

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

TAMARA MARTIN,

Plaintiff and Appellant,

v.

JEFFREY STEGNER et al.

Defendants and Respondents.

A139838

(Contra Costa County
Super. Ct. No. MSC1201215)

Tamara Martin filed a lawsuit naming six defendants: three accountants, an attorney, and the two accounting firms in which the accountants were principals. One of the accountants and his firm filed an anti-SLAPP motion, set for hearing on July 24, 2013.¹ On July 9 and July 16, Martin filed requests for dismissal. On July 23, the court issued its tentative ruling, and on August 7 entered its formal order granting the anti-SLAPP motion and awarding defendants the full amount of attorney fees and costs requested.

Martin appeals. We vacate the order, concluding the court was without jurisdiction to consider the motion, a conclusion based on *The Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869 (*Yang*), a case that is on point—a case, most remarkably, not cited in either side’s brief.²

¹ All dates are in 2013.

² We advised counsel to be prepared to address *Yang* at oral argument.

BACKGROUND

On April 19, Martin (originally pro per, now represented by counsel) filed a first amended complaint purporting to allege four causes of action: (1) professional negligence; (2) fraud and deceit; (3) breach of contract; and (4) intentional misrepresentation. The action arose out of Martin's settlement of her marital dissolution action, a settlement confirmed by the trial court, a settlement which Martin claimed resulted from her professionals' misrepresentations and/or malpractice. Martin's lawsuit named her former accountant and accounting firm, Leslie Dawson and Glenn & Dawson; her former attorney, John Manoogian; and an accountant and firm approved by the court to act as a neutral accounting expert, Jeffrey Stegner and Armanino McKenna LLP.

On May 22, Stegner and Armanino filed an anti-SLAPP motion, set for hearing on July 24.

On July 9, Martin filed a request for dismissal of Stegner, followed a week later by a dismissal of Armanino.

On July 17, Stegner and Armanino filed a notice of non-opposition to their SLAPP motion, which notice also argued that they should be awarded their attorney fees and costs, which they claimed to be at least \$3,900.

On July 23, the court issued a tentative ruling that read, "Granted. No opposition."

On August 7, the court filed its order, prepared by counsel for Stegner and Armanino, the substance of which read in its entirety as follows:

"IT IS ORDERED THAT:

"1. The Neutrals' anti-SLAPP motion is granted. No opposition.

"2. Plaintiff's Fifth Cause of Action for Professional Negligence is stricken from the Complaint with prejudice without leave to amend.

"3. Plaintiffs' First Amended Complaint is stricken with prejudice as against the Neutrals without leave to amend.

"4. The Neutrals are hereby awarded \$3,900 in their attorneys' fees and costs incurred in bringing their anti-SLAPP motion."

Martin filed a timely notice of appeal.

DISCUSSION

In *Yang, supra*, 178 Cal.App.4th 869, a law firm sued its former clients which had refused to pay an attorney fee bill, claiming the law firm had not provided competent representation. The defendants filed an anti-SLAPP motion, which the law firm did not oppose. Rather, on the day before the scheduled hearing, the law firm filed a request for dismissal without prejudice. The trial court denied the motion, and defendants appealed. (*Id.* at p. 869.)

The Court of Appeal vacated the order and remanded the case to the trial court with directions to dismiss the case without prejudice. The court held that because the law firm had voluntarily dismissed the complaint, the trial court was without jurisdiction to consider the anti-SLAPP motion. (*Yang, supra*, 178 Cal.App.4th at pp. 876–880.)

Yang is on point. And dispositive. The trial court was without jurisdiction to grant the motion. Unfortunately for the trial court, neither party advised it of the applicable law, allowing it to enter an order it had no jurisdiction to do—not to mention an order dismissing the action with prejudice.

In *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82, fn. 9, we addressed the fact that counsel for the appellant did not even mention in either of its briefs cases that its opponent had cited in its respondent’s brief, cases the opponent described as “on point.” While we did not necessarily agree that the cases were “on point,” we did say that “they clearly are pertinent to any meaningful discussion of the issue here,” and went on to chastise counsel. Here, *Yang* is “on point.” And our observation in *Batt* is a fortiori:

“The California Rules of Professional Conduct provide that in presenting a matter to a court ‘an attorney must employ, for the purpose of maintaining the causes confided to the attorney, only those means consistent with truth. (Rules of Professional Conduct, Rule 5-200(A).) . . . Thus, an attorney must not do any of the following: [¶] . . . Seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law. (Rules of Professional Conduct, Rule 5-200(B).)’ (1 Witkin, Cal. Procedure ([5th ed. 2008]) Attorneys, [§ 461, p. 576].)

“While Rules of Professional Conduct, rule 5-200 is perhaps applicable only by interpretation, the model rules of conduct adopted by the American Bar Association have a section that needs no interpretation. Rule 3.3, entitled, ‘Candor Toward the Tribunal,’ provides in pertinent part as follows: ‘A lawyer shall not knowingly: [¶] . . . [¶] (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel’ (ABA Model Rules Prof. Conduct, rule 3.3(a)(2).)

“ ‘Although California has not adopted the Model Rules, courts and [attorneys] find the rules . . . helpful and persuasive in situations where the [California rules] are unclear or inadequate.’ (1 Witkin, Cal. Procedure, *supra*, Attorneys, [§ 407, p. 521.]) We are one of those courts. (See generally Fortune et al., Modern Litigation and Professional Responsibility Handbook (2001) § 8.5.1, pp. 329–330 [‘The obligation to disclose adverse legal authority is an aspect of the lawyer’s role as “officer of the court.” . . . lawyers should reveal cases and statutes of the controlling jurisdiction that the court needs to be aware of in order to intelligently rule on the matter. It is good ethics *and* good tactics to identify the adverse authorities, even though not directly adverse, and then argue why they are distinguishable or unsound. The court will appreciate the candor of the lawyer and will be more inclined to follow the lawyer’s argument’].)”

We do not imply that either counsel acted knowingly or intended to mislead when they failed to cite *Yang*. We nevertheless remind counsel of their obligation.

Yang went on to hold that “the anti-SLAPP statute, Code of Civil Procedure section 425.16, anticipates circumstances in which parties dismiss their cases while motions to strike are pending. In such circumstances, the trial court is given the limited jurisdiction to rule on the merits of the motion in order to decide if it should award attorney fees and costs to the defendants. (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 216, 218–219; Code Civ. Proc., § 425.16, subd. (c).) Thus, here, 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 defendants’ motion for attorney fees and costs. (Code Civ. Proc.,

§ 425.16, subd. (c); *Kyle, supra*, 71 Cal.App.4th at p. 908, fn. 4.)” (*Yang, supra*, 178 Cal.App.4th 869 at p. 879.)

DISPOSITION

The order appealed from is vacated. Martin shall recover her costs on appeal.

Richman, J.

We concur:

Kline, P.J.

Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.