

A Commercial Litigator's Guide to the Tort of Malicious Prosecution

By Y. David Scharf, Danielle C. Lesser and David C. Pollack
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(L-R) Scharf, Lesser, Pollack of Morrison Cohen

Imagine that your corporate client has just been sued for dubious, but highly publicized, allegations of wrongdoing, prompting several of your client's key customers to depart before you can move to dismiss. What are your potential remedies? Among other things, you may consider an action for malicious prosecution. Although this is a very difficult claim to make, when each of its elements are met, an action for malicious prosecution – or even a credible threat of it – can provide redress for frivolous claims and help deter them in the future.

In general, the elements of malicious prosecution are (i) a prior proceeding, which (ii) successfully terminated in favor of the malicious prosecution plaintiff (i.e., the defendant in the prior action), (iii) was brought without probable cause, (iv) was initiated out of malice; and in some jurisdictions, including New York, (v) a showing of special damages is also required.

Malicious prosecution claims often arise out of formal criminal proceedings, but many different types of “proceedings” will suffice, pursuant to the first element above; even a counterclaim can suffice. While there is a dearth of New York law on the point, the Restatement (Second) of Torts, § 674 (comment a), makes clear that, as a general rule, the filing of a counterclaim constitutes a “proceeding” for malicious prosecution purposes. This can be significant for a company that has chosen to litigate a relatively straightforward legal issue against an adversary, who responds with headline-grabbing counterclaims of dubious legal merit.

D/F Management LLC v. Julianna Margulies

One high-profile example of this phenomenon occurred in the experience of D/F Management LLC (“D/F”) in response to its suit against actress Julianna Margulies for unpaid commissions. D/F’s action, filed in Los Angeles Superior Court in July 2012, was supposed to be a simple breach of contract case. However, Margulies responded with counterclaims laced with personal attacks against her former manager at D/F, whom she alleged had “certain personal problems” and engaged in “inappropriate” behavior around her. [1] Taking the position that these counterclaims were wholly without merit, D/F publicly warned that it was

considering a malicious prosecution action against Margulies based upon her claims. While Margulies’s counsel dismissed the warning, it did not (at least publicly) challenge D/F’s right, in principle, to pursue a malicious prosecution claim based upon counterclaims asserted against it.

The *D/F v. Margulies* dispute also implicated the second element of malicious prosecution – that the prior proceeding be terminated successfully. Unlike other remedies for frivolous litigation, such as a motion for sanctions or claims for defamation, which should be pursued as soon as practical, a malicious prosecution claim need not – and typically cannot – be filed until the conclusion of the prior proceeding. Thus, while Margulies’s counterclaims were filed in November 2012, D/F did not announce that it was considering a malicious prosecution action until August 2013. In the intervening months, D/F amassed evidence in discovery that its counsel asserted would allow D/F to seek damages for malicious prosecution after trial on the initial action.

D/F never brought the malicious prosecution action, as the parties announced a settlement in late August. But the threat of the action may have been helpful in bringing Margulies to the negotiating table. Nonetheless, waiting to pursue a malicious prosecution claim, while sometimes the best option, should not be considered as an exclusive remedy to frivolous litigation. Depending on the circumstances, a motion for sanctions and/or a counterclaim for defamation may be pursued even while an action for malicious prosecution is contemplated, so long as the elements of those remedies are met.

Lack of Probable Cause and Malice

The crux of the malicious prosecution claim is the third element: lack of probable cause. This is a very high bar, particularly where the prior proceeding was a civil action rather than a criminal one. Given that no malicious prosecution claim can stand where a litigant acts in good faith and takes a reasonable, albeit erroneous, position, proving lack of probable cause requires an extraordinary showing of impropriety.**[2]** In the *D/F v. Margulies* dispute, for instance, D/F alleged that it had evidence showing that Margulies’s counterclaims relied on knowingly false statements of material fact and that Margulies tried to improperly influence a key witness’s testimony an hour before her deposition.

Evidence of such sweeping allegations of wrongdoing is as rare as it is essential to malicious prosecution claims, especially if any of the claims in the prior proceeding survived a dispositive motion. A finding against the malicious prosecution plaintiff on a motion in the prior proceeding based upon factual issues (as opposed to purely legal questions) can create a “presumption” that probable cause existed in the prior proceeding. That presumption can only be overcome by evidence of fraud, perjury or the suppression of evidence, without which the malicious prosecution claim cannot withstand a motion to dismiss.**[3]**

Even where such a presumption has not been created, malicious prosecution plaintiffs in New York must demonstrate an “entire lack of probable cause,” as the Appellate Division, Third Department, emphasized in *Perryman v. Village of Saranac Lake*, 41 A.D.3d 1080, 1081 (3d Dep’t 2007). In *Perryman*,

the court noted that there was probable cause for at least 16 out of the 19 claims asserted in the prior proceeding, and that this was enough to establish probable cause for the proceeding “as a whole.” To be sure, the *Perryman* court recognized that litigants cannot necessarily escape liability for malicious prosecution where they assert “as many serious but unsubstantiated charges as they wish, as long as probable cause exists for at least one minor charge.” Nonetheless, the court found no evidence that the malicious prosecution defendant in *Perryman* engaged in that practice, and dismissed the malicious prosecution claim.

If the lack-of-probable-cause element can be met, the malicious prosecution plaintiff must also show “actual malice.” This means that the prior proceeding was brought with “a wrong or improper motive, something other than a desire to see the ends of justice served,” as the New York Court of Appeals explained in *Nardelli v. Stamberg*, 44 N.Y.2d 500, 503 (1978). This does not require direct evidence of a malicious motive, but it does require evidence from which a spiteful motivation can be inferred. Thus, malice may exist where an adversary makes knowingly false statements and knows that its claims will cause harm.

Special Damages

In New York, the final element of malicious prosecution is special damages. Pursuant to the New York Court of Appeals ruling in *Engel v. CBS, Inc.*, 93 N.Y.2d 195, 204 (1999), special damages can only be shown if the result of the prior proceeding interfered with the malicious prosecution plaintiff’s freedom (e.g., arrest), property (e.g., attachment), or other similarly dire consequence. Thus, the *Engel* Court made clear that something far beyond “the physical, psychological or financial demands of defending a lawsuit” is necessary to support a claim for malicious prosecution. Such things as “the loss of one client” and “vague allegations of reputational loss” were held to be insufficient by the *Engel* court, and similar showings have been held insufficient in lower courts.[4]

Nonetheless, the *Engel* court did suggest that “specific, verifiable loss of business” could provide the “necessary grievance” to satisfy the special damages requirement. Thus, based upon *Engel*, New York County Commercial Division Justice Shirley Kornreich held, in *Strumpf v. Asdourian*, No. 110141-2006, 2006 N.Y. Misc. LEXIS 3976, at *10 (Sup. Ct. N.Y. County, Dec. 12, 2006), that a malicious prosecution plaintiff had put forward special damages sufficient to defeat a motion to dismiss. In that case, Justice Kornreich held that the pleading specifically alleged actual damages in the amount of \$100,000 stemming from “a hike in [the malicious prosecution plaintiff’s] malpractice insurance rates . . . [and] the loss of certain clients whom she was compelled to advise regarding the malpractice suit pending against her.”

Capitalizing on Malicious Prosecution

The above-mentioned issues relating to malicious prosecution are crucial for businesses whose perceived “deep pockets” can lead any litigant to assert unsubstantiated claims against these businesses in the hopes of extracting a quick settlement payment. As noted, malicious prosecution is a very difficult claim to make and will often be unavailable, given its stringent requirements. But its distinct advantages (and

pitfalls) should be considered when the negative publicity of a potentially frivolous claim is felt. As in the D/F case, the simple mentioning of the prospect of a malicious prosecution action has the potential to turn the tables in the public eye, which in some cases, can be the most important.

Y. David Scharf and **Danielle C. Lesser** are partners in the Business Litigation Department at Morrison Cohen LLP. **David C. Pollack** is an associate with the firm in the same department.

[1] Case No. BC 487959, Defendant Julianna Margulies' Cross-Complaint Against D/F Management, LLC, filed on Oct. 5, 2012, ¶¶ 4, 7; *see also Julianna Margulies Threatened With Malicious Prosecution Lawsuit in Ex-Manager Fight*, "The Hollywood Reporter," dated Aug. 21, 2013, available at <http://www.hollywoodreporter.com/thr-esq/julianna-margulies-threatened-malicious-prosecution-608979> (last visited Sept. 12, 2013); *Julianna Margulies Settles 'Good Wife' Commissions Lawsuit With Ex-Managers*, "Deadline," dated Aug. 28, 2013, available at <http://www.deadline.com/2013/08/julianna-margulies-settles-good-wife-commissions-lawsuit-with-ex-managers/> (last visited Sept. 12, 2013).

[2] *Passlogix, Inc. v. 2FA Tech., LLC*, 708 F. Supp. 2d 378, 408 (S.D.N.Y. 2010) (finding that litigant acted in "good faith based upon 'an advocate's view of the evidence'" (citing *Intelli-Check, Inc. v. Tricom Card Techs., Inc.*, No. 03 Civ. 3706, 2005 U.S. Dist. LEXIS 38196, at *37 (E.D.N.Y. Dec. 22, 2005)); *see also Fink v. Shawangunk Conservancy, Inc.*, 15 A.D.3d 754, 755 (3d Dep't 2005) (holding that lack of probable cause must be "patent" where it is based on a prior civil proceeding); N.Y. Jur., False Imprisonment and Malicious Prosecution § 79.

[3] *Maxwell v. City of New York*, 156 A.D.2d 28, 34 (1st Dep't 1990) (quoting *Gisondi v. Town of Harrison*, 72 N.Y. 2d 280, 284 (1988)); *see also I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 207 (1st Dep't 2005) ("[A] judgment . . . entered against the malicious prosecution plaintiff in the prior action . . . is at least prima facie evidence that the prior action was based on probable cause.").

[4] *Kaye v. Trump*, 58 A.D.3d 579, 580 (1st Dep't 2009) (finding no special damages where malicious prosecution plaintiff "conclusorily alleged that she was forced by defendants' 'acts' to sell her condominium unit and move from the building"); *Villacorta v. Saks Inc.*, No. 100168/2007, 2011 N.Y. Misc. LEXIS 3036, at *16 n.6 (Sup. Ct. May 6, 2011) (holding "cost of defense . . . including investigation costs" insufficient for special damages purposes).

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