



Is More Litigation the Remedy for Meritless CEQA Litigation? Fourth District Concludes Malicious Prosecution Action Against Losing CEQA Plaintiffs Survives Anti-SLAPP Motion

By [Arthur F. Coon](#) on May 17, 2021

In an opinion filed April 23, and later certified for publication on May 13, 2021, the Fourth District Court of Appeal affirmed in part an order denying an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion, and held that a malicious prosecution action could proceed against losing CEQA plaintiffs who had unsuccessfully challenged a Mitigated Negative Declaration (MND), but not against their attorneys. *Jan Dunning, et al. v. Kevin K. Johnson, APLC, et al.* (4th Dist. 2021) ___ Cal. App. 5th ____. While the merits of the malicious prosecution action have yet to be determined, the Court of Appeal's ruling that the action could even proceed is itself significant given the daunting hurdle posed by the anti-SLAPP statute, and should give pause to project opponents who think that meritless CEQA litigation lacking probable cause and brought with malice can be pursued without potential consequence.

Setting the Stage: Malicious Prosecution, The Anti-SLAPP Statute, And The Underlying CEQA Action

The common law tort of malicious prosecution has three elements: (1) a prior action was commenced or maintained by defendant (i.e., the plaintiff in the prior action) and it terminated in favor of plaintiff (i.e., the defendant in the prior action); (2) the prior action was brought or maintained without probable cause; and (3) the prior action was initiated or maintained with malice. A lack of probable cause means, *objectively* viewed, the action is *legally untenable*, given the evidence and the legal theory asserted. The malice element is established by a showing that, *subjectively*, the defendant initiated the underlying action *primarily for an improper purpose*, e.g., without a belief in the claim's validity, out of hostility or ill will, to deprive a person of a beneficial use of property, and/or to force a settlement unrelated to the merits of the claim.

The anti-SLAPP statute, enacted in 1992, seeks to protect defendants from meritless lawsuits that chill constitutional rights of petition and free speech on issues of public concern, and it authorizes a special

motion to strike such claims early in the litigation. An anti-SLAPP motion has two steps: (1) the defendant must show the challenged allegations or claims arise from protected activity, and if so (2) the plaintiff must show its claims have at least “minimal merit” in order for them to proceed. Because no party disputed the underlying CEQA litigation in this case involved protected activity, the sole question was whether plaintiff demonstrated each element of the malicious prosecution claim had at least minimal merit, a showing described as implicating “a summary judgment-like procedure” requiring plaintiff to adduce competent admissible evidence sufficient to sustain a judgment in its favor. Orders on anti-SLAPP motions are immediately appealable and reviewed de novo on appeal.

The underlying CEQA litigation here involved Clews Horse Ranch’s challenge to the City of San Diego’s MND and project approvals for a private secondary school adjacent to its commercial horse ranch. The trial court denied the Ranch’s petition for writ of mandate and complaint, and the Court of Appeal affirmed that judgment in *Clews Land and Livestock, LLC v. City of San Diego* (2017) 19 Cal.App. 5th 161, my January 16, 2018 post on which can be found [here](#). That decision resulted in the termination of the underlying CEQA action in favor of the CEQA defendants/malicious prosecution plaintiffs, which satisfied the first element of the malicious prosecution tort.

**The Evidence And The Trial Court and Court of Appeal Decisions
On The Anti-SLAPP Motion and Order**

In affirming in part and reversing in part the trial court’s order denying the anti-SLAPP motion, the Court of Appeal held plaintiffs (Cal Coast) established a probability of prevailing on the malicious prosecution claim against Clews Horse Ranch, but not against the attorney defendants who represented the Ranch in its unsuccessful CEQA action. Cal Coast’s malicious prosecution action alleged three theories on the malice element: (1) the Ranch pursued the CEQA litigation for an improper purpose – to prevent or delay development of Cal Coast’s property; (2) the Ranch’s principal, Christian Clews, pleaded guilty to federal criminal child pornography charges, and used the CEQA litigation to maintain the seclusion that allowed him to perpetrate sexual abuse of children visiting the ranch; and (3) the attorney defendants pursued the CEQA litigation in hopes that Cal Coast would abandon its project, which would reduce the likelihood of the Ranch suing them for malpractice for failure to timely administratively appeal the MND.

The attorney defendants filed declarations denying the malpractice motivation, alleging they did not learn of Christian Clews’ criminal conduct until after filing the CEQA case appeal, and claiming they believed there were reasonable grounds to pursue the CEQA litigation. They also filed declarations from two other attorneys, with experience in municipal and environmental law, respectively, averring their opinions that there was good cause to challenge denial of the administrative appeal, and that there was probable cause to challenge the project on the merits. A Ranch principal averred in a declaration that she retained the defendant attorneys and pursued the CEQA litigation out of her genuine concerns with the school project’s environmental and safety impacts.

Cal Coast filed plaintiff and attorney declarations opposing the anti-SLAPP motion, claiming the Ranch engaged in “bad faith” settlement negotiations, in which they demanded “unreasonable concessions” demonstrating their real purpose to block or force abandonment of the project, and further averring the details of Christian Clews’ criminal arrest and the belief that he wanted to prevent development to keep his criminal activities private. Cal Coast submitted other declarations from individuals indicating the Ranch had interfered with use and development on the project site in the past, and that Christian had harassed and physically assaulted former owners.

Based on this evidence, the trial court denied the anti-SLAPP motion, finding at least minimal merit on the lack of probable cause element (based on the mishandled administrative appeal and the appellate

decision holding no fair argument requiring an EIR had been made) and also at least minimal merit on the contention that the CEQA action had been pursued with malice to deprive Cal Coast of the beneficial use of its property.

The Court of Appeal concluded Cal Coast had sufficiently established, with at least minimal merit, that the Ranch lacked probable cause for pursuing at least one of its CEQA theories – noise impacts requiring an EIR – both because the evidence advanced in support of it did not pertain to impacts on the environment of “persons in general” (as opposed to particular persons) and because that evidence was also speculative (and therefore insubstantial) lay opinion evidence. The Ranch’s criticisms of Cal Coast’s noise study showing no significant effect were also insufficient to provide substantial evidence to support a fair argument, and thus did not provide a basis to conclude the Ranch made a tenable argument under CEQA. Hence, “Cal Coast established a probability of prevailing on the issue of whether the defendants pursued at least one of their theories in the CEQA Litigation without probable cause,” and the Court thus found there was no need to consider Cal Coast’s other lack-of-probable cause arguments concerning administrative exhaustion, zoning, and other CEQA impact areas.

The malicious prosecution claim against the attorneys stood on different footing, however, according to the Court of Appeal. The improper motivations – i.e., malice – of Clews Horse Ranch in pursuing the litigation could not simply be imputed to its attorneys. Further, while a lack of probable cause is relevant to malice, standing alone it is an insufficient basis from which to infer the existence of that separate, subjective element. Accordingly, “[t]he alleged lack of probable cause and Clews Horse Ranch’s asserted motives do not constitute a prima facie showing of malice for the attorney defendants.” Nor, per the Court, was there evidence supporting a prima facie showing that the attorneys became aware of their clients’ improper motives and lack of probable cause at some point in the prosecution of the CEQA litigation. Further, the settlement negotiations actually did relate to the merits of the CEQA claims, and Cal Coast’s assertions and arguments that the attorneys acted in bad faith or for improper purposes to block or thwart the project through delay, with motivations to avoid malpractice liability, were speculative and unsupported by the appellate record. Thus, even though the record contained evidence supporting inferences of a lack of evidentiary support for one or more of the CEQA theories, a lack of factual investigation by the attorneys, and actual ill will of the Ranch toward Cal Coast, it was still insufficient to support an inference that the attorneys “*knowingly* pursued untenable claims or otherwise acted with malice” (emph. added); the record evidence was thus insufficient as a matter of law to establish the malice element of malicious prosecution as to them.

Conclusion and Implications

Historically, the tort of malicious prosecution has sometimes been considered by courts as “disfavored” satellite litigation, for obvious reasons – the expense and consumption of time and judicial and party resources involved in bringing and prosecuting separate, serial litigation hardly make it an ideal “remedy” for previously brought objectively untenable and subjectively malicious litigation. Nonetheless, as this case demonstrates, and despite the substantial hurdle posed by the anti-SLAPP statute, it remains as a potential remedy for maliciously prosecuted CEQA cases – if the successful CEQA defendants have the substantial resources and resolve necessary to pursue it.

But the “remedy” of a malicious prosecution action does not come without costs, and this case holds valuable lessons for both sides. For potential malicious prosecution plaintiffs, one lesson is to choose your defendants with care, and with careful attention to the sufficiency of the record evidence to establish all the necessary elements of the claim against them. Here, because it did not defeat the attorneys’ anti-SLAPP motion on appeal, plaintiff Cal Coast paid a steep price – it ended up being ordered to pay not



only the attorneys' appellate costs, but also their attorneys' fees as the prevailing defendants in an anti-SLAPP appeal.

On the flip side, there is a lesson for CEQA plaintiffs and their lawyers who may be tempted to pursue legally or factually untenable claims as part of a "shotgun" attack asserting numerous theories of CEQA noncompliance: think twice. If you lose the case, thus satisfying the malicious prosecution tort's "favorable termination" element, you may be held liable for maliciously prosecuting untenable *theories* of CEQA noncompliance – even if they are joined with other theories that are objectively tenable, i.e., supported by probable cause.

Bringing malicious prosecution actions against losing CEQA plaintiffs is a "high risk/high reward" proposition. It holds out the prospect of recovering actual and punitive damages for a winning plaintiff – *if* the plaintiff can survive the substantial anti-SLAPP hurdle (which itself will involve the substantial time and expense of an interlocutory appeal), and if it can then ultimately prevail on the merits prevail in the litigation (which will proceed with the trial court's determination of probability of success playing no role). But an unsuccessful plaintiff will be hit with an order to pay an undoubtedly hefty award of attorneys' fees under the anti-SLAPP statute in favor of the winning defendant. Not to mention the additional risks and burdens of potentially "going down the litigation rabbit hole" if a "SLAPPBack" cause of action is filed, essentially asserting that the malicious prosecution action itself constitutes malicious prosecution.

Notwithstanding the many potential perils and impracticalities involved in its pursuit in the CEQA context, perhaps the demonstrated availability of a malicious prosecution action in appropriate cases may still serve the salutary function of keeping potential CEQA plaintiffs from bringing meritless cases, or at least deterring them from "piling on" by pursuing untenable theories in "shotgun" fashion in the cases they do bring.

Questions? Please contact [Arthur F. Coon](#) of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrllegal.com.