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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PARMANAND KUMAR,

Plaintiff and Appellant,

v.

ROBERT E. WEISS INCORPORATED  
et al.,

Defendants and Respondents.

B234663

(Los Angeles County  
Super. Ct. No. VC056719)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Yvonne T. Sanchez, Judge. Dismissed in part and affirmed in part.

Burgee & Abramoff and John G. Burgee, for Plaintiff and Appellant.

Law Offices of Stephen E. Ensberg, Stephen E. Ensberg and Nancy J. Skovholt,  
for Defendants and Respondents.

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This action arises out of a dispute between plaintiff Parmanand Kumar and his homeowners' association. Defendants the Law Offices of Robert E. Weiss Incorporated and attorney Cris A. Klingerman (collectively the law firm) represented the homeowners' association in that matter. When Kumar sued the law firm essentially for legal malpractice, the trial court granted the law firm's motion to strike Kumar's complaint as a Strategic Lawsuit Against Public Participation (SLAPP; Code Civ. Proc., § 425.16). The court later awarded attorney fees to the law firm.

Kumar appeals from both orders. He contends: (1) the trial court lacked jurisdiction to hear the anti-SLAPP motion; (2) the causes of action against the law firm were not based on constitutionally protected activity within the meaning of the anti-SLAPP statute; and (3) the attorney fee award was improper because the anti-SLAPP motion should have been denied. We dismiss the appeal from the order granting the anti-SLAPP motion as untimely and affirm the attorney fee award.

### **FACTUAL AND PROCEDURAL HISTORY**

The operative pleading is the First Amended Complaint which Kumar filed on September 7, 2010. The law firm responded by filing an anti-SLAPP motion on January 31, 2011. In a declaration, attorney Klingerman stated, among other things, that neither he nor the Weiss firm had been properly served with the original or first amended complaints. Nevertheless the law firm pursued its anti-SLAPP motion. The next day, February 1, 2011, Kumar filed a request for dismissal without prejudice only as to the law firm and one other defendant. The dismissal was entered that day. Kumar opposed the continued prosecution of the anti-SLAPP motion on the basis that (1) the law firm had never been formally served with the summons and complaint and, (2) Kumar had dismissed the law firm from the action.

Following a hearing on March 4, 2011, the trial court granted the law firm's anti-SLAPP motion. That same day, the law firm served by mail a document entitled "Notice of Entry of Minute Order and Order/Ruling," which attached a copy of the minute order and of the attorney-drafted "Order/Ruling" signed by the trial court.

Several weeks later on April 27, 2011, the trial court granted the law firm's motion for attorney fees and costs pursuant to Code of Civil Procedure section 425.16, subdivision (c)(1), and awarded the law firm \$8,744.50 in fees. On May 3, 2011, the law firm served by mail a "Notice of Ruling" of the attorney fee order. The copy of the Notice of Ruling in the appellate record is neither file stamped nor signed by the trial court.

On May 24, 2011, the trial court signed and filed an Order of Dismissal, which stated that dismissal with prejudice was pursuant to the anti-SLAPP statute; the law firm was awarded costs in the amount of \$8,744.50. On May 27, 2011, respondent served by mail a Notice of Entry of Order of Dismissal, which attached a copy of the Order of Dismissal.

On July 20, 2011, appellant filed a Notice of Appeal from the Order of Dismissal filed on May 24, 2011, which purported to appeal both the March 4 order granting the anti-SLAPP motion and the April 27 attorney fee award.

## **DISCUSSION**

### *A. Appeal From the March 4 Order Granting the Anti-SLAPP Motion Is Untimely and Is Dismissed*

An order granting an anti-SLAPP motion is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(13).) As relevant here, a notice of appeal must be filed on or before 60 days after the party filing the notice of appeal is served by a party with a document entitled "Notice of Entry" of judgment or appealable order, or a file-stamped copy of the judgment or appealable order, accompanied by proof of service. (Cal. Rules of Court, rule 8.104(a)(2); rule 8.104(e).)<sup>1</sup> Filing a timely notice of appeal is

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<sup>1</sup> Rule 8.104(a) provides that a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was served; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of

jurisdictional and failure to timely file the notice mandates dismissal of the appeal. (Cal. Rules of Court, rule 8.104(b); *ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn.* (2004) 122 Cal.App.4th 994, 998.)

Here, the 60-day period in which to file a timely notice of appeal from the order granting the anti-SLAPP motion started running on March 4, 2011, the date the law firm served Kumar with a document entitled “Notice of Entry of Minute Order and Order/Ruling.” Thus, a timely notice of appeal from that order had to be filed on or before May 4, 2011. The July 20, 2011 notice was too late.

The facts of *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242 are nearly on all fours. In *Maughan*, on February 25, 2005, the trial court granted an anti-SLAPP motion, and the clerk mailed noticed of entry. On April 20, 2005, the court awarded attorney fees to respondent. A judgment, recapitulating the earlier orders including the grant of the anti-SLAPP motion, was also signed and filed on that date. (*Id.* at pp. 1245-1246.) On July 20, 2005, the appellant filed his notice of appeal purportedly from the April 20, 2005 “Judgment.” The Court of Appeal dismissed the appeal as untimely, concluding that the 60-day time period ran from February 25, the day of mailing notice of entry of the order granting the motion. As that order was immediately appealable, the subsequent entry of judgment on April 20, 2005 was legally insignificant for determining the appeal period. The court held that, if an order is appealable, an aggrieved party must timely file an appeal or forever lose that opportunity. It is no matter that a judgment is subsequently entered. (*Id.* at pp. 1246-1247, see also *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 659 (maj. opn.), *id.* at pp. 662-665 (conc. opn. of Rubin, J. [Code Civ. Proc., §§ 425.16, subd. (i) and 904.1, subd. (a)(13) together create trap for unwary and wary alike]); see also § 906 [on appeal from judgment, appellate court is not authorized to review “any prior decision or order from which an appeal might have been taken”].)

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Entry” of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment.” Only the second alternative is relevant to this case.

Here, no notice of appeal of any kind was filed until July 20, long past 60 days from the March 4th order. Because the notice of appeal was untimely, we have no jurisdiction to consider the merits of Kumar’s argument that the court erred in granting the anti-SLAPP motion. We thus dismiss that appeal.

B. *The Attorney Fee Award Did Not Constitute an Abuse of Discretion*<sup>2</sup>

Kumar contends the attorney fee award must be reversed. He makes two arguments: (1) “the complaint was not within the purview of the anti-SLAPP statute”; and (2) the fees were not reasonably incurred because respondents were never “formally served” with the operative First Amended Complaint. Both arguments fail.

An award of attorney fees to a prevailing defendant on an anti-SLAPP motion is mandatory. (Code Civ. Proc., § 425.16, subd. (c)(1); *Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 544.) We review the trial court’s determination of the amount of the award for abuse of discretion and will not set aside the award “ ‘absent a showing that it is manifestly excessive in the circumstances.’ ” (*Mallard* at p. 544.) There is no abuse of discretion in making an award that “will adequately compensate the defendant for the expense of responding to a baseless lawsuit.” (*Dove Audio v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.)

As Kumar failed to timely appeal from the order granting the anti-SLAPP motion, he may not dispute the underlying order which is exactly what he does in the two arguments proffered in opposition to the attorney fee order. For us to address those arguments we would be allowing Kumar to do indirectly that which we have directly foreclosed. The only possible challenges to the award remaining to Kumar are that the

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<sup>2</sup> The notice of appeal was timely with respect to the April 27 order awarding attorney fees. This is because the 60-day period did not start to run with service of the Notice of Ruling on May 3 since it was neither a document entitled “Notice of Entry” nor was it a file-stamped copy of the judgment or order. (Cal. Rules of Court, rule 8.104(a)(2).) The 60-day period began to run on May 27, the date the law firm served the document entitled “Notice of Entry of Order of Dismissal.” Accordingly, the notice of appeal filed on July 20 was within the 60 days.

amount was excessive or that there was some technical defect in the fee application. Kumar makes neither argument in his objection to the attorney fee award. We thus affirm the attorney's fee award.

### **DISPOSITION**

The appeal from the March 4, 2011 order granting the anti-SLAPP motion is dismissed. The April 27, 2011 order awarding attorney fees to the law firm is affirmed. The law firm is to recover its costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.