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The new legal recourse for judgment debtors in ex parte proceedings

By Shawn Shaffie and Allan J. Favish

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Legal practitioners representing judgment debtors may have an easier burden when pursuing malicious prosecution claims. Traditionally, to succeed in a malicious prosecution claim, a plaintiff must prove the underlying legal proceeding was terminated in their favor. However, this requirement may not apply if the proceeding arises from a wrongful ex parte proceeding in which your client was not given an opportunity to be heard, and in which often, a creditor obtains a court order without the other party's knowledge or even opportunity to respond. Here, you should be aware of the ex parte exception to malicious prosecution requirements.

Lack of due process: Ex parte proceedings can deprive parties of their fundamental right to due process

Under California law, to prevail on a malicious prosecution claim, a plaintiff usually must prove that the prior proceeding was pursued to a legal termination in the plaintiff's favor. The issue of whether this requirement applies when the prior proceeding was ex parte and where the opposing party had no opportunity to be heard, has not been directly decided by a California appellate court. However, other authorities clearly state that the requirement does not apply in the context of an ex parte proceeding where the opposing party had no opportunity to be heard.

Potential for abuse: Creditors may exploit this process to gain unfair advantages, potentially leading to the wrongful seizure of assets

One situation in which this could arise is when a judgment creditor initiates an ex parte proceeding where the judgment debtor has no opportunity to be heard, and thereby obtains an enforcement order against the judgment debtor which is used to seize the judgment debtor's assets. The judgment debtor may want to sue the judgment creditor for malicious prosecution if the ex-parte proceeding in which the judgment debtor had no opportunity to be heard, was brought without probable cause and was initiated with malice. Under such circumstances, does the enforcement order need to be overturned before a malicious prosecution action can be successful? The answer is probably no.

Expanded legal recourse: California case law aligns with broader legal principles to suggest the traditional requirement of favorable termination will not apply to ex parte proceedings

The California Supreme Court set forth the elements of malicious prosecution: "[A] plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's favor . . . (2) was brought without probable cause . . . and (3) was initiated with malice . . . ." *Zamos v. Stroud*, 32 Cal. 4th 958, 965-66 (2004) (quoting *Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 50 (1974)). At footnote 6 in Zamos, the California Supreme Court favorably cited Restatement (Second) of Torts § 674, which describes a malicious prosecution claim without using the phrase "malicious prosecution":

One who takes an active part in the initiation, continuation, or procurement of civil proceedings

against another is subject to liability to the other for wrongful civil proceedings if:

(a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

Comment f to section 674 states:

Ancillary proceedings. A particular civil proceeding may be ancillary to other proceedings. Thus an attachment may be issued to secure the payment of a possible future judgment. If the principal proceedings were improperly brought under the rule stated in this Section, compensation for the harm done by the ancillary proceedings is recoverable as part of the damages for the improper initiation of the principal proceedings. Even though the principal proceedings are properly brought, the ancillary proceeding may be wrongfully initiated. In this case, the wrongful procurement and execution of the ancillary process subjects the person procuring it to liability under the rule stated in this Section. If the ancillary proceedings are ex parte, the person against whom they are brought need not prove a termination of proceedings favorable to him.

Comment k to section 674 states:

Ex parte proceedings. Under the rule stated in this Section, an action may be maintained for the wrongful initiation of ex parte proceedings without proving that they have terminated in favor of the person against whom they have been brought. Proceedings are ex parte when relief is granted without an opportunity for the person against whom the relief is sought to be heard.

When discussing the elements of malicious prosecution, Witkin recognizes the exception regarding ex parte proceedings in which the opposing party had no opportunity to be heard. Witkin states that "[t]he prior civil action or proceeding must have terminated in favor of the present plaintiff. . . . Rest.2d, Torts § 674" and also notes "Comment k [noting exception where prior proceeding was ex parte]. . . ." *See* 5 Witkin, Summary of California Law, 11th, Torts § 585 (2024). Witkin also states that the "[p]rior civil action or proceeding must have terminated in favor of plaintiff: *See* Rest.3d, Torts: Liability for Economic Harm § 24" and also notes "Comment g (superseding Rest.2d, Torts § 674) [continuing to note exception where prior proceeding was ex parte]." *Id.* The Reporter's Note to Restatement (Third) of Torts § 24 states: "This Section is the successor to Restatement Second, Torts §§ 674, 676, 680, and 681A-681B (AM. LAW INST. 1977)."

Restatement (Third) of Torts § 24 (2020) sets forth the circumstances under which an actor is subject to liability for the wrongful use of civil proceedings. Comment g to section 24 states:

It sometimes is said that a party is excused from the need to show favorable termination in a suit under this Section if the proceedings at issue were ex parte–that is, if the party against whom relief was sought had no opportunity to be heard. Applications of this principle are rare. It makes good sense, however, if the party adversely affected by the proceedings had no reasonable chance to obtain a favorable termination in them because there was no chance to participate.

A leading torts treatise recognizes the malicious prosecution requirement that the wrongful proceedings must have terminated in the malicious prosecution plaintiff's favor, unless the proceedings "had been ex parte in character." F. Harper, F. James, Jr. & O. Gray, Harper, James and Gray on Torts, Third Edition § 4.8, at 515-516, 518 (2006) (footnotes omitted).

In *Rutherford v. Johnson*, 250 Cal. App. 2d 316, 319-20 (1967) the Court of Appeal quoted the malicious prosecution requirements from section 674 of the first Restatement of Torts, including the ex parte exception, but the case did not involve the ex parte exception.

Therefore, it is likely that a California appellate court would hold that a judgment debtor suing for malicious prosecution does not have to prove that an ex parte proceeding in which the judgment debtor had no opportunity to be heard, which was brought with malice and lacking probable cause, was terminated in the judgment debtor's favor. In this way, judgment debtors may be able to seek damages for harm caused by malicious and unfounded legal actions taken vis-à-vis ex parte.

Shawn Shaffie *is a partner, and* **Allan J. Favish** *is senior counsel at Parker Shaffie LLP.*

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