

New Counsel Beware: Substituting Into a Case May Expose You to Malicious Prosecution

By Kit James Gardner

The California Supreme Court recently denied review of a case that may have far-reaching consequences for attorneys who have become or may become the target of a malicious prosecution action brought by their adversary, Sycamore Ridge Apartments, LLC v. Naumann, 157 Cal. App. 4th 1385 (2007) review denied (March 19, 2008).

In Sycamore Ridge, the Fourth District Court of Appeal (Division One), in reversing the trial court's order granting an anti-SLAPP motion, held that a malicious prosecution case could proceed with respect to a law firm that had associated into the case as co-counsel only one month prior to the voluntary dismissal of the client whose complaint gave rise to the malicious prosecution action. The fact that this law firm was not permitted to avoid the consequences of a malicious prosecution action only one month into its representation presents a serious challenge to any lawyer associating into a case as co-counsel or otherwise.

The facts giving rise to the malicious prosecution complaint at issue in Sycamore Ridge are as follows: A group of lawyers (referred to in the opinion as the "Naumann defendants") filed a complaint against Sycamore Ridge Apartments, LLC on behalf of 45 tenants for, among other things, allegedly failing to maintain the premises in a habitable condition. Through discovery, however, it became apparent that one of the plaintiffs, Shirley Powell, was *only* concerned that Sycamore Ridge had failed to return her security deposit when she moved out (despite the fact that pre-lawsuit interviews had indicated that she had physical complaints as well). A small claims action commenced earlier by Powell, however, had already concluded in Sycamore Ridge's favor.

Despite the fact that Powell's discovery responses were devoid of any indication of physical, emotional, or other injuries aside from her contention that her security deposit had not been returned, the Naumann defendants served a Statement of Damages on Powell's behalf listing \$20,000 for emotional distress, \$2,000 in property damage, and \$50,000 in punitive damages. Powell failed to appear at her deposition nine months later, on September 21, 2004. On September 16, 2004, the law firm of LaFave & Rice (referred to in the opinion as the "LaFave defendants") became involved, and associated into the case as co-counsel on October 5, 2004. A letter from Naumann dated October 22, 2004, confirmed Powell's intent to voluntarily dismiss her complaint, and on November 19, 2004, Powell's lawsuit was eventually voluntarily dismissed.

Upon dismissal of Powell's case, Sycamore Ridge filed a malicious prosecution action against Powell, the Naumann defendants, and LaFave. Both the Naumann and LaFave defendants filed separate special motions to strike ("anti-SLAPP") pursuant to Code of Civil Procedure section 425.16, which provides that, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public

issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Cal. Code Civ. Proc. § 425.16(b)(1).

The elements of a malicious prosecution action are: (1) the prior action was terminated in favor of the malicious prosecution plaintiff, (2) the prior action was commenced or maintained without probable cause, and (3) was initiated with malice. Crowley v. Kattleman, 8 Cal. 4th 666, 671 (1994). A claim for malicious prosecution may apply to a defendant who has brought an action charging multiple grounds of liability when some, but not all, of the grounds were asserted without probable cause and with malice. Crowley v. Kattleman, 8 Cal. 4th at 671. In order to avoid having a malicious prosecution complaint being stricken as a SLAPP suit, the malicious prosecution plaintiff “need only establish that his or her claim has ‘minimal merit.’” Sycamore Ridge, 157 Cal. App. 4th at 1397.

The LaFave defendants, for their part, contended that they had not become involved in the litigation until August 31, 2004, that their participation was limited to providing expertise concerning mold, and that they had not had any contact with Powell. The trial court denied the Naumann defendants’ anti-SLAPP motion, but granted the LaFave defendants’ anti-SLAPP motion. The trial court ruled that Sycamore Ridge had failed to sustain its burden of demonstrating a probability that it would prevail against the LaFave defendants in its malicious prosecution action because there existed “no evidence that the LaFave defendants participated in the lawsuit.” Both the Naumann defendants and Sycamore Ridge appealed.

The Court of Appeal methodically discussed the elements of malicious actions and anti-SLAPP law. The Court handily sustained the order denying the Naumann defendants’ anti-SLAPP motion on the grounds that Sycamore Ridge had met its requisite burden noting, among other things, that “it became clear after Powell provided responses to the interrogatories that she was not claiming any physical injuries or property damage” yet “the Naumann defendants not only did not dismiss Powell’s causes of action based on personal injury and/or property damage, but they took the affirmative step of filing a statement of damages on her behalf.” Id. at 1403-1404.

As to the LaFave defendants, the Court concluded, “[T]he LaFave defendants cannot escape potential liability simply because they entered the case after it was well underway, and shortly before it was dismissed. One may be liable for malicious prosecution for prosecuting an action even if he or she did not institute the action.” Id. at 1406. The Court held,

Before agreeing to become attorney of record in a pending case, an attorney should, at a minimum, be familiar with his client’s claims and should have made a preliminary determination whether probable cause exists to support the asserted claims or defenses. By associating into the case as cocounsel, the LaFave defendants became the proponents of all of Powell’s claims, which included a large number of claims that were

untenable on their face. The LaFave defendants thus either knew or should have known of the significant deficiencies in Powell's claims at the time they associated into the case, and there is no evidence indicating that the LaFave defendants took immediate steps to dismiss the meritless claims upon associating into the case. Under these circumstances, Sycamore Ridge has made a sufficient showing that the probable cause prong of its malicious prosecution claim against the LaFave defendants has the "minimal merit" necessary to defeat the LaFave defendants' anti-SLAPP motion.

Id. at 1408.

The Court also found that there was sufficient evidence to infer malice on the part of the LaFave defendants to survive the anti-SLAPP motion, and therefore reversed the trial court's order granting the motion. The Court's holding serves as a warning to any attorney contemplating substituting or associating into a case: not only must you take care to do the obvious, such as avoiding conflicts of interest, but you must also familiarize yourself with the case to a sufficient degree so that you can spot potentially unmeritorious claims and issues in your new client's case. Thus, at a minimum, prior to or upon becoming an attorney of record in a case, a thorough review of the file--including a review of discovery responses and deposition transcripts--should be undertaken.

If it is discovered that a client's claim is clearly untenable, discussions should be immediately opened with opposing counsel to negotiate a dismissal of the case or claims *contingent upon a waiver of fees, costs, and expenses*. Failing a settled dismissal, an immediate dismissal of the claim should be considered since *continuing* to prosecute a lawsuit discovered to lack probable cause may also support a claim for malicious prosecution. Id. at 1398.

Of course, the reversal of the trial court's order granting the LaFave defendants' anti-SLAPP motion does not mean that the LaFave defendants could not otherwise prevail at trial or on summary judgment but here, too, the Court of Appeal's opinion contained a number of discussions of law that did not bode well for them. Furthermore, the LaFave defendants were deprived of an opportunity to extricate themselves from the case at the pleading stage and were deprived of the benefits, such as a mandatory award of attorneys' fees, that would have accompanied an anti-SLAPP victory. The message is therefore clear: you must know your case well--and that of each of your clients in a multi-party dispute--before substituting or associating into a case.

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