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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WAT KHMER TEMPLE TRIGODA-JOTHIGNANO CHUON-NATH, Plaintiff and Appellant, v. PISEGNA & ZIMMERMAN et al., Defendants and Respondents.	B166769 (Los Angeles County Super. Ct. No. BC284605)

APPEAL from a judgment of the Superior Court of Los Angeles County. Haley J. Fromholz, Judge. Affirmed.

Stroud & Do and James T. Stroud for Plaintiff and Appellant.

Robie & Matthai, Edith R. Matthai and Natalie A. Kouyoumdjian for Defendants and Respondents.

A Buddhist temple appeals from a judgment of dismissal of its action for malicious prosecution after the trial court granted the attorney defendants' motion to strike the temple's complaint as a strategic lawsuit against public participation.[1] The trial court found the attorneys had probable cause to file a cross-complaint in the prior action and as a result the temple could not prove a probability of prevailing on the merits of its malicious prosecution action. We affirm.

FACTS AND PROCEEDINGS BELOW

Appellant, Wat Khmer Temple Trigoda-Jothignano Chuon-Nath, is a Buddhist temple. Its monks and members primarily, if not exclusively, are Cambodian nationals. Ms. Sina San is a devout Buddhist. The temple was an integral part of her social and religious life in America.

A few days before Thanksgiving in 1998 Ms. San received a telephone call at home from Thoy Chao, a Buddhist monk at the temple. Chao was not fluent in English. He asked Ms. San to come to the temple where he resided to help translate some documents. Ms. San had helped translate documents for the temple before and agreed to do so again.

Ms. San arrived at the temple in the late afternoon. The temple was nearly deserted because the temple had sold the building and most of the resident monks had moved to the temple's new facilities on Beverly Boulevard. Chao met Ms. San at the entrance and instructed her to follow him. Chao led her to a room which appeared to be sleeping quarters for the monks. Ms. San waited at the door while Chao entered, purportedly to get the documents he wanted translated. Chao abruptly turned around, grabbed Ms. San, pulled her into the room and closed the door. Chao forced Ms. San to the ground. He forcibly removed her pants and underwear and raped her.

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[1] Code of Civil Procedure section 425.16.

Ms. San was humiliated and ashamed. This was extremely unseemly conduct for a Buddhist monk. Buddhist monks take vows of celibacy and risk being derobed and removed from the temple for such behavior. Ms. San was too embarrassed and fearful of the consequences to notify police about the incident.

A few weeks later Ms. San discovered she was pregnant. She elected to have an abortion.

Ms. San continued to participate in temple activities. She heard Chao had left the country and had returned to Cambodia. However, in early 2000 Ms. San saw Chao at a temple function. Shortly thereafter Ms. San started receiving threatening telephone calls from Chao. He apparently threatened to kill her if she said anything about the rape.

Ms. San believed her life was in danger. In late April 2000 Ms. San went to talk to monk Sophan Cong, the temple's head monk. Ms. San told the head monk Chao had raped her in 1998 and was now threatening to kill her. She asked the head monk for help and for justice. She asked the head monk to call a meeting to discuss and help resolve her problems.

The head monk told Ms. San he did not believe her. The head monk threatened to sue Ms. San if she went to law enforcement authorities. The head monk told Ms. San she should leave California and he would give her money to help pay her moving costs.

Another monk, Duon Chau, was present and heard Ms. San's conversation with the head monk. Duon Chau later stated he did not think the head monk was taking the matter seriously.

Ms. San contacted the head monk a few times thereafter to urge him to take action to bring her "justice." The head monk refused to hold a meeting or to otherwise take any action.

In May 2000 Ms. San reported the rape to the Los Angeles Police Department which began an investigation into Ms. San's charges of rape and death threats.

Shortly after Ms. San contacted law enforcement authorities, rumors circulated around the temple about an alleged affair between Ms. San and another monk Savin Sorn. Savin Sorn was one of the few persons at the temple who believed Ms. San. The head monk called a meeting at which Savin Sorn was accused of having an affair with Ms. San. The head monk told Savin Sorn if he could convince Ms. San to drop her charges against Chao, Sorn could live peacefully and be left alone.

Monk Duon Chau attended this meeting. He believed the allegation of a sexual liaison with Ms. San was just an excuse to oust Savin Sorn from the temple because he was a friend of Ms. San's. In August 2000 the temple served a three-day notice to quit and evicted Savin Sorn from the temple.

LAPD Detective Lisa Governo was assigned to investigate Ms. San's rape and threat charges. She interviewed witnesses, several more than once. She interviewed Ms. San on multiple occasions, sometimes with the district attorney and sometimes without, sometimes with counsel and sometimes without. The LAPD's investigation continued for more than a year. At its conclusion, Detective Governo continued to believe Ms. San was a credible witness and accurate historian.

In August 2000 Detective Governo arranged to interview Thoy Chao. She had also obtained a search warrant for a sample of his blood. However, after consulting with the temple's counsel, he declined to be interviewed and left the country. Ultimately Chao returned and provided a blood sample. DNA analysis of Chao's blood and of a tissue sample from the aborted fetus established he could not be ruled out as the father.

In September 2000, the head monk filed an ex parte motion for a restraining order against Savin Sorn. In January 2001 the head monk also sought a restraining order against Ms. San. The head monk submitted a declaration in support of his request for a restraining order against Ms. San in which he stated Ms. San had threatened his and another monk's life. In his declaration, the head monk stated, "We recently expelled a monk from the temple, Savin Sorn, for, among other things, involvement with a woman, Ms. Sina San. Ms. San has also accused another monk, Thoy Chao, of raping her and that matter is under investigation by the police."

Respondent Salvatore DeSimone of respondent law firm Pisegna & Zimmerman represented Ms. San in connection with the temple's request for a restraining order. In counsel's view, including unnecessary statements in the declaration about Ms. San's rape charge and about the alleged sexual affair were examples of how the temple, through its head monk, pursued a campaign to humiliate and discredit Ms. San because she had reported the rape to the police.

In March 2001 Chao filed a complaint against Ms. San for slander per se based on her accusation he had raped her.

In April 2001 respondents Salvatore DeSimone, Pisegna & Zimmerman, William Zimmerman and Lori DeCristo (attorneys) filed a cross-complaint against Chao and the temple on Ms. San's behalf. The cross-complaint alleged causes of action for assault, battery and intentional infliction of emotional distress against both Chao and the temple. The cross-complaint alleged the temple's actions of confirming and ratifying Chao's conduct was done with knowledge Ms. San would suffer emotional and physical distress, and the temple committed these acts with a wanton and reckless disregard of the consequences to Ms. San.

The prior case was tried to a jury in February 2002. At the close of the evidence the court and counsel discussed jury instructions and Ms. San's agency theory for finding the temple liable for battery. Based on the court's comments about the evidence supporting the temple's liability for the rape on an agency theory, the attorneys decided not to submit any of the issues regarding the temple to the jury. The court thereafter formally dismissed the temple from the action.

The jury found against Chao on his complaint for slander per se and found against Ms. San on her battery claim.[2] However, the jury found Chao liable for intentional infliction of emotional distress and awarded Ms. San $20,000 on her cross-complaint.

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[2] The assault charge did not go to the jury.

In November 2002 the temple filed suit against the attorneys for malicious prosecution alleging the attorneys knew before they filed the cross-complaint they had no evidence the temple ratified or approved any of Chao's acts and thus any reasonable attorney would conclude the cross-complaint was totally and completely without merit.

Ms. San's attorneys filed a motion to strike pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute. Although the temple received a favorable termination of the prior action, the attorneys argued the temple would nevertheless be unable to prove a reasonable probability of prevailing on the merits, i.e., of proving the attorneys lacked probable cause to file the cross-complaint against the temple. The attorneys also argued the temple could not establish the attorneys acted with malice, a necessary element of a cause of action for malicious prosecution.

The trial court granted the attorneys' motion to strike and dismissed the temple's complaint. The court thereafter awarded the attorneys their fees and costs in bringing the successful motion to strike. The temple appeals.

DISCUSSION

I. THE TEMPLE'S COMPLAINT AGAINST THE ATTORNEYS FOR MALICIOUS PROSECUTION FALLS WITHIN THE SCOPE OF THE ANTI-SLAPP STATUTE.

Section 425.16 of the Code of Civil Procedure, or the anti-SLAPP statute, provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability the plaintiff will prevail on the claim."[3]

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[3] Code of Civil Procedure section 425.16, subdivision (b)(1).

"Resolution of an anti-SLAPP motion 'requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech . . . ." If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.)"[4]

The present action for malicious prosecution arises from the attorneys having filed the underlying cross-complaint on Ms. San's behalf. It is undisputed the filing of a lawsuit for redress of grievances is a constitutional right falling within the ambit of the anti-SLAPP statute. Indeed, because a malicious prosecution suit by definition alleges the defendant committed a tort by filing a prior lawsuit, all malicious prosecution causes of action "fall within the purview of the anti-SLAPP statute."[5] This is true whether the malicious prosecution cause of action is alleged against the client or the lawyers who bring the lawsuit on the client's behalf.[6]

In this case the attorneys have met their burden of establishing the challenged cause of action is one arising from protected activity. At this point, the burden shifts to the temple to demonstrate a probability of prevailing on its claim for malicious prosecution against the attorneys. "To satisfy this prong, the plaintiff must 'state[] and substantiate[] a legally sufficient claim.' [Citation.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by

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[4] *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.

[5] *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th 728, 735.

[6] See, e.g. *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th 728, 734-735 [recognizing the propriety of the client as well as her attorney both invoking the protection of the anti-SLAPP statute]; see also, *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 816 (same)].

the plaintiff is credited."' [Citation.]"[7] Although the trial court does not weigh the credibility or comparative strength of the competing evidence, *the court "'should grant the motion if, as a matter of law, the defendants' evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim*.' [Citations.]"[8]

We review the record with these standards in mind.

II. THE ATTORNEYS HAD PROBABLE CAUSE TO ASSERT THE CLAIMS AGAINST THE TEMPLE.

To establish a claim for malicious prosecution, the temple is required to demonstrate the prior action was (1) begun at the direction of the attorney defendants; (2) pursued to a legal termination in the temple's favor; (3) brought without probable cause; and (4) initiated with malice.[9] The parties agree the first two elements are satisfied. The disputed issues instead concern whether the attorneys had probable cause to bring the prior action and whether the attorneys were motivated by malice when they filed the cross-complaint.

Because the element of probable cause is a question of law for the court to decide, the parties agree our review is de novo.[10]

"[T]he existence or nonexistence of probable cause is a legal question to be resolved by the court in the malicious prosecution case; litigants are thus protected against the danger that a lay jury would mistake a merely unsuccessful claim for a legally untenable one. (*Sheldon Appel, supra*, 47 Cal.3d at pp. 874-877.) [The Supreme Court has] held that probable cause is determined objectively, i.e., without reference to whether the attorney bringing the prior action believed the case was tenable (*id*. at pp. 877-882),

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[7] *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th 728, 741.

[8] *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th 728, 741, footnote 10, italics added.

[9] *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871.

and that the standard of probable cause to bring a civil suit was equivalent to that for determining the frivolousness of an appeal (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637), i.e., probable cause exists if 'any reasonable attorney would have thought the claim tenable.' (*Sheldon Appel, supra*, at p. 886.) This rather lenient standard for bringing a civil action reflects 'the important public policy of avoiding the chilling of novel or debatable legal claims.' (*Id*. at p. 885.) Attorneys and litigants, . . . '"have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ."' (*Ibid*., quoting *In re Marriage of Flaherty, supra*, at p. 650.) Only those actions that '"any reasonable attorney would agree [are] totally and completely without merit"' may form the basis for a malicious prosecution suit. (*Ibid*.)"[11]

Contrary to the temple's argument, proof it received a favorable termination is not enough to prove, or even infer, a lack of probable cause for purposes of establishing a probability of prevailing in its action for malicious prosecution. The temple still has to "*separately* show lack of probable cause. Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which all reasonable lawyers agree totally lack merit—this is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause.' [Citations.]"[12]

We infer from the trial court's grant of the attorneys' anti-SLAPP motion the court found the attorneys had probable cause to include the temple as a defendant in Ms. San's cross-complaint. Based on our de novo review of the probable cause element, we agree.

Before filing the cross-complaint the attorneys learned about the actions the head monk, and others at his direction, had taken to discredit Ms. San and her rape story and/or

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[10] *Arcaro v. Silva and Silva Enterprises Corp*. (1999) 77 Cal.App.4th 152, 156; *Slaney v. Ranger Ins. Co*. (2004) 115 Cal.App.4th 306, 318.

[11] *Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th 811, 817.

[12] *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th 728, 741, footnote 13.

to silence her complaints and requests for justice. Attorney Salvatore DeSimone submitted a declaration in support of the attorneys' motion to strike for the purpose of explaining to the court the facts and information he had when filing the cross-complaint against the temple.[13] A summary of DeSimone's declaration discussing what he knew is as follows:[14] Ms. San sought legal assistance from the attorneys. She told how monk Chao had raped her at the temple and explained she had not filed criminal charges. When she started receiving death threats from monk Chao Ms. San explained she had a meeting with the temple's head monk to request justice and to help resolve the matter. The head monk did not believe her and refused to call a meeting. The head monk threatened to sue her if she went to the police to report the rape. The head monk also advised her to leave the state and offered to help pay her moving expenses.

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[13] The temple filed objections to DeSimone's declaration. Nothing in the record, however, indicates the trial court ruled on those objections. Also, because the temple did not provide this court with a reporter's transcript of the proceedings, we do not know whether the temple specifically requested rulings on its objections and the trial court nevertheless declined to rule. In any event, the temple does not so claim. Given these circumstances, the temple's objections to the declaration are deemed waived on appeal. Accordingly, in reviewing the trial court's ruling we consider all the evidence presented by the parties. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 623-624; *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1378.)

[14] It is true, as the temple points out, the second amended and operative cross-complaint lacks sufficient detail to demonstrate precisely what information the attorneys had when filing the action. It is also true, as the temple argues, DeSimone's declaration lacks specific dates and times which would help pinpoint when and from whom DeSimone learned the various facts regarding the temple's involvement. Nevertheless, the attorneys' whole point in preparing and submitting DeSimone's declaration in conjunction with their motion to strike was to show the facts he knew and the information he had which prompted him to include the temple as a defendant in the cross-complaint. Despite any real or perceived discrepancies in her later trial testimony, the attorneys were entitled to rely on information initially provided by the client in deciding whether there was probable cause to file the action. (*Swat-Fame, Inc. v. Goldstein, supra*, 101 Cal.App.4th 613, 626.)

Ms. San reported the rape to the police in May 2000. Counsel reviewed reports of Ms. San's first two police interviews and noted they were consistent with the facts as first relayed to him by Ms. San. Counsel declared he monitored the police investigation as it progressed and was thus aware of evidence police collected and of the witnesses police interviewed. He then learned the temple had embarked on a campaign to discredit Ms. San. He learned the temple had manufactured a claim Ms. San and monk Savin Sorn were having a sexual affair and had been found together. From police interviews with monks, including Duon Chau, counsel learned the head monk had warned monk Savin Sorn harassment would continue unless Sorn convinced Ms. San to drop the rape charges against monk Chao. In January 2001 the head monk sought a restraining order against Ms. San. The head monk and another monk declared in affidavits attached to the petition she had threatened their lives. According to counsel, these monks' declarations also included unnecessary and inflammatory statements about Ms. San's rape charge and claimed sexual relationship with now ex-monk Savin Sorn. Counsel believed these statements were included in the declarations solely to humiliate and discredit Ms. San and to interfere with the criminal investigation.

All these events occurred *before* the attorneys filed the cross-complaint against Chao and the temple in April 2001. Thus, the attorneys had information the head monk refused to take her rape story seriously, and instead threatened to file a lawsuit against Ms. San if she went to the police; the head monk urged her to move out of state and offered financial assistance to that end; and the head monk and others at his direction, circulated and published damaging rumors about Ms. San after she filed a criminal complaint in an effort to thwart the criminal investigation and discredit and humiliate Ms. San.

We cannot say no reasonable attorney would find this evidence sufficient to state a legally and factually tenable claim against the temple for intentional infliction of emotional distress. Similarly, a reasonable attorney could also have found this evidence supported a claim the temple had ratified Chao's conduct as evidenced by its subsequent

aggressive and punishing actions against Ms. San for reporting the rape.[15] Of course, this is not the same as saying Ms. San would have prevailed at trial had the attorneys instead elected to submit all issues concerning the temple to the jury. However, our high court has admonished, "[c]ounsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ."[16]

It is sufficient to defeat a cause of action for malicious prosecution if the defendant had probable cause when he or she brought the challenged action.[17] However, in this particular case the attorneys became even more convinced about the truth and accuracy of Ms. San's version of events from matters learned during discovery and revealed at trial. For example, the attorneys learned the detective interviewed the head monk twice and during the first interview the head monk denied Ms. San had come to him to report the rape and threats and denied she had sought the temple's assistance in resolving the matter. During his second police interview the head monk admitted Ms. San informed him about the rape and had sought his assistance early on. He also admitted he had altered the temple's historical records concerning his meetings with Ms. San between the detective's first and second visits. The head monk told the detective he investigated Ms. San's charge by speaking with a few monks who expressed disbelief because no one had seen them together. Based on these monks' reactions the head monk concluded the rape did not occur and Ms. San's charges were unfounded. This evidence of the head monk's deceit and minimal investigation tended to cast doubt on the veracity of his other statements.

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[15] *Pusateri v. E.F. Hutton & Co., Inc*. (1986) 180 Cal.App.3d 247, 253 ["Failure to dismiss an employee after the commission of oppressive acts is evidence of ratification if the managing agent has knowledge of, or the opportunity to learn of, the misconduct and fails to investigate."].

[16] *Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d 863, 885, quotation marks omitted.

[17] *Swat-Fame, Inc. v. Goldstein, supra*, 101 Cal.App.4th 613, 628. ["The long-standing rule in California is that, if probable cause exists at the outset of the action, the party acting with probable cause is insulated from liability for malicious prosecution."].

The DNA analysis conducted by the LAPD proved Chao could not be excluded as the father of Ms. San's aborted fetus. This evidence tended to corroborate Ms. San's charge of rape.

Detective Governo informed the attorneys, and testified at trial, that as her investigation progressed she became more convinced of the truth and accuracy of Ms. San's charge of rape and Ms. San's claim the temple had embarked on a campaign to destroy her reputation in retaliation for reporting the rape to the police. The detective noted Ms. San never varied in her explanation of the events despite numerous interviews, with and without counsel, and with and without the district attorney being present. The detective testified she believed Ms. San was a credible witness even though the district attorney ultimately declined to bring criminal charges against Chao. The detective's investigation tended to reaffirm, not cast doubt on, the information Ms. San provided the attorneys before they instituted suit.

In the context of a malicious prosecution action, the relevant question is whether "based on the information available to them, the lawyers had probable cause at the time they *initiated* the underlying action."[18] We conclude the attorneys' evidence proffered in support of their anti-SLAPP motion conclusively establishes they had probable cause to file the cross-complaint against the temple. This evidentiary showing demonstrates the correctness of the trial court's ruling and renders irrelevant the temple's attempt to create an evidentiary foundation for its claim.[19]

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[18] *Swat-Fame, Inc. v. Goldstein, supra*, 101 Cal.App.4th 613, 629.

[19] *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th 728, 741, footnote 10. Thus, the head monk's declaration denying all statements and actions attributed to him does not create an evidentiary dispute precluding the grant of the anti-SLAPP motion because it does not relate at all to what the attorneys knew or should have known when they filed the cross-complaint. (See, e.g., *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 514 [counter affidavit did not impair the finding the suit was filed with probable cause because the declaration did not identify any fact which allegedly should have put counsel on notice the client's claim was not tenable].)

Because we find the attorneys had probable cause to file the action against the temple we need not reach the separate question whether the temple produced evidence the attorneys were motivated by malice when they filed the cross-complaint. This is because "[i]f the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated."[20]

The temple argues the head monk's statements and actions cannot be deemed those of the temple. This is true, the temple claims, because it is a corporation which operates only under the direction of its seven-member board of directors. However, the temple, as any corporation, can only act through its officers and directors.[21] Moreover, from the record evidence it appears the head monk has the authority to act as the temple's representative. The head monk is a director of the temple corporation. The head monk is also the leader of all the temple's monks. He had the power to call a meeting and grant Ms. San the justice she requested. He also had the power to deny the requested relief. Given these significant dual roles as director and head of all the temple's monks the head monk had at minimum apparent authority to act on the temple's behalf.[22]

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[20] *Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d 863, 871; see also, *Swat-Fame, Inc. v. Goldstein, supra*, 101 Cal.App.4th 613, 625, footnote 9.

[21] *Foreman Roofing Inc. v. United Union of Roofers, Waterproofers and Allied Workers, Local 36* (1983) 144 Cal.App.3d 99, 107-108 [corporation may only act through its officers]; 9 Witkin, Summary of California Law (9th ed. 1993 Supp.) Corporations, section 115, page 397 and cases cited [authority of corporate officers and agents is either expressed in the corporation's bylaws or is conferred by the corporation's directors.].

[22] Civil Code section 2318 ["Every agent has actually such authority as is defined by this Title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority."]; see also, 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, section 75, pages 78-79.

DISPOSITION

The judgment of dismissal is affirmed. The award of attorneys' fees to respondents is affirmed. Respondents to recover their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P.J.

WOODS, J.