

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES G. WARNER,
Debtor.

Case No. 97-55564
Chapter 7

DANIEL C. WHITE,
Plaintiff,

Adversary No. 97-5480

vs.

**MEMORANDUM DECISION AND
ORDER THEREON**

CHARLES G. WARNER,
Defendant.

I. Introduction

The debtor and defendant has brought this motion for summary judgment claiming that, as a matter of law, the plaintiff cannot establish the non-dischargeability of his claim for damages for malicious prosecution. For the reasons hereinafter explained, the motion is granted.

II. Statement of Facts

Charles G. Warner, Esq. represented twelve of Dr. Daniel C. White's former patients in dental malpractice actions against White. Warner filed numerous lawsuits asserting legal theories of professional negligence, lack of informed consent, spoliation of evidence, fraud, and intentional infliction of emotional distress. With respect to the matter before the Court, however, ultimately White prevailed in five lawsuits

1 as follows:

<u>Plaintiffs</u>	<u>Date Filed</u>	<u>Result</u>
<u>Bassett</u>	March 24, 1993	Dismissed by an unopposed summary judgment motion
<u>Senko</u>	March 24, 1993	Dismissed by a summary judgment motion based on the statute of limitations
<u>Rodriguez</u>	March 24, 1993	Voluntarily dismissed with prejudice
<u>Kelley</u>	May 13, 1993	Dismissed by a summary judgment motion
<u>Bryant</u>	August 27, 1993	Dismissed by an unopposed summary judgment motion

9 White sued Warner in state court for malicious prosecution. When Warner filed bankruptcy, White filed
10 this complaint to except his claim from discharge pursuant to 11 U.S.C. §523(a)(6).

11 At the initial hearing on the motion for summary judgment, the Court determined that the result
12 would turn on whether Warner had probable cause for bringing the actions when he filed the lawsuits.
13 The Court requested an additional declaration detailing Warner’s knowledge at the time the suits were
14 filed. In his Supplemental Declaration, Warner has stated that before filing any of the actions, he knew
15 the following facts.

16 With respect to professional negligence, Warner declared he knew that all patients had
17 complained of dental problems which they related to treatment by White. Dr. Jacobson, a licensed dentist
18 and attorney, rendered his opinion as a dental professional that there had been malpractice in every case.
19 Former patients had complained about White to the California Board of Dental Examiners. Two patients
20 in unrelated lawsuits had obtained substantial settlements against White after their attorney discovered
21 evidence of substandard care by White, and that he had performed oral surgery after he injecting himself
22 with heroin. There was evidence that White abused drugs during at least some of the same periods when
23 was treating these patients. Dr. Jacobson advised Warner that it is below the standard of care for a
24 dentist to work on patients if addicted, even if the dentist is not “high” at the moment.

25 With respect to lack of informed consent, Warner declared he knew from the interviews that he
26 or Dr. Jacobson had with the patients that White failed to speak to his patients about the consent forms
27 until after their dental work had been done. White failed to adequately explain the options available to
28 his patients. White never told his patients that he was addicted to illegal drugs.

1 With respect to spoliation of evidence, Warner declared he knew from representing two related
2 patients that White habitually kept incomplete dental charts and that he altered the information on the
3 charts. White's staff was evasive and not forthcoming when asked to furnish dental records. A tape
4 which White had made of discussions with Senko inexplicably disappeared from White's office.

5 With respect to fraud, Warner declared he knew from the discussions that he or Dr. Jacobson had
6 with patients that White habitually lied to his patients and withheld vital information from them, including
7 information concerning alternative treatments, his abuse of controlled substances, and his improper billing
8 practices. White used "phony" slide shows depicting rotting teeth and gums and alternatively perfect
9 teeth, in order to convince his patients to authorize treatment. Two patients needed to have White's
10 work redone at substantial expense. In addition, White periodically double-billed his patients.

11 With respect to intentional infliction of emotional distress, Warner declared he knew from the
12 discussions that he or Dr. Jacobson had with these patients that White over-medicated patients, and that
13 White had physically threatened at least one former patient. Warner believed that the known facts recited
14 in support of the other legal theories also supported a claim for emotional distress.

15 III. Contentions of the Parties

16 Warner maintains that prior to filing these lawsuits he knew of undisputed facts from which a
17 reasonable lawyer could conclude that the causes of action were tenable against White.

18 White opposes the motion for summary judgment on four grounds. First, White argues that a
19 triable issue of fact exists as to Warner's knowledge concerning the drug allegations. Second, White
20 contends that Warner failed to investigate any of the facts or allegations before filing the lawsuits. Third,
21 White claims that a contradiction exists between Warner's original and supplemental declarations
22 regarding a declaration by a former White employee, which White contends rendered Warner's
23 declaration not credible. Fourth, White argues that Warner's failure to comply with the California Code
24 of Civil Procedure §364, requiring ninety days notice before an attorney may commence a professional
25 negligence action, bars summary judgment.

26 IV. Discussion

27 A. Standard for Summary Judgment

1 In order to prevail on a motion for summary judgment under Federal Rule of Civil Procedure
2 56(c), the moving party must show that there are no genuine issues of material fact and that the moving
3 party is entitled to judgment as a matter of law. Bhan v. Nme Hospitals, Inc., 929 F.2d 1404, 1409 (9th
4 Cir. 1991), *cert. denied*, 502 U.S. 994 (1991). To demonstrate that he is entitled to judgment as a matter
5 of law, Warner is not required to produce evidence to negate White’s claim. Instead, Warner need only
6 show that White’s evidence is insufficient to establish an essential element of his claim. See Celotex
7 Corp. v. Catrett, 477 U.S. 317, 323 (1986).

8 In order to establish a cause of action for malicious prosecution, a plaintiff must prove that a prior
9 action was (1) commenced by or at the defendant’s direction and terminated in the plaintiff’s favor; (2)
10 brought without probable cause; and (3) initiated with malice. See Sangster v. Paetkau, 68 Cal. App. 4th
11 151, 163 (1998). The determinative issue in this case is whether probable cause can be established.

12 The probable cause element of a malicious prosecution action requires a judicial determination
13 of the reasonableness of the defendant’s prior lawsuit. The question for the court is whether, on the basis
14 of the facts known to the defendant, the prosecution of the prior action was “legally tenable.” Sangster,
15 68 Cal. App. 4th at 164. When determining whether the prior action was legally tenable, the court must
16 construe the allegations of the underlying complaint in the light most favorable to the malicious
17 prosecution defendant. Id. at 165. In all cases, probable cause is to be determined by an objective
18 standard. If any reasonable attorney would have thought the claim tenable, then probable cause is not
19 lacking. Id.

20 Although the existence or absence of probable cause has “traditionally been viewed as a question
21 of law to be determined by the court,” a court cannot decide this issue of law unless the facts relevant
22 to the issue are undisputed. Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 875 (1989). Thus,
23 the Court must first consider whether a material issue of fact exists as to the state of Warner’s factual
24 knowledge at the time he filed the lawsuits. Next, the Court will evaluate whether these facts are
25 sufficient to support probable cause.

26 **B. There are no genuine issues of material fact as to the state of Warner’s factual knowledge**
27 **at the time he filed the lawsuits.**

28 There is no dispute as to what Warner knew at the time he filed the lawsuits. In his Supplemental

1 Declaration, Warner has enumerated clearly the facts known to him, as well as the sources of his
2 information. Although Warner’s Declaration contains conclusory statements, it also includes the facts
3 from which Warner derived his conclusions.

4 What White challenges are the conclusions Warner drew from the facts, and not the facts
5 themselves. In his Objection to Warner’s Supplemental Declaration, White does not dispute the
6 information that Warner obtained from work done on previous lawsuits, from discussions with former
7 patients, or from Dr. Jacobson. Instead, White argues that the facts known to Warner were insufficient
8 to support the existence of probable cause.

9 Although White argues that a triable issue of fact exists as to Warner’s knowledge concerning the
10 veracity of the drug abuse allegations, the Court finds that this fact is not material to a determination of
11 probable cause. The fact that there may be some disputed facts on the record does not by itself defeat
12 a motion for summary judgment in a malicious prosecution action. See Hufstedler, Kaus & Ettinger v.
13 Superior Court, 42 Cal. App. 4th 55, 62 (1996) (citation omitted). The Court’s analysis is limited to the
14 facts that are undisputed.

15 **C. The facts are sufficient to support a finding of probable cause.**

16 When determining probable cause, a court is not required to examine whether the defendant
17 would have prevailed in a prior action. Rather, the court need only decide whether the defendant’s claims
18 were tenable. As the California Supreme Court has stated, litigants “have a right to present issues that
19 are arguably correct, even if it is extremely unlikely that they will win.” Sheldon Appel, 47 Cal. 3d at
20 885. Given the undisputed facts, the Court finds that there was an arguable case for each cause of action.

21
22 For a claim of professional negligence, the plaintiff must show that the defendant’s act or omission
23 fell below the standard of care in the community, and that this act or omission was the proximate cause
24 of the plaintiff’s injuries. See Willard v. Hagemester, 121 Cal. App. 3d 406 (1981); see also BAJI (8th
25 ed.) BAJI No. 6.00. Given that White’s patients complained of dental problems which they related to
26 treatment by White, and that it was Dr. Jacobson’s opinion as a dental professional that there had been
27 dental malpractice in every case, the Court finds that there was an arguable case for professional
28 negligence.

1 To establish a claim of lack of informed consent, the plaintiff must show that the defendant failed
2 to disclose all relevant information which would enable the plaintiff to make an informed decision
3 regarding the proposed treatment. BAJI (8th ed.) BAJI No. 16.01.1. Given that White failed to speak
4 to his patients about consent forms until after he completed their dental work, and that White failed to
5 adequately explain the dental alternatives available to his patients, the Court finds that there was an
6 arguable case for lack of informed consent.

7 To establish a claim for intentional spoliation of evidence, a plaintiff must show that (1) the
8 plaintiff possessed a claim for damages against the defendant; (2) the defendant was aware of this claim;
9 (3) the defendant knew of the existence of records and other information which might constitute evidence
10 in pending or potential litigation; (4) the defendant caused the destruction, damage, loss, or concealment
11 of those records; and (5) as a result the plaintiff sustained damage. BAJI (8th ed.) BAJI No. 7.95. Given
12 that in previous lawsuits White had altered records, and that a tape containing discussions with a former
13 patient inexplicably disappeared from White's office, the Court finds that there was an arguable case for
14 spoliation of evidence.

15 To establish a claim for fraud, the plaintiff must show that (1) the defendant made a
16 misrepresentation with the knowledge of its falsity; (2) the defendant intended to defraud the plaintiff;
17 (3) the plaintiff justifiably relied on the representations; and (4) as a result, the plaintiff sustained damage.
18 See Cicone v. URS Corp., 183 Cal. App. 3d 194, 200 (1986); see also BAJI (8th ed.) BAJI No. 12.31.
19 Given that White customarily used slide shows to encourage his patients to authorize treatment, that
20 former patients needed to have White's work done at substantial expense, and that it was Dr. Jacobson's
21 opinion that White performed unnecessary procedures on his patients, the Court finds that there was an
22 arguable case for fraud.

23 To establish a claim for intentional infliction of emotional distress, the plaintiff must show that
24 (1) the defendant's conduct was outrageous; (2) the defendant intended to cause emotional injury; (3)
25 the plaintiff suffered severe emotional distress; and (4) the defendant's conduct caused the injury. See
26 Davidson v. City of Westminster, 32 Cal. 3d 197, 209 (1982); see also BAJI (8th ed.) BAJI No. 12.70.
27 Given that White had over-medicated at least one patient, that he failed to disclose relevant information
28 to his patients, that he used slide shows to encourage authorization of procedures, and that his patients

1 complained of dental problems which they related to treatment by White the Court finds that there was
2 an arguable case for intentional infliction of emotional distress.

3
4 **D. An attorney’s belief in the tenability of a claim is irrelevant to a determination of probable cause.**

5 White’s argument that Warner lacked probable cause because he may have believed that the drug
6 allegations were false lacks merit because it suggests that probable cause is determined according to a
7 subjective standard. The California Supreme Court has emphasized that the resolution of the probable
8 cause question calls for the application of an objective standard to the facts on which the defendant acted.
9 “The question is not whether he thought the facts to constitute probable cause, but whether the court
10 thinks they did.” Sheldon Appel, 47 Cal. 3d at 881. If a court concludes that any reasonable attorney
11 would have thought the prior action tenable, then probable cause is not lacking. The defendant is entitled
12 to judgment in the malicious prosecution action regardless of what the defendant’s subjective belief may
13 have been. See Sangster, 68 Cal. App. 4th at 165. As the Court finds that Warner’s prior actions were
14 objectively reasonable, his subjective belief in the legal tenability of the claims is irrelevant to a
15 determination for probable cause.

16 **E. An attorney’s investigation of the facts is irrelevant to a determination of probable cause.**

17 White’s argument that Warner did not have probable cause because he failed to investigate the
18 facts before filing the lawsuits lacks merit because the adequacy of an attorney’s research is immaterial
19 to the question of probable cause. The California Supreme Court specifically addressed this issue, stating
20 that in Williams v. Coombs and other cases, the Court of Appeals “improperly altered the probable cause
21 element by suggesting that an attorney’s reasonable investigation and industrious search of legal authority
22 is an essential component of probable cause.” Sheldon Appel, 47 Cal. 3d at 882-83. The California
23 Supreme Court explained that such an interpretation is flawed because it is “fundamentally incompatible
24 with the objective nature of the probable cause determination” Id. at 883.

25 The California Supreme Court further explained that the imposition of such a requirement is at
26 odds with a consistent line of California decisions which have made clear that an attorney’s duty of care
27 runs primarily to his own client, rather than to the client’s adversary. Id. Public policy dictates against
28

1 allowing inadequate research to serve as an independent basis for proving the absence of probable cause.
2 It would extend a lawyer's duty of care to an unintended beneficiary, and create a conflict of interest
3 between the attorney and client, tempting an attorney to perform extensive research not for the benefit
4 of his client, but simply to protect himself from his client's adversaries in the event the initial suit fails.
5 Id. Not only would an attorney be prevented from devoting his entire energies to his client's interests,
6 but such a requirement would cast a "chilling pall over attorneys' vigilance in the protection of litigants."
7 Id. at 871. See also Goodman v. Kennedy, 18 Cal. 3d 335, 344 (1976) (citations omitted).

8 As with an attorney's subjective belief in the legal tenability of a claim, the extent of a defendant's
9 investigation and research could be relevant to the question of whether or not the attorney acted with
10 malice. Sheldon Appel, 47 Cal. 3d at 883. However, since probable cause has been established, such an
11 inquiry is not necessary here.

12 Thus, White's contention that an attorney must adhere to an elevated standard of care when
13 bringing malpractice suits against a health care professionals is unsupported. The California Supreme
14 Court has overruled Williams v. Coombs specifically on that proposition. Therefore, it was appropriate
15 for Warner to rely on his clients' allegations without investigating the facts prior to filing the lawsuits.

16 **F. There are no contradictions in Warner's two declarations.**

17 White has failed to show that an issue of credibility exists. White's claim that Warner's two
18 declarations contradict each other is unconvincing because Warner makes no mention of the unsigned
19 declaration by Dr. White's former employee in his Supplemental Declaration. Even if White's contention
20 is that an omission constitutes a contradiction, the Court finds that the fact at issue is not material.

21 **G. Failure to comply with California Code of Civil Procedure §364 is not grounds for denying**
22 **summary judgment.**

23 California Code of Civil Procedure §365 specifically states: "failure to comply with §364 "shall
24 not invalidate any proceedings of any court of this state." Rather, failure to comply "shall be grounds for
25 professional discipline and the State Bar of California shall investigate and take appropriate action in any
26 such cases brought to its attention." While Warner may be subject to disciplinary consequences, his non-
27 compliance is not significant to a motion for summary judgment.

28 **V. Conclusion**

1 Given Warner’s factual knowledge at the time of filing the lawsuits, the Court finds that Warner’s
2 actions against White were legally tenable. Notwithstanding the allegations of drug abuse, the undisputed
3 facts in the record establish an objectively reasonable basis for bringing all causes of action alleged in the
4 prior lawsuits. The motion for summary judgment is granted.

5 Good cause appearing, IT IS SO ORDERED:

6
7 DATED: _____

UNITED STATES BANKRUPTCY JUDGE

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28