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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GELAREH RAHBAR,

Plaintiff and Appellant,

v.

JENNIFER BATOON,

Defendant and Respondent.

A132294

(San Francisco City & County
Super. Ct. No. CGC-10-502884)

Defendant and respondent Jennifer Batoon wrote a negative review on an Internet consumer Web site of her former dentist, plaintiff and appellant Gelareh Rahbar. Based on the review, Rahbar sued Batoon. Batoon successfully filed a special motion to strike under the anti-SLAPP statute (Code of Civ. Proc., § 425.16)¹ and recovered attorney fees. Undeterred, Rahbar filed the instant lawsuit based upon the same review, but never served Batoon with the complaint. Batoon eventually learned of the second lawsuit, however, and told Rahbar to dismiss it or face another anti-SLAPP motion. Rahbar did nothing, and Batoon filed a special motion to strike. Although Rahbar then filed a dismissal, she never opposed the anti-SLAPP motion, and did not appear at the hearing, despite a tentative ruling against her. Given the dismissal, the trial court denied Batoon's motion to strike as moot, but ruled she was entitled to fees because Rahbar's lawsuit was, indeed, another SLAPP suit. At that point, Rahbar sought leave, through motions to

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

vacate and for reconsideration, to challenge Batoon's motion to strike on the merits. The trial court denied relief, and Rahbar has now appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Rahbar is a dentist; Batoon was her patient. In August 2008, Batoon posted a review of Rahbar on the consumer information Web site Yelp. Her two-page review began: "DON'T GO HERE. MOST PAINFUL DENTIST EVER." Batoon then voiced dissatisfaction with Rahbar's treatment choices, communication skills, and billing practices. She concluded: "i read about the angry message to the other negative reviewer on here, & dr. rahbar, don't contact me, i'll just ignore it. i have a right to voice my opinion, & i'm legitimate. i will not be bullied. if you contact me, this review will only get worse."²

First Lawsuit

In September 2009, Rahbar sued Batoon for defamation and invasion of privacy, based on the Yelp review, in San Francisco Superior Court. Rahbar's complaint also contained a cause of action for breach of contract, based on Batoon's alleged outstanding balance of \$454 for previously-rendered dental services.

Batoon moved to strike the defamation and invasion of privacy causes of action under the anti-SLAPP statute. The court granted the motion. Rahbar moved for reconsideration under section 1008. The court denied the motion, stating on the record that even if reconsideration were proper, Rahbar had failed to produce admissible evidence in support of her claims—specifically, there was no evidence she brought them within the applicable one-year statute of limitations and therefore striking them was proper. The court also awarded Batoon \$43,035 in attorney fees for prevailing on her anti-SLAPP motion. To settle the remaining contract claim, Batoon credited \$454 against the fee award, and Rahbar released Batoon from contractual liability.

On July 21, 2010, the court entered judgment against Rahbar and in favor of Batoon in the amount of \$43,035. Rahbar did not appeal.

² It is not necessary to quote Batoon's lengthy review in full.

Present Lawsuit

Just one month later, on August 20, 2010, Rahbar filed, again in San Francisco Superior Court, the instant lawsuit against Batoon. As in the 2009 lawsuit, Rahbar complained of Batoon's August 2008 Yelp review.

Batoon became aware of the second lawsuit on October 6, 2010, while negotiating with Rahbar over postjudgment attorney fees in the first case. Rahbar represented the new case would be dismissed. However, on October 18, 2010, she filed an amended complaint for trade libel, intentional and negligent interference with economic advantage, extortion, and intentional infliction of emotional distress. The amended complaint also sought a temporary restraining order and injunction against the Web site review.

In a letter dated November 5, 2010, Batoon told Rahbar to expect an anti-SLAPP motion in the second lawsuit if Rahbar failed to dismiss it. There was no dismissal, and Batoon followed through, filing a special motion to strike on November 19, 2010. After arguing Rahbar's second lawsuit was, like the first, intended to silence Batoon's legitimate public speech on an issue of public interest, Batoon contended Rahbar was unlikely to prevail because the judgment in the first lawsuit, by operation of res judicata, precluded all of Rahbar's causes of action in the new lawsuit.³

With the anti-SLAPP motion pending, Rahbar finally filed a request for dismissal, without prejudice, of the entire action on December 27, 2010. She filed no opposition, however, to the special motion to strike.

³ Under the anti-SLAPP statute, “[a] two-step process is followed in determining the outcome of a special motion to strike pursuant to section 425.16. ‘First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1). . . .)’” [Citations.] “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” [Citation.] [Citation.]” (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 681.)

Batoon filed a short reply on January 5, 2011, asserting a dismissal does not keep the trial court from ruling on the merits of an anti-SLAPP motion for the purpose of deciding if the defendant is entitled to an award of statutory attorney fees.

The trial court issued a tentative ruling denying the motion to strike as moot—Rahbar’s dismissal left nothing to strike—but also concluding Rahbar’s complaint was a SLAPP action and inviting Batoon to file a motion for attorney fees. No one contested the tentative ruling, and on January 12, 2011, without a hearing, the trial court adopted its tentative ruling as a final order.

On February 16, 2011, Batoon served Rahbar with notice of the order.⁴ On February 25, 2011, Batoon filed a motion seeking \$11,890 (\$7670.34 with offsets due Rahbar) in attorney fees.

On February 28, 2011, Rahbar finally responded, filing a motion for reconsideration (under § 1008) or to vacate (under § 473) the trial court’s January 12 anti-SLAPP order. For the first time, Rahbar challenged Batoon’s special motion to strike, arguing (a) the motion was fatally premature because Batoon had never been served with any complaint in the action and (b) the dismissal foreclosed any further proceedings on the anti-SLAPP motion. Rahbar “believed the court would not even entertain the . . . motion” because of these circumstances, and asked the trial court to pardon this mistake and allow her to oppose Batoon’s motion on the merits.

On March 10, 2011, Rahbar filed an opposition to Batoon’s motion for attorney fees. Rahbar asked the trial court to deny fees because (a) Batoon had never been served

⁴ The proof of service pertains to a document entitled “NOTICE OF ENTRY OF RULING GRANTING DEFENDANT’S SPECIAL MOTION TO STRIKE THE COMPLAINT.” The actual title of the document served contains the word “ON” instead of “GRANTING.” Rahbar does not dispute she received the notice, and such a trivial clerical defect does not render it ineffective as she contends. (See *Ramirez v. Moran* (1988) 201 Cal.App.3d 431, 437 [even without any proof of service, notice of entry can be valid]; *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 114 [“a technical defect in the notice of entry of judgment cannot be invoked to avoid the . . . 60-day period for filing a notice of appeal, unless the defect was arguably so egregious as effectively to preclude any *actual notice* of entry of judgment”].)

with any complaint in the action and her anti-SLAPP motion was therefore void, and (b) the trial court had actually failed to rule on the merits of the anti-SLAPP motion. Rahbar alternatively argued the amount of fees Batoon sought was excessive.

Batoon opposed the motion for reconsideration or to vacate on April 1, 2011, and Rahbar replied on April 7, 2011. Also on April 7, Batoon filed a reply in support of her fees motion, increasing her total request, based on additional work, to \$17,045 (\$12,825.34 with offsets due Rahbar).

On April 14, 2011, the trial court held a hearing on the motions for reconsideration or to vacate, and for attorney fees. It denied relief stating: “Plaintiff did not demonstrate any diligence, oppose the motion, or contest the tentative ruling even though plaintiff was aware of the motion and hearing. Further there was no mistake at law. . . .” It also granted Batoon the full amount of fees she requested. On April 18, 2011, the trial court entered judgment in favor of Batoon and ordered Rahbar to pay Batoon \$12,825.34. The record does not show when Rahbar was served with notice of entry of this judgment or notice of entry of the order denying reconsideration or to vacate.

On May 27, 2011—100 days after service of the trial court’s January 12 ruling on the anti-SLAPP motion, 88 days after Rahbar filed her motion for reconsideration or to vacate, and 39 days after entry of judgment—Rahbar filed a notice of appeal. The notice purports to appeal from: “the court order granting . . . [Batoon’s] Motion for Attorney Fees and Costs . . . entered on April 18, 2011” and “the order of the court . . . denying . . . [Rahbar’s] ‘Motion for Reconsideration.’ ”

DISCUSSION

Appealability

Our first task is to ascertain—looking at Rahbar’s notice of appeal and the arguments in her briefs, and keeping in mind the bounds of our jurisdiction—what issues we may address on appeal.

Rahbar’s notice of appeal only takes issue with two discrete orders, the April 14 orders denying her motion to reconsider or vacate, and granting Batoon’s motion for

attorney's fees. The notice does not mention the earlier, January 12 order determining Batoon's anti-SLAPP motion had merit and inviting her to seek fees.

Turning to Rahbar's briefs, her first two arguments are (1) Batoon's special motion to strike was fatally premature and (2) the order granting the anti-SLAPP motion was improperly based on res judicata. These arguments pertain to whether the trial court should have entertained Batoon's anti-SLAPP motion in the first instance, not to whether the trial court should have reconsidered or vacated its ruling.

Batoon argues the January 12 ruling on the merits of her anti-SLAPP motion is beyond our review. Not only does Rahbar's notice of appeal omit reference to the January order, but she filed the notice of appeal 100 days after service of that order, well outside the 60-day period to appeal set forth in California Rule of Court, rule 8.104(a)(1)(B). (See *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247 [dismissing appeal from anti-SLAPP order coming outside the 60-day window].)

Rahbar's motion to reconsider under section 1008, subdivision (a), however, extended that 60-day deadline until "30 days after the superior court clerk, or a party serves an order denying the motion" or "90 days after the first motion to reconsider is filed," whichever was earlier. (Cal. Rules of Court, rule 8.108(e); see *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 659 [discussing procedure]; see also Cal. Rules of Court, rule 8.108(c) [same extension if valid motion to vacate is filed].) There is no indication from the record that any notice of entry of the order denying reconsideration or to vacate was ever served on Rahbar. Thus, our focus is on the 90-day deadline. Rahbar filed her notice of appeal 88 days after filing her motion for reconsideration, making her notice of appeal timely.

We then face the question: despite the notice of appeal's reference to only the April 14 order denying reconsideration and the request to vacate, should we nonetheless construe the notice of appeal as encompassing the underlying January 12 order deeming Batoon's anti-SLAPP motion to have merit? The answer is "yes," since there is no prejudice to Batoon in considering the merits of that order. (See *Walker v. Los Angeles*

County Metropolitan Transportation Authority (2005) 35 Cal.4th 15, 22 [“[A] reviewing court should construe a notice of appeal from an order denying a new trial to be an appeal from the underlying judgment when it is reasonably clear the appellant intended to appeal from the judgment and the respondent would not be misled or prejudiced.”]; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1275, fn. 24.) As for reviewing the April 14 order, the trial court’s denial of section 473 relief is appealable (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1409, fn. 3), and though the denial of a motion for reconsideration under section 1008, subdivision (a), is not separately appealable (*Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 158), it is subject to review in conjunction with an appeal from the underlying order (*California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 42).⁵ The trial court’s fee award is also reviewable, both as to Batoon’s entitlement to fees and the amount of fees awarded to her. (See *Maughan v. Google Technology, Inc.*, *supra*, 143 Cal.App.4th at p. 1248.)

Initial Order Granting Anti-SLAPP Motion

Trial Court’s “Jurisdiction” to Rule on Special Motion to Strike

Although we have jurisdiction to review the trial court’s January 12 order determining that Batoon’s anti-SLAPP motion had merit, we do not reach the merits since Rahbar made absolutely no response to Batoon’s motion in the trial court. Despite being aware of Batoon’s motion, Rahbar filed no opposition papers. Nor did she appear to contest the motion in court, ignoring the tentative ruling that went against her and invited Batoon to seek attorney fees. Generally, a party who fails to file an opposition to an adversary’s motion waives arguments the party could have raised but did not. (*Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602 [“Having failed to effectively

⁵ Effective January 1, 2012, section 1008, subdivision (g) now provides: “An order denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order.” (See Stats. 2011, ch. 78 (A.B. 1067) § 1; *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577.)

oppose Ticor’s motion in the trial court, appellants have thus waived any objections to the resulting order.”]; *Cummings v. Cummings* (1929) 97 Cal.App. 144, 149.)

Rahbar tries to escape this general rule by casting her timeliness arguments as jurisdictional.

In her opening brief, Rahbar contends section 425.16’s provision that “[t]he special motion may be filed within 60 days of the service of the complaint” not only rendered Batoon’s motion untimely, but wholly deprived the trial court of jurisdiction to rule on it. Rahbar has not cited any legal authority that supports her assertion that a trial court has jurisdiction to rule on a special motion to strike only if the motion is filed after (and within 60 days of) service of the complaint. (See *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 557 [“The appellant must present an adequate argument including citations to supporting authorities and to relevant portions of the record.”].) Moreover, the cases we have located indicate the time periods set forth in the statute do not go to the trial court’s fundamental power to act, but rather, set forth time periods that are waived if proper objection is not made in the trial court. (See *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840 [“nonjurisdictional nature of the time limit [set forth in section 425.16, subd. (f)] is also emphasized by the permissive ‘may’ in the setting forth of the time limit”]; cf. *Carpenter & Zuckerman LLP v. Cohen* (2011) 195 Cal.App.4th 373, 384, fn. 6, citing *Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 306 [“Defendants contend that plaintiffs were required to file a motion for attorney fees in the trial court within 60 days of the remittitur, but failed to do so. Defendants did not adequately raise this issue in the trial court and therefore forfeited the issue on appeal.”].)⁶

⁶ In *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees’ Retirement Assn.* (2004) 125 Cal.App.4th 343, 351, the Court of Appeal considered whether the trial court could hear a special motion to strike set for hearing more than 30 days after it was filed despite the mandatory language of statute that the motion “shall be scheduled by the clerk of the court for hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.” (§ 425.16, subd. (f).) Because of the exception for docket congestion, which necessarily entails a

We also conclude, in any event, that Batoon’s special motion to strike was timely. First, the plain language of the anti-SLAPP statute speaks only in terms of the *end* of the ordinary time period for filing a motion to strike, not the beginning. Its language does not prohibit motions before service of a complaint, but rather states a motion “may be filed within 60 days” of service, and explicitly allows trial courts to accept later filings in the “court’s discretion, at any later time upon terms it deems proper.” (§ 425.16, subd. (f); see *Glass v. Benkert* (1971) 18 Cal.App.3d 322, 326-327 [“ ‘ “Within” does not fix the first point of time, but the limit beyond which action may not be taken.’ ”].) Second, the filing of an anti-SLAPP motion, which requests relief from the court on the presumption the court has authority to hear the underlying action, is a general appearance. (§ 1014 [“A defendant appears in an action when the defendant answers, demurs, files a notice of motion to strike”]; *Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1756-1757 [“A general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed.”].) “A general appearance by a party is equivalent to personal service of summons on such party. . . .” (§ 410.50; cf. *In re Estate of Walden* (1914) 168 Cal. 759, 761 [“Voluntary appearance is equivalent to personal service.”].) Thus, “service” of Batoon and filing of her anti-SLAPP motion effectively occurred simultaneously, and so Batoon’s motion was filed even within the post-service window of time Rahbar advocates. This conclusion accords with the stated purpose of the anti-SLAPP statute to “ ‘enable the defendant-victim of a SLAPP suit to extract himself or herself from the lawsuit as quickly and inexpensively as possible’ ” (*S.B. Beach*

factual examination of the court’s calendar, the Court of Appeal held the 30-day limitation is waived if not raised in the trial court. (*San Ramon Valley Fire Protection Dist., supra*, at p. 351.) We also note the seemingly mandatory statutory language at issue in that case is distinctly different than the permissive language at issue here.

Properties v. Berti (2006) 39 Cal.4th 374, 382 (*Berti*)) and with the statute’s own command to “broadly construe” its terms (§ 425.16, subd. (a)).⁷

Rahbar also contends, for the first time in her reply brief, that the trial court lacked jurisdiction to rule on Batoon’s motion because Rahbar dismissed the case before the trial court ruled. First, it is well established that points raised for the first time in a reply brief are waived. (*Shaw v. Hughs Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1345, fn. 6.) Second, even though it “is the general rule that once a person is dismissed from a lawsuit she is no longer a party to it and the court lacks jurisdiction to conduct further proceedings respecting her (*Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.* (1989) 215 Cal.App.3d 353, 357 . . .)[,] ‘. . . [the] courts have carved out a number of exceptions to this rule in order to give meaning and effect to a former party’s statutory rights. Even after a party is dismissed from the action [s]he may still have collateral statutory rights which the court must determine and enforce. These include the right to statutory costs and attorney’s fees [Citations.]’ (*Ibid.*)” (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 755, fn 3.) Thus, “a defendant who is voluntarily dismissed, with or without prejudice, after filing a section 425.16 motion to strike”—such as Batoon in this case—“is nevertheless entitled to have the merits of such motion heard as a predicate to a determination of the defendant’s motion for attorney’s fees and costs under subdivision (c) of that section.” (*Id.* at p. 751.)

The proper course, then, for a trial court faced with a motion to strike and a subsequently dismissed complaint is to do exactly what the trial court did below—deny the motion to strike as moot, but retain jurisdiction to decide the merits for the purpose of determining whether fees should be awarded. (*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 875-876, 879 [“when plaintiff dismissed its case at a time when defendants’ anti-SLAPP motion was pending, the trial court continued to have jurisdiction over the case only for the limited purpose of ruling on the defendants’ motion

⁷ It also does not prevent a plaintiff who has a change of heart from dismissing its action *before* an anti-SLAPP motion exposes it to costs and fees. (See *Berti, supra*, 39 Cal.4th at pp. 379, 382.)

for attorney fees and costs”]; *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218 [“the trial court must, upon defendant’s motion for a fee award, rule on the merits of the SLAPP motion even if the matter has been dismissed prior to the hearing on that motion”]; *Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 447 [“the trial court must proceed to determine the merits of the pending motion to strike and conclude that the plaintiff’s action was a SLAPP suit before awarding attorney fees to the defendant”]; see also *Berti, supra*, 39 Cal.4th at p. 381, fn. 2 [collecting these cases]; cf. *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 919 [“trial court’s adjudication of the merits of the section 425.16 motion” after dismissal “supports affirmance of the award of attorney’s fees and costs to defendant, without the need for remand”].)⁸

In sum, even had Rahbar not waived them, there is no merit to her arguments that the trial court had no authority to rule on the merits of Batoon’s special motion to strike as a predicate to making a fee and cost award under the anti-SLAPP statute.

Res judicata

Rahbar makes no suggestion the trial court’s res judicata determination is a jurisdictional matter she did not waive by failing to oppose Batoon’s special motion to strike in the trial court. Accordingly, we need not discuss the issue further. In any event, even if Rahbar had not waived the issue, the trial court correctly concluded the doctrine barred the instant lawsuit, her second against Batoon based on Batoon’s negative review of Rahbar’s dental services.

⁸ Rahbar also contends, also for the first time in her reply brief, that the trial court deprived her of due process by ruling on Batoon’s motion to strike, which it supposedly had no jurisdiction to do, and employing that ruling to award Batoon fees. Not only has Rahbar waived this argument (*Shaw v. Hughs Aircraft Co., supra*, 83 Cal.App.4th at p. 1345, fn. 6), it is meritless. As we have discussed, the trial court did have jurisdiction to act, plus Rahbar had adequate notice the trial court would award fees if she failed to act, yet she did just that. Her assertion that “there is a subtle but discrete difference between the purpose of the two-prong analysis” for “striking of one or more causes of action” and “the same two-prong analysis” for an award of attorney fees is not well taken. (See *Kyle v. Carmon, supra*, 71 Cal.App.4th at p. 919.)

Res judicata precludes relitigation of matters that were, or could have been, resolved in an earlier judicial proceeding. (*Pitzen v. Superior Court* (2004) 120 Cal.App.4th 1374, 1381.) “ ‘It preserve[s] the integrity of the judicial system, promote[s] judicial economy, and protect[s] litigants from harassment by vexatious litigation.’ ” (*Ibid.*; see also *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897 [doctrine prevents “piecemeal litigation”].) California law focuses “on the ‘primary right’ at stake: if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.” (*Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1174.) Rahbar’s two lawsuits against Batoon both stem from the deterioration of their doctor-patient relationship, which culminated in the August 2008 Yelp review. Regardless of whether the trial court in the first lawsuit entered judgment against Rahbar because of statute of limitation issues or other merits-based shortcomings, that judgment is final and it precludes Rahbar from bringing future cases based on this same scenario of events.⁹

Motions to Vacate and to Reconsider

Rahbar finally challenged Batoon’s anti-SLAPP motion by way of motions to vacate under section 473 and to reconsider under section 1008. The trial court did not abuse its discretion in denying these motions.

Motion to Vacate

In seeking to vacate the trial court’s ruling that Batoon’s special motion to strike had merit and she could seek fees and costs, Rahbar claimed she had not opposed the motion because she believed it was not “legally enforceable” and untimely, and she was therefore “excused” from filing an opposition.

⁹ There is no merit to Rahbar’s assertion that res judicata depends on whether the anti-SLAPP motions in the two lawsuits raised the same issues. To the contrary, the issue for purposes of preclusion is whether the two lawsuits arise out of the same set of operative facts and involve the same prior right—and they, indeed, do.

The applicable portion of section 473 reads: “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . .” (§ 473, subd. (b).) The party seeking relief has the burden to show a satisfactory excuse for default and diligence to correct the mistake. “Whether the moving party has successfully carried this burden is a question entrusted in the first instance to the discretion of the trial court; its ruling will not be disturbed in the absence of a demonstrated abuse of that discretion.” (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1410.)

“An ‘honest mistake of law’ can provide ‘a valid ground for relief,’ at least ‘where a problem is complex and debatable,’ but relief may be properly denied where the record shows only ‘ignorance of the law coupled with negligence in ascertaining it.’ [Citation.] In considering whether a mistake of law furnishes grounds for relief, ‘ “the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law.’ ” ’ [Citations.]” (*Hopkins & Carley v. Gen, supra*, 200 Cal.App.4th at pp. 1412-1413.) Ignorance of the law, naiveté, or failure to retain counsel are not reasonable mistakes. (*Id.* at pp. 1413-1414.) Nor is failure to timely object or failure to advance an argument. (*Id.* at p. 1414.) “Where the law is doubtful or uncertain, an attorney is obliged ‘ “to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.” ’ [Citation.]” (*Ibid.*)

Rahbar’s claimed mistake was inexcusable. Assuming she researched the law, or read Batoon’s reply brief, she would have seen unequivocal support for the proposition that an anti-SLAPP motion survives the dismissal of a lawsuit for the purpose of determining a fee award. (See *Berti, supra*, 39 Cal.4th at p. 381, fn. 2 [collecting these cases].) The trial court also put Rahbar on notice, by its tentative ruling, that it intended to award fees. Yet Rahbar filed no opposition, did not contest the tentative, and did not appear at the hearing. Remaining silent or holding back while aware of an adversary’s motion is risky at best, and can be fatal to a motion to vacate. (*Luri v. Greenwald* (2003)

107 Cal.App.4th 1119, 1128-1129 [no error in denying section 473 motion when litigant was aware of but did not oppose summary judgment]; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 319 [“belief that the motion to dismiss [belatedly first amended complaint] had become moot once respondents demurred to” it did not excuse non opposition]; *Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1658 [“After the trial court dismissed this action for failure to prosecute, it properly refused to vacate the judgment of dismissal in response to a motion brought pursuant to section 473.”]; *Williams v. Los Angeles Unified School Dist.* (1994) 23 Cal.App.4th 84, 105 [“A motion for relief from [dismissal] may not be used to merely amplify or supplement the evidence and arguments that were presented in opposition to the original motion to dismiss.”].)

While the preference is for trial on the merits, this policy “cannot invariably prevail over competing policies, including those that ‘favor getting cases to trial on time, avoiding unnecessary and prejudicial delay, and preventing litigants from playing fast and loose with the pertinent legal rules and procedures.’ [Citation.]” (*Hopkins & Carley v. Gens, supra*, 200 Cal.App.4th at p. 1415.) Courts “ ‘do not act as guardians for incompetent parties or parties who are grossly careless as to their own affairs. There must be rules and regulations by which rights are determined and under which judgments become final.’ ” [Citations.] This is a rule of necessity, for “ ‘[w]hen inexcusable neglect is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law.’ ” [Citations.]” (*Ibid.*)

Motion for Reconsideration

Turning to Rahbar’s motion for reconsideration, a party may seek reconsideration of an order based on new facts, circumstances, or law that, for good reason, could not have been presented before. (§ 1008, subd. (a); *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.) We review the denial of a motion for reconsideration under section 1008 for abuse of discretion. (*California Correctional Peace Officers Assn. v. Virga, supra*, 181 Cal.App.4th at p. 42.)

Rahbar contends she was either unaware or mistaken about the laws applicable to her opposition of Batoon’s anti-SLAPP motion and the trial court should have,

essentially, given her a second chance to present her arguments. This is not the purpose of a motion for reconsideration. It was her “responsibility to advance all correct legal theories [at once] . . . so as not to burden the trial court with repeated motions for the same relief.” (*California Correctional Peace Officers Assn. v. Virga, supra*, 181 Cal.App.4th at p. 47.) A litigant need not defend against an adversary who keeps “belatedly conjur[ing] a legal theory different from those previously rejected” nor can we condone a state of affairs in which the “ability of a party to obtain reconsideration would expand in inverse relationship to the competence of counsel.” (*Baldwin v. Home Savings of America, supra*, 59 Cal.App.4th at p. 1199.) Rahbar failed to timely advance her arguments, and the trial court was well within its discretion to deny reconsideration.

Attorney Fees

Rahbar first asserts the trial court could not make a fee award until it determined who was the prevailing party and the court failed to do so because it failed to set forth “specific findings of fact.” The trial court, however, in ruling on Batoon’s anti-SLAPP motion concluded Batoon “has shown that the suit was a SLAPP and may file a motion to recover fees per C.C.P. 425.16(c).” This conclusion is all that was needed to trigger the anti-SLAPP statute’s fee provision. Indeed, an award of fees to a prevailing defendant on such a motion is “mandatory.” (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 193.) And no lengthy statement of decision or statement of reasons is required in granting a motion for fees, or, for that matter, in granting an anti-SLAPP motion in the first place. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 [“The superior court was not required to issue a statement of decision with regard to the fee award” after an anti-SLAPP win.]; *Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620, 623 [grant of anti-SLAPP does not require statement of decision].)

Rahbar next asserts Batoon cannot recover fees because she had a contingency fee arrangement with counsel. This is another argument Rahbar never made in the trial court, even in her motions to vacate and for reconsideration. It is also patently without merit. (*Ketchum v. Moses, supra*, 24 Cal.4th at pp. 1137-1139 & fn. 4 [even permitting fee *enhancements* for cases with contingent risk].)

Finally, Rahbar asserts Batoon cannot obtain attorney fees for prevailing on her anti-SLAPP motion because it was Batoon who imprudently and impermissibly responded to the Rahbar’s first amended complaint before it was served. The only case she cites to support this theory is *Berti, supra*, 39 Cal.4th at pages 379, 382, which held a plaintiff who dismisses a suit *before* defendant files an anti-SLAPP motion is not liable for fees. Here, of course, Rahbar dismissed only *after* Batoon filed her motion, putting herself on the other side of *Berti*’s “bright line” and therefore not escaping the risk of a fee award. (*Id.* at pp. 381, 383.) Additionally, *Berti* does not address whether served and unserved complaints should be treated differently for the purposes of awarding attorney fees. It does, however, state the purpose of the anti-SLAPP statute is to “ ‘enable the defendant-victim of a SLAPP suit to extract himself or herself from the lawsuit as quickly and inexpensively as possible’ ” and recognizes that “ ‘[a]n action which is ultimately dismissed by the plaintiff . . . is nevertheless a burden on the target of the litigation and the judicial system.’ ” (*Id.* at p. 382.) These pronouncements suggest a defendant who moves to strike a previously unserved complaint *may* obtain fees. Moreover, as discussed above, filing an anti-SLAPP motion effectuates a general appearance and service, indicating there is no meaningful distinction between anti-SLAPP motions filed against served and unserved complaints. (§§ 410.50, 1014.)¹⁰

¹⁰ At oral argument, Rahbar requested that if we rule Batoon may recover attorney fees, we disallow any fees incurred after Rahbar dismissed the suit—dismissal being the main objective of Batoon’s anti-SLAPP motion. Failing to raise this argument during briefing, Rahbar has waived it. (See *Shaw v. Hughs Aircraft Co., supra*, 83 Cal.App.4th at p. 1345, fn. 6.) In any event, “an award of fees may include not only the fees incurred with respect to the underlying claim, but also the fees incurred in enforcing the right to mandatory fees under Code of Civil Procedure section 425.16.” (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1141.) “The ability to recover fees . . . under the anti-SLAPP provisions is contingent on prevailing on the special motion to strike *and on postmotion disputes whose resolution may be complex and time consuming.*” (*Id.* at p. 1139, italics added.) Rahbar has provided us no reason to classify any of Batoon’s fees as unrecoverable.

DISPOSITION

The judgment is affirmed. Costs on appeal to respondent Batoon, who is also entitled to recover attorney fees on appeal under the anti-SLAPP statute in an amount to be determined by the trial court upon proper motion.

Banke, J.

We concur:

Marchiano, P. J.

Margulies, J.