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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHERYL MESTLER,

Plaintiff and Appellant,

v.

KTGY GROUP, INC. et al.,

Defendants and Respondents.

D057313

(Super. Ct. No.
37-2008-00089878-CU-CO-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed and remanded with directions.

I.

INTRODUCTION

The anti-SLAPP statute (Code Civ. Proc., § 425.16)¹ provides generally that a defendant who prevails on a special motion to strike brought pursuant to that statute shall be entitled to recover his or her attorney fees and costs incurred in connection with the motion. (§ 425.16, subd. (c)(1).) KTGy Group, Inc., and its former employee, Robert

¹ "SLAPP" stands for Strategic Lawsuit Against Public Participation. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.) Unless otherwise specified, all subsequent statutory references are to the Code of Civil Procedure.

Williams (collectively respondents), prevailed on a special motion to strike a complaint filed against them by Cheryl Mestler. Respondents filed a motion requesting that the trial court award them \$36,472.04 in attorney fees and costs pursuant to section 425.16, subdivision (c)(1). Respondents claimed that this amount represented the reasonable value of services provided by their attorneys in connection with the special motion to strike. In the alternative, respondents requested that the court award them \$23,405.04, which is the amount of attorney fees and costs that respondents actually incurred. Mestler filed an opposition in which she argued that the trial court should award respondents no more than \$6,000 in attorney fees and costs. The trial court awarded respondents \$20,165.04 in attorney fees and costs.

Mestler's sole claim on appeal is that the amount of attorney fees that the trial court awarded was "unreasonable, excessive, and unwarranted." We conclude that the trial court did not abuse its broad discretion in determining the reasonable amount of recoverable attorney fees and costs. Accordingly, we affirm the order.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The second amended complaint*

In September 2009, Mestler filed a second amended complaint (complaint) against respondents, among other defendants. In her complaint, Mestler alleged that she lived in a subdivision, and that Richard and Erin Johnson were her neighbors in the subdivision. Mestler alleged that the Johnsons had hired respondents to redesign their house following the 2007 Witch Creek Fire. Mestler further alleged that Williams had made false and misleading statements concerning proposed plans for the house to a homeowner's

association's architectural review committee and in a declaration filed with the court in opposition to Mestler's request for an injunction to stop construction of the house.

B. *The anti-SLAPP motion*

In October 2009, respondents filed a special motion to strike the complaint. In their motion, respondents claimed that Mestler's action was based on statements made in furtherance of their right to free speech, and that their statements were protected by the anti-SLAPP statute. Specifically, respondents argued that Williams's statements, which were made in connection with a homeowner's association proceeding, constituted public communications regarding an issue of public importance, and that the statements therefore came within the scope of the anti-SLAPP statute. In addition, respondents claimed that Williams's declaration, which was filed in opposition to Mestler's request for an injunction, constituted protected speech within the scope of the statute. Finally, respondents argued that Mestler had the burden of proving a probability of prevailing on the merits of her claims. Respondents supported their motion with a declaration from Williams describing the hearings and judicial proceedings in which he had made the statements that formed the basis of Mestler's complaint.

Mestler filed an opposition in which she claimed that the statements that Williams made to the architectural review committee were not within the scope of the anti-SLAPP statute. Mestler also argued that there was a strong likelihood that she would prevail in her claims against respondents because Williams had made significant misrepresentations concerning the proposed plans for the Johnsons' house, and that the statements had caused her to suffer damages. Mestler supported her motion with several photographs and declarations related to Williams's alleged misrepresentations.

Respondents filed a reply in which they reiterated their argument that Mestler's complaint was based on protected activity. In addition, respondents maintained that Mestler had not carried her burden of demonstrating a probability of prevailing on her claims. Respondents argued that Mestler's claims failed as a matter of law because all of Williams's statements were privileged and, alternatively, because "there is no tort remedy for litigation related misconduct."

In November 2009, after holding a hearing, the trial court granted respondents' special motion to strike. The court found that Mestler's claims arose from activity that was protected by the anti-SLAPP statute. The court also found that Mestler had failed to establish a probability of prevailing on her claims because "the litigation privilege protects all of [respondents'] alleged communications."

C. *The attorney fees motion*

In December 2009, respondents filed a motion requesting attorney fees pursuant to section 425.16, subdivision (c)(1). In their motion, respondents claimed that their attorneys had worked 106.40 hours on matters related to the anti-SLAPP motion (72 partner hours and 34.40 associate hours). Respondents argued that \$300 to \$350 an hour represented a reasonable rate for the type of legal services that their attorneys had provided. Respondents requested that the trial court award them a total of \$36,472.04, which respondents maintained represented the reasonable value of the services that their attorneys had provided in connection with the special motion to strike. In the alternative, respondents requested that the court award them \$23,405.40, the actual attorney fees and costs that respondents had incurred.

Respondents supported their motion with a detailed declaration from David Brandon, the partner at the law firm representing respondents who was responsible for overseeing their representation in this case. In his declaration, Brandon stated that the insurance carrier who was paying respondents' attorney fees paid an hourly partner rate of \$190, and an hourly associate rate of \$175. However, Brandon stated that a reasonable hourly rate for work of this type was \$350 for partners and \$300 for associates. Brandon also detailed various professional qualifications that he contended supported a partner rate of \$350 per hour.

Along with his declaration, Brandon attached redacted copies of his law firm's invoices generated on this matter. Brandon indicated on the invoices which of the billing entries were related to the anti-SLAPP motion. Brandon stated that he included "time entries for the preparation of the anti-SLAPP motion[], the review of the opposition, the preparation of the reply and the attendance at the hearing." Brandon also stated that he included time spent related to respondents' opposition to Mestler's motion to amend her complaint because respondents had argued that the anti-SLAPP statute precluded such an amendment. Brandon indicated that the invoices showed that his firm had billed respondents 64 partner hours and 18.90 associate hours related to the anti-SLAPP motion. Brandon also stated that he anticipated that his firm would bill respondents 23.50 hours related to this fee motion, including eight partner hours and 15.50 associate hours.

Mestler filed an opposition to the motion for attorney fees. In her opposition, Mestler contended that the amount of attorney fees that respondents were seeking to recover was unreasonable. Mestler argued that the anti-SLAPP motion that was filed on respondents' behalf did "not require great time, effort or legal expertise," and claimed that

respondents were "attempting to gouge . . . plaintiff" by exaggerating and overstating their legal bills. Mestler also contended that it was not necessary for attorneys based in Los Angeles to have attended the anti-SLAPP motion hearing when the law firm representing respondents also had a San Diego office.

Mestler supported her opposition with a declaration from Attorney Gerald Buckosky. In his declaration, Buckosky stated that he had performed an audit of the invoices filed in support of respondents' request for attorney fees and costs and that, in his opinion, the billing entries related to the anti-SLAPP motion represented an "egregious example of over[.]billing." Buckosky claimed that an anti-SLAPP motion is a "simple research project" that an associate could prepare under the supervision of a partner, and that the anti-SLAPP motion filed in this case could have been prepared in four to six hours. Buckosky stated that the total amount of fees and costs reasonably incurred was "in the \$4,000 to \$6,000 range."

Respondents filed a reply in which they argued that the trial court should disregard Attorney Buckosky's declaration because he was "far from a disinterested party" in the matter. Respondents claimed that Buckosky had "an ongoing financial relationship with [Mestler]," and specifically, that Buckosky was "a creditor of Mestler for around \$98,000.00." Respondents also reiterated their contention that the number of hours that their attorneys worked in connection with the anti-SLAPP motion was reasonable. Respondents disputed Mestler's contention that the anti-SLAPP motion was "simple," noting that the trial court's order granting the motion was four single-spaced pages.

The trial court held a hearing on the motion for attorney fees and costs. After hearing argument, the court confirmed a tentative order awarding respondents \$20,165.04

in attorney fees and costs. The court rejected respondents' request for an award of attorney fees based on an hourly rate greater than the hourly rates actually charged by their attorneys. The court expressed its view that the issues presented in the anti-SLAPP motion "were neither novel nor difficult and did not require exceptional skill to present." The court found the hourly rates actually charged to respondents (\$190 for partners, \$175 for associates) to be reasonable. The court also determined that respondents were not entitled to recover fees for 18 hours that their attorneys had spent traveling between Los Angeles and San Diego for hearings, reasoning that local counsel could have attending the hearings instead. The court stated that it was "not persuaded by any of the other points raised by [Mestler] in opposition." Specifically, the court stated, "The court considers the Declaration of Gerald A. Buckosky regarding the reasonableness of the hours spent, and finds the hours spent reasonable."

III.

DISCUSSION

A. *The trial court did not abuse its discretion in awarding respondents \$20,165.04 in attorney fees and costs*

Mestler claims that the trial court erred in awarding respondents \$20,165.04 in attorney fees and costs as prevailing defendants on their special motion to strike.

1. *Standard of review*

Citing cases reciting the standard of review applicable to the review of an order granting or denying an *anti-SLAPP motion*, Mestler claims that we review the trial court's order awarding *attorney fees* de novo. She is mistaken.

"An appellate court reviews the amount of mandatory attorney fees awarded by the trial court to a defendant who successfully brings an anti-SLAPP motion for abuse of discretion." (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 686 (*Paulus*), citing *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1426.) The abuse of discretion standard of review applies in this context because, "[t]he 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' [Citation.]" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 (*Ketchum*).)

In *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242 at pages 1249 through 1250, the court described the concept of abuse of discretion in the context of an award of attorney fees to a prevailing anti-SLAPP defendant:

" ' "While the concept 'abuse of discretion' is not easily susceptible to precise definition, the appropriate test has been enunciated in terms of whether or not the trial court exceeded ' "the bounds of reason, all of the circumstances before it being considered. . . ." ' [Citations.]" [Citation.] "A decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.] In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review." [Citation.]' [Citation.] Accordingly, an abuse of discretion transpires if ' "the trial court exceeded the bounds of reason" ' in making its award of attorney fees. [Citation.]"

2. *Governing law*

a. *Attorney fees pursuant to the anti-SLAPP statute*

Section 425.16, subdivision (c) provides in relevant part: "[I]n any action subject to [an anti-SLAPP motion], a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."

"[U]nder Code of Civil Procedure section 425.16, subdivision (c), any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." (*Ketchum, supra*, 24 Cal.4th at p. 1131.) In *Ketchum*, the Supreme Court outlined the purpose of this fee-shifting provision:

"The fee-shifting provision was apparently intended to discourage such strategic lawsuits against public participation by imposing the litigation costs on the party seeking to 'chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.] The fee-shifting provision also encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement." (*Ibid.*)

b. *The lodestar method of determining reasonable attorney fees*

The *Ketchum* court held that the Legislature intended that courts use the lodestar adjustment method to determine the amount of attorney fees to be awarded pursuant to section 425.16, subdivision (c). (*Ketchum, supra*, 24 Cal.4th at p. 1136.) The *Ketchum* court noted that the initial lodestar amount is "based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.'" (*Id.*, at pp. 1131-1332, citation omitted.) The *Ketchum* court further noted that pursuant to *Serrano v. Unruh* (1982) 32 Cal.3d 621, 639, "absent circumstances rendering the award unjust, an attorney fee award should ordinarily

include compensation for all the hours reasonably spent, including those relating solely to the fee." (*Ketchum, supra*, at p. 1133, italics omitted.)

3. *Application*

The record indicates that the trial court reasonably exercised its discretion in determining the amount of attorney fees and costs to award respondents. The court refused to award respondents a higher hourly fee than that charged by their attorneys, and reduced for the amount of attorney fees awarded for hours the court found had not been reasonably spent (i.e., attorney travel between Los Angeles and San Diego). In its order, the court specifically stated that it found the remainder of the hours worked by respondents' attorneys to have been reasonably spent, and rejected the conclusion of Attorney Buckosky to the contrary. The court had a reasonable basis for making this determination in light of the billing invoices that respondents provided, and Attorney Brandon's supporting declaration. In short, the trial court did not " 'exceed[] the bounds of reason' " (*Maughan v. Google Technology, Inc., supra*, 143 Cal.App.4th at p. 1250), in determining that an attorney fee award of approximately \$20,000 was reasonable in this case.

We reject all of Mestler's contentions to the contrary. Mestler contends that the itemized billings "include the expenditure of time on legal issues that did not [a]ffect them or the [r]espondents' legal interests." Mestler fails to support this contention with any specific citation to the record demonstrating that respondents requested an award of attorney fees for work unrelated to the anti-SLAPP motion. Mestler also argues that the amount of time that respondents' attorneys spent conducting research in drafting the anti-SLAPP motion and reply (31.5 hours) was "vastly out-of-proportion to the reasonable

[amount] necessary." However, the trial court could reasonably have concluded otherwise. Finally, referring to the time period between Mestler's filing of the complaint and the respondents filing of their special motion to strike, Mestler contends that it is "unreasonable on its face" to award attorney fees and costs "in excess of \$20,000 for a 33[-]day period." The trial court determined that the respondents reasonably incurred the attorney fees and costs that the court awarded during this period, and Mestler has failed to demonstrate that the court abused its discretion in making this determination.

Accordingly, we conclude that the trial court did not abuse its discretion in awarding respondents \$20,165.04 in attorney fees and costs.²

B. *Respondents are entitled to appellate attorney fees in an amount to be determined on remand*

Respondents request that this court award it attorney fees and costs on appeal. Respondents are entitled to recover their attorney fees and costs on appeal pursuant to section 425.16, subdivision (c). On remand, the trial court shall determine the amount of recoverable appellate attorney fees and costs. (See *Paulus, supra*, 139 Cal.App.4th at p. 687.)

² Although we ultimately conclude that the trial court did not abuse its broad discretion in determining the amount of attorney fees in this case, we urge trial courts to carefully scrutinize attorney fee requests in the anti-SLAPP context to ensure that awards are based solely on hours "*reasonably spent*" by attorneys litigating such matters. (*Ketchum, supra*, 24 Cal.4th at p. 1133.)

IV.

DISPOSITION

The attorney fee order is affirmed. The matter is remanded to the trial court with directions to award appellate attorney fees and costs to respondents in an amount to be determined by the trial court on remand.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.