

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARSHALL KRUPP,

Plaintiff and Appellant,

v.

LOMBARD STREET EQUITIES INC. et  
al.,

Defendants and Respondents.

G027399

(Consolidated with G027731)

(Super. Ct. No. 817971)

O P I N I O N

Appeals from judgments of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Law Offices of Sheldon I. Lodmer, Sheldon I. Lodmer and Robert D. Lipscomb for Plaintiff and Appellant.

Stewart, Dimmick, Marshall & Zell, Kellie S. Christianson and Scott P. Cranny for Defendants and Respondents Lombard Street Equities, Inc., Ray Malzo, Ronald Keilwitz, George A. Harrelson, Jr., and William Taylor.

Richard M. Henry, in pro. per., for Defendant and Respondent.

\* \* \*

In consolidated appeals, plaintiff Marshall Krupp challenges the trial court's judgment dismissing his action after sustaining demurrers without leave to amend in favor of defendants Lombard Street Equities, Inc. and several of its employees and/or officers, Ray Malzo, Ronald Keilwitz, George A. Harrelson, Jr., and William Taylor (collectively Lombard; G027731), and Richard M. Henry, Lombard's attorney (G027399). Plaintiff argues he had adequately alleged the elements for malicious prosecution against Lombard, and the court erroneously concluded Lombard and Henry were protected by the litigation privilege. We disagree and affirm.

## FACTS

According to plaintiff's complaint, Lombard Street Equities, Inc. operates a motorcycle dealership under the name Orange County Harley-Davidson. Plaintiff purchased a motorcycle from Lombard and, dissatisfied with its services and repairs, returned to the dealership. Because "[d]efendants . . . did not like the fact that [p]laintiff was standing up to each of them in protecting his rights[,] . . . [they] chose to have [him] arrested . . . ." Plaintiff was arrested and charged with violating Penal Code 602.1, subdivision (a), obstructing or intimidating a business operator or its customers. The criminal proceeding was dismissed.

Soon after, Henry, Lombard's attorney, sent a letter to plaintiff formally notifying him that he was barred from entering the dealership based on a valid order entered by the court after plaintiff was "prosecuted for violating Penal Code, § 602.1[, subd.] (a)." The letter further noted immediate assistance from local law enforcement agencies would be sought if plaintiff committed any future violations. Plaintiff's complaint also indicated this letter "was seen and read by persons who reside in and around the area where [he] lives and works."

Plaintiff sued Lombard for malicious prosecution, false arrest, intentional infliction of emotional distress, slander, and libel. He also named Henry as a party to the libel action. Plaintiff alleged Lombard acted without an honest, good faith belief when they filed a false criminal complaint, which led to his arrest and criminal prosecution. He claimed Lombard's conduct was motivated by complaints he had made about them to the Harley-Davidson main office. Plaintiff also alleged the criminal proceeding was ultimately dismissed "in the interest of justice" because there was insufficient evidence to support a case against him. Further, he asserted Henry, at Lombard's behest, published a letter falsely stating he had been prosecuted for violating Penal Code section 602.1, subdivision (a), and that he was subject to a valid court order barring him from the dealership.

Lombard and Henry separately demurred. Both Lombard and Henry argued any statements they made were privileged pursuant to Civil Code section 47, subdivision (b), and thus, were immune from liability. Lombard further asserted that plaintiff could not state a claim for malicious prosecution because the underlying criminal proceeding did not terminate in his favor. To support their position, Lombard requested the court take judicial notice of plaintiff's criminal court file, *People v. Krupp*, (Super. Ct. Orange County, 1999, No. SA99CM02397). The file indicated the district attorney agreed to dismiss the action if plaintiff "stay[ed] away from [the dealership] . . . and violate[d] no further laws for 4 months." Approximately three months later, the criminal action was dismissed.

The court sustained both demurrers without leave to amend. Taking judicial notice of the criminal court file, it found the dismissal of plaintiff's criminal charge did not amount to a "favorable termination" to support his claim of malicious prosecution against Lombard. It further determined plaintiff failed to state causes of action for false arrest, intentional infliction of emotional distress, libel or slander because

Lombard and Henry were protected by the litigation privilege (Civ. Code, § 47, subd. (b)). The court dismissed the suit as to all defendants. Plaintiff appealed.

## DISCUSSION

### *Standard of Review*

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’ [Citation.]” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

### *Litigation Privilege*

Plaintiff contends the court erred in sustaining the demurrers in favor of Lombard and Henry because their communications do not fall within the protection of the litigation privilege. He identified two separate communications he asserted were actionable: (1) Lombard’s report to the police; and (2) Henry’s letter. Specifically, plaintiff asserts Lombard’s statements to the police were false, malicious, and not made in good faith, and Henry’s letter contained false assertions and was not connected to any proceeding because the underlying criminal action had been dismissed a month earlier. His contentions fail.

“[A] communication is privileged under [Civil Code] section 47, subdivision (b) if made in, or in anticipation of, litigation by litigants or other authorized participants to achieve the objects of the litigation, and if the communication has some connection or logical relation to the action. [Citations.]” (*Rothman v. Jackson* (1996)

49 Cal.App.4th 1134, 1145; see also *O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134.) When this privilege applies, it is absolute. (*Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 266.) “. . . For policy reasons, even an act committed fraudulently or with malice is privileged . . . .” (*O'Keefe v. Kompa, supra*, 84 Cal.App.4th at p. 135.)

Communication to police intended to prompt a criminal investigation or to report suspected illegal activity falls within this class of absolute privilege. (*Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1502-1503 [communication to police, which led to detention of wrong individual]; *Cote v. Henderson* (1990) 218 Cal.App.3d 796, 806 [criminal acts reported to police and district attorney].) Thus, even if we assume Lombard acted maliciously and in bad faith by making a false report to the police, plaintiff's claims for false arrest, intentional infliction of emotional distress, slander, and libel must fail because Lombard's statements were absolutely privileged, serving as a complete defense to those causes of action. (See, e.g., *Whelan v. Wolford* (1958) 164 Cal.App.2d 689, 693; *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 29.) Further, Henry's letter also falls within the litigation privilege. The letter was directly related to the underlying action. It specifically referred to the criminal proceedings and served to define and protect Lombard's rights against plaintiff. The dismissal of the criminal action does not alter the letter's relevance or logical connection to the litigation, nor does it prevent the application of the litigation privilege. (See *O'Keefe v. Kompa, supra*, 84 Cal.App.4th at p. 134-135 [privilege applies to postjudgment “enforcement efforts”].)

### *Malicious Prosecution*

Plaintiff asserts the court erred by sustaining the demurrer because nothing in his criminal court file indicates he obtained an unfavorable termination in the underlying action. He asserts that the court file “disclosures are consistent with a belief by the District Attorney that [he] was not guilty.” We disagree.

To maintain a claim for malicious prosecution, a plaintiff must demonstrate a defendant, acting with malice, initiated a civil or criminal action against him or her without probable cause, and the action was terminated in plaintiff's favor. (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 892-893.) Simply establishing that an action was dismissed is insufficient to support a malicious prosecution claim. (*Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855.) "The key is whether the termination reflects on the underlying defendant's innocence. [Citations.]" (*Ibid.*) "A termination is favorable when it reflects "the opinion of someone, either the trial court or the prosecuting party, that the action lacked merit or if pursued would result in a decision in favor of defendant." [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881.)

Though the action was dismissed in plaintiff's favor, there is no indication that the district attorney refused to pursue the matter due to a lack of sufficient evidence. Further, the criminal court file fails to demonstrate that the court or the district attorney believed plaintiff to be innocent. Instead, the court file suggests the dismissal stemmed from a compromise between the district attorney and plaintiff. "[A] resolution of the underlying litigation that leaves some doubt as to the defendant's innocence or liability is *not* a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff. Thus, a dismissal resulting from negotiation, settlement or agreement is generally not deemed a favorable termination of the proceedings. [Citations.]" (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335.) The dismissal of the underlying criminal complaint does not constitute a favorable termination to support plaintiff's malicious prosecution claim.

DISPOSITION

The judgments are affirmed. Respondents shall recover costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.