (the first cause of action). Against attorneys, however, he proceeds on a cause of action for simple negligence which requires a different and less demanding standard of proof. We believe the public policy of favoring free access to our courts is still viable. However, if Norton's cause of action against attorneys for negligence is permitted, this policy will be subverted. The attorney must have the same

freedom in initiating his client's suit as the client. If he does not, lawsuits now justifiably commenced will be refused by attorneys, and the client, in most cases, will be denied his day in court." (*Id.* at pp. 921-923, fns. omitted.)

The year after *Norton* was published, it was cited approvingly by our Supreme Court in *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 344-345, fn. 5 (*Goodman*). In that case, the court affirmed a superior court judgment of dismissal after that court had sustained a demurrer without leave to amend in an action brought by several plaintiffs against, among others, an attorney for a corporation that had issued stock which the plaintiffs had bought. The plaintiffs' complaint alleged that the defendant attorney was negligent in the legal advice he had given his clients regarding the circumstances under which the stock could be sold without SEC registration. The court held that such an action was not viable: "To make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice but also to the other parties to the transaction with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counseling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal 'would prevent him from devoting his entire energies to his client's interests.' [Citation.] The result would be both 'an undue burden on the profession' [citation] and a diminution in the quality of the legal services received by the client. [Citation.]" (*Id.* at p. 344.)

There are many other cases also involving asserted negligence by formerly adverse attorneys, all of them rejecting similar claims on the basis, inter alia, that such attorneys have no legal duty to the adverse party. These include: *B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 837-838; *Omega Video, Inc. v. Superior Court* (1983) 146 Cal.App.3d 470, 480-481; *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal.App.3d 307, 318; *Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 178-183, disapproved on other grounds in *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 882-883 (*Sheldon Appel*); *Parnell v. Smart* (1977) 66 Cal.App.3d 833, 837-838.

Our research has disclosed no cases holding to the contrary. The law thus seems clear that a party to former litigation cannot maintain an action for *negligent conduct* against an attorney for an adverse party in prior litigation because, among other reasons, that attorney owes the former adversary no duty of care.

However, as appellants point out in their briefs to us, the issue of "duty" is relevant only to the torts involving alleged *negligent conduct*, and is not a requirement for any *intentional tort*. Thus, the question remains as to the potential liability of an attorney for a formerly adverse party for deliberate torts. There are reported California cases addressing the potential liability of attorneys to adverse parties in prior litigation for at least two intentional torts: malicious prosecution and abuse of process.

Regarding malicious prosecution,[2] as the *Norton* court clearly understood, while an attorney cannot be liable in negligence to a formerly adverse party, that rule does not exempt the attorney from liability for malicious prosecution. (*Norton, supra,* 49 Cal.App.3d at pp. 921-922.) And other, more recent authority has confirmed that, under certain circumstances, attorneys for formerly adverse parties in litigation may be liable for malicious prosecution. (*Westamco Investment Co. v. Lee* (1999) 69 Cal.App.4th 481, 487-488.) Indeed, in *Sheldon Appel,* our Supreme Court recognized that such liability may obtain. There, the court reversed a malicious prosecution judgment entered by a Los Angeles Superior Court against a firm of attorneys previously adverse in litigation to some real estate investors. Its reversal was, however, based on the fact that the court had submitted both the issues of the presence of malice and the existence of probable cause to the jury, whereas only the first is a factual issue. The issue of the existence of probable cause is, the court said, "a question of law to be determined by the court, rather than a question of fact for the jury." (*Sheldon Appel, supra,* 47 Cal.3d at p. 875; see also *id.* at pp. 876-884 and 5 Witkin, Summary of Cal. Law, *supra*, § 510, pp. 754-760 and Supp., p. 53 and cases cited therein.) *Sheldon Appel* thus effectively confirmed that, properly pled and tried, the tort of malicious prosecution may be asserted against formerly adverse attorneys.

And malicious prosecution may not be the only intentional tort for which a lawyer previously adverse to second-case plaintiffs may be liable. In *Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, one of our sister courts held that a law firm that, after securing a judgment against one Joel Drum on behalf of a client, then prematurely levied a writ of execution, causing Drum's accounts to be frozen and his checks dishonored, could sue that law firm for abuse of process.[3] In the process, it held that such an action is not precluded by the anti-SLAPP statute (Code Civ. Proc., § 425.16) nor the litigation privilege. (§ 47(b).) The appellate court saw no problem in such a cause of action being maintained, under the facts alleged, against just the adverse attorneys in the prior action, and not their original plaintiff-client.

In terms of its intrinsic elements, the tort of slander of title does not rise to the level of either malicious prosecution or abuse of process. Citing the Restatement of Torts, one court has defined slander of title thusly: "The elements of the tort . . . have traditionally been held to be publication, falsity, absence of privilege, and disparagement of another's land which is relied upon by a third party and results in a pecuniary loss." (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214.) Looking at

that issue from the other direction, it has been held that slander of title does not include express malice as an intrinsic factor. (See, e.g., *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 622; *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 66-67; *Gudger v. Manton* (1943) 21 Cal.2d 537, 543, disapproved on other grounds in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381; see, generally, 2 Harper, et al., Law of Torts (3d ed. 2006) § 6.1A, pp. 326-337.)

Although appellants did not specifically plead malicious prosecution in their amended complaint, that complaint does include allegations of malice. In paragraph 12, one of the general introductory paragraphs of the complaint, appellants pled that the actions thereafter to be alleged "were done knowingly, willfully, and with malicious intent." Though this allegation was apparently included in the original complaint which, as noted, was only brought against the Mooneys, we have no reason to conclude that it was not also intended to apply to the new fifth cause of action in the amended complaint, which included Becker as a defendant. Additionally, the closing paragraph of the first (nuisance) cause of action against the Mooneys reiterates the allegation that the defendants' actions were "undertaken with fraud, malice or oppression." Then, and most importantly, in the introductory paragraph to the new fifth cause of action, appellants specifically plead that they "incorporate herein by reference the allegations of paragraphs 1 through 25 as if fully set forth herein." The combination of these allegations seems to us sufficient to inject into the slander of title cause of action an allegation of malice, even as to attorney Becker.

Finally, it also bears noting that, even as pled against Becker, the fifth cause of action did specifically allege that the statements published by the defendants, including the lis pendens, "included false statements that the defendants knew to be false or for [sic] which the defendants made without regard for their truthfulness." This, it seems to us, is tantamount to an allegation of lack of probable cause.

In any event, the law is clear that, in evaluating a complaint against a general demurrer, it "is not necessary that the cause of action be the one intended by plaintiff. The test is whether the complaint states *any* valid claim entitling plaintiff to relief. Thus, plaintiff may be mistaken as to the nature of the case, or the legal theory on which he or she can prevail. But if the essential facts of *some* valid cause of action is alleged, the complaint is good against a general demurrer." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 7:41, p. 7-19.)

Although, according to the record before us, appellants never requested leave of the trial court to amend their cause of action against Becker in any respect––and do not mention either the possibility of or the desire to amend in their briefs to us––"the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." (Code Civ. Proc., § 472c, subd. (a); see also *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.)

The absence of any suggestion in appellants' opposition to Becker's demurrer or in oral argument to the trial court that they either (1) wished to amend or (2) intended to plead some sort of intentional tort via their fifth cause of action[4] makes us reluctant to rule that the trial court abused its discretion by sustaining the demurrer without leave to amend. However, under all the circumstances noted above, particularly what appellants *did* plead––both expressly and by incorporation––in their fifth cause of action, we think the better course of action is to remand this matter to the trial court with instructions to consider whether (1) *any* intentional tort––as distinguished from a claim of negligence––was in fact pled by appellants and (2) if not, whether appellants wish to and can plead a valid intentional tort cause of action against Becker regarding the allegedly improper lis pendens.

However, in that connection, and reverting now to the issue principally argued by appellants below, if, as and when any such amendment is proffered and found viable by the trial court, that court should then consider the impact of section 47(b), which provides that a publication is "privileged" if made in "any . . . judicial proceeding," subject, however, to an express exception provided in subdivision (b)(4): "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."

Once upon a time, California law was clear that, under the original version of section 47(b), the filing of a lis pendens was "clothed with absolute privilege." (*Albertson v. Raboff, supra,* 46 Cal.2d at p. 379 (*Albertson*); see also *Drum, supra,* 107 Cal.App.4th at p. 1024 & *Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1378-1379 (*Palmer*).) That state of affairs changed significantly with the addition of what is now section 47(b)(4) in 1992.[5] We interpret that provision to mean that, in order to be privileged under section 47(b), a notice of lis pendens must *both* (1) identify a specific action "previously filed" with a superior court and (2) show that the previously-filed action affects "the title or right of possession of real property."

It would appear that the first requirement for the attachment of the privilege is met in this case; even respondent Becker concedes that the pertinent lis pendens was "signed and filed . . . in conjunction with litigation involving a tree growing upon a shared property line."

But nothing in the record before us permits us to determine if that litigation involved the "right of possession" of either of the two properties involved in that litigation.[6] If it did, the litigation privilege clearly applies and the fifth cause of action cannot stand; if it did not, the section 47(b)(4) privilege equally clearly does not apply. (See, regarding this issue, *Palmer, supra,* 109 Cal.App.4th at p. 1381.) We leave this determination, if indeed it becomes pertinent, to the trial court on remand.

IV. DISPOSITION

The judgment is reversed and the case remanded to the trial court for action not inconsistent with the foregoing opinion. Costs on appeal are awarded to appellants.

We concur: Lambden, J., Richman, J.

Notes:

[1] The correct name of this tort is "slander *of* title" (see 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 640-642, pp. 944-948), the name we will use hereafter.

[2] The elements necessary to prevail on a claim of malicious prosecution were recently articulated by our Supreme Court: "[T]he plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice. [Citing *Sheldon Appel*.] [¶] The question of probable cause is 'whether, as an objective matter, the prior action was legally tenable or not.' [Citing *Sheldon Appel*.] 'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' [Citation.] 'In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.' [Citation.] Probable cause, moreover, must exist for every cause of action advanced in the underlying action. '[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted . . . ." [Citations.] [¶] 'The "malice" element . . . relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will or some improper ulterior motive.' [Citations.] Malice 'may range anywhere from open hostility to indifference. [Citations.] Malice may also be inferred from the facts establishing lack of probable cause.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292; see also *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50; *Sheldon Appel, supra,* 47 Cal.3d at p. 874; Rest. 2d Torts, § 676, com. c; 5 Witkin, Summary of Cal. Law, *supra,* § 511, pp. 760-762.)

[3] "The tort of abuse of process constitutes the use of a legal process against another to accomplish a purpose for which it is not designed. [Citations.] Its elements are: (1) an ulterior motive; and (2) a willful act in the use of process not proper in the regular conduct of the proceedings. [Citations.] '[T]he essence of the tort "abuse of process" lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice. . . . .' [Citations.] In *Brown* [v. *Kennard* (2001) 94 Cal.App.4th 40], the court recognized 'an action for abuse of process may inhere where a wrongful levy is executed upon exempt property.' [Citation.]" (*Drum, supra,* 107 Cal.App.4th at p. 1019.)

We are, of course, aware that *Drum* was disapproved in part by our Supreme Court last year in *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065. But that disapproval involved the issue of whether the litigation privilege of section 47(b) applied to "non communicative acts that are necessarily related to the communicative conduct" (*ibid.*), and does not appear to suggest that a claim of abuse of process may never be asserted against a formerly adverse attorney. (See also, regarding the issue of potential civil tort liability against formerly adverse attorneys, Rest.3d Torts, § 57 and com. d thereto, and Rest.2d Torts, §§ 674-676.)

[4] The record before us is rather confused as to appellants' intentions in this regard. In their opposition to Becker's demurrer below, appellants specifically noted that *Norton* "does hold that a malicious prosecution cause of action against the attorney by parties who were not represented by the attorney would not be barred." In response to that, respondent Becker noted that appellants have "not brought a malicious prosecution action against" him. Then, at oral argument, the court also specifically noted that the tort of malicious prosecution is one of the "very finite exceptions" to the rule that "an attorney acting on behalf of clients is [not] liable to being sued." Despite these comments and arguments, appellants' counsel nowhere suggested to the lower court that they intended to assert either the tort of malicious prosecution or any other intentional tort against Becker. Nor, as noted, did appellants ever request leave to amend to do so, nor do they argue that issue in their briefs to us.

[5] Regarding the possible reason for this change, see *Wilton v. Mountain Wood Homeowners Assn.* (1993) 18 Cal.App.4th 565, 569, fn. 1. In this connection, it is also noteworthy that the Code of Civil Procedure provides that "[a] party to an action who asserts a real property claim may record a notice of pendency of action in which that real property claim is alleged." (Code Civ. Proc., § 405.20.) Regarding the various changes in the law on this subject since *Albertson*, see *Rothman v. Jackson* (1996)

49 Cal.App.4th 1134, 1142, fn. 2, and *Palmer, supra,* 109 Cal.App.4th at pp. 1378-1380.)

[6] Via an augmentation of the record on appeal, appellants and the Humboldt County Clerk's Office have now provided us with a copy of the order of March 30, 2006, entered by another department of the Humboldt County Superior Court granting the motion of appellant Castelanelli to expunge the lis pendens recorded by the Mooneys, allegedly (per the amended complaint here, via respondent Becker) on their property. That order specifically states that the motion to expunge is being granted because "the underlying action does not involve title to real property." But we do not and cannot make the determination that, therefore, the lis pendens the Mooneys and Becker filed does not come within section 47(b)(4) for two reasons: (1) the expunging order does not address the question of whether the action in connection with which the lis pendens was filed affected the "right of possession of real property" and (2) the applicability of section 47(b)(4) to this lis pendens is a determination which should, in the first instance, be made by the trial court.
