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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KELLY SHOEN et al.,

Plaintiffs and Appellants,

v.

VISTA LANAI APARTMENTS
PARTNERSHIP,

Defendant and Respondent.

B260726

(Los Angeles County
Super. Ct. No. BC530704)

APPEAL from an order of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Dismissed.

Kelly Shoen, In Properia Persona, for Plaintiffs and Appellants.

Citron & Citron, Thomas A. Citron and Katherine A. Tatikian for Defendant and Respondent.

Plaintiffs, Kelly and Clarice Schoen, appeal from the order granting the special motion to strike of defendant, Vista Lanai Apartments Partnership. Defendant has moved to dismiss the appeal because the notice of appeal was not timely filed. We order dismissal of the appeal.

On May 19, 2014, defendant's special motion to strike was granted. On June 3, 2014, plaintiffs filed a motion to set aside the judgment pursuant to Code of Civil Procedure section 473, subdivision (b). However, no hearing date was specified in the June 3, 2014 motion. Because of that, no hearing was ever held on the June 3, 2014 motion. On September 22, 2014, plaintiffs filed a second motion to set aside the judgment. On November 14, 2014, plaintiffs' motion to set aside the judgment was denied. On November 14, 2014, defendant's attorney fee motion was granted. On December 15, 2014, plaintiffs filed a notice of appeal.

The notice of appeal filed December 15, 2014, is untimely as to the merits of the May 19, 2014 order denying the special motion to strike. The order granting the special motion to strike was entered in the clerk's minutes on May 19, 2014. The notice of appeal was filed on December 15, 2015, 210 days after the order granting the special motion to strike was entered in the clerk's minutes. The notice of appeal is untimely as it was subject to the maximum 180-day filing period. (Cal. Rules of Court, rule 8.104(a)((1)(C)¹; *Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 940-941; *Thiara v. Pacific Coast Khalsa Diwan Society* (2010) 182 Cal.App.4th 51, 58.) In a similar vein, the potential availability of a rule 8.108 extension changes nothing. The notice of appeal was filed more than 180 days after the order granting the special motion to strike was entered in the clerk's minutes. This renders any issue of a potential extension of time to file the notice of appeal immaterial. (Rule 8.108(b)(1)(C); *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 818; *Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1455.) Under any scenario, the 180-day time requirement commences when the appealable order is entered in the clerk's minutes. (Rule 8.104(c); *Strathvale Holdings v.*

¹ Future references to a rule are to the California Rules of Court.

E.B.H. (2005) 126 Cal.App.4th 1241, 1246.) Thus, the appeal taken from the May 19, 2013 order granting the special motion to strike is untimely. Hence, the appeal from the order granting the special motion to strike must be dismissed. (*Adoption of Alexander S.* (1988) 44 Cal.3d 857, 862-864; *Hollister Convalescent Hosp. Inc. v. Rico* (1975) 15 Cal.3d 660, 674.)

There remains the issue though of the appeal from the November 14, 2014 order granting defendant's attorney fee motion. The notice of appeal makes no reference to the attorney fee order. The notice of appeal refers to an order or judgment under Code of Civil Procedure section 904.1, subdivisions (a)(3) through (13). Also, the notice of appeal cryptically states, "Ca. CCP 904.1.13-Opposition to Motion under 425.17, CCP 904.1.4 - Notice of Motion under 473(b)." The opening brief makes no reference to the attorney fee issue.

In our view, the proper way to resolve the attorney fee is as follows. To begin with, the notice of appeal makes no reference to the attorney fee issue. In fact, the only references to rulings on the notice of appeal are to: Code of Civil Procedure section 904.1, subdivision (a)(3) through (a)(13); the opposition to Code of Civil Procedure section 425.17; and Code of Civil Procedure section 473, subdivision (b). No reference is made to any attorney fee issue. Under established authority, the notice of appeal's failure to even inferentially mention the attorney fee ruling prevents it being litigated on appeal. (*Glassco v. El Sereno Country Club, Inc.* (1932) 217 Cal. 90, 91-92; *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624-625; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47; *Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788, 790; *Estate of McManus* (1963) 214 Cal.App.2d 390, 393.) Under related but different circumstances, Courts of Appeal have held they have no jurisdiction over attorney fee issues. (*Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 632-633; *Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 436.) And, no motion to amend the notice of appeal has been filed. We recognize the issue of the

omission of any reference to the attorney fee order and its relationship to our jurisdiction is very close.

Further, the opening brief makes no reference to the attorney fee issue. Thus, any issue in that regard has been forfeited. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 70 disapproved on another point in *Bailey v. County of Los Angeles* (1956) 46 Cal.2d 132, 139.) There is no relief we can grant plaintiffs in connection with the merits of the order granting defendant's special motion to strike. And there is no relief we can grant plaintiffs in connection with the attorney fee order which is not mentioned in the notice of appeal and has been forfeited. As there is no effectual relief we can provide plaintiff, their appeal must be dismissed as moot. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541; *Consolidated Vultee Aircraft Corp. v. United Automobile, etc., Workers* (1946) 27 Cal.2d 859, 863.) The mootness issue is not close.

The appeal is dismissed. Defendant, Vista Lanai Apartments Partnership, shall recover its costs incurred on appeal from plaintiffs, Kelly and Clarice Schoen. Any motion for attorney fees shall be pursued pursuant to California Rules of Court, rule 3.1702(c).

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TURNER, P. J.

We concur:

KRIEGLER, J.

BAKER, J.