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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARCUS OWENS et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

EMERALD OWENS,

Real Party in Interest.

D061136

(Super. Ct. No. 37-2011-00094728-CU-
PO-CTL)

ORIGINAL PROCEEDING in mandate to challenge orders of the Superior Court of San Diego County, Judith F. Hayes, Judge. Petition granted.

In this original proceeding seeking a writ of mandate, Marcus Owens, Sandra Hayden and Paula Thayer, the children of Homer Owens, challenge certain rulings made in an action filed against them by Homer's wife, Emerald. Marcus and Sandra challenge

a ruling made in connection with the trial court's order overruling their demurrer, and Paula challenges the order denying her motion to quash service of summons for lack of personal jurisdiction. We issued an order to show cause limited to the relief requested by Paula.

As we shall explain, the trial court erred in denying Paula's motion to quash after ruling she had waived her jurisdictional objection by addressing the merits of Emerald's action in the motion to quash and in a subsequent motion for sanctions. We therefore grant the petition.

FACTUAL BACKGROUND

Emerald and Homer are an elderly couple who married in 2002 and lived in California. Marcus, Sandra and Paula are Homer's children from a prior marriage. Paula has lived with her husband Douglas in Utah for the past 14 years.

In July 2009, Emerald traveled to Hawaii with her daughter, leaving Homer, who suffered from dementia and other health problems, in the care of two nurses. While Emerald was in Hawaii, Homer executed a durable power of attorney naming Douglas his agent and an advanced health care directive nominating Douglas as his first choice for guardian and conservator. At or about the same time, Homer closed joint bank accounts, filed for divorce and moved to Utah.

While these events were going on, Emerald placed numerous telephone calls from Hawaii to her home in California and to Homer's children. After receiving no response, Emerald left messages threatening to contact the police to report Homer as missing or kidnapped. Douglas then returned her call and informed her that Homer's children had

relocated him to a nursing home in Utah and hired an attorney to institute divorce proceedings. Douglas refused to disclose Homer's specific location, telling Emerald it was none of her business and she had no say in the matter. Emerald was so distraught that she suffered a stroke and had to be hospitalized.

Emerald thereafter engaged in litigation with Homer (whom Douglas represented as guardian and conservator) in a Utah court concerning, among other matters, Homer's conservatorship and divorce. The divorce proceedings ended in May 2011 with a stipulation by which, among other things, certain property was divided and the proceedings were dismissed with prejudice.

PROCEDURAL BACKGROUND

In July 2011, Emerald filed the underlying action against Homer's children and others. She asserted various causes of action, including violations of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.), conversion, intentional infliction of emotional distress, negligence and malicious prosecution of the divorce proceedings. The gist of all these claims was that Homer's children and Douglas had conspired to separate Homer and Emerald and to obtain control of their assets.

Paula and other defendants in the underlying action moved to quash service of summons on the ground of lack of personal jurisdiction. (Code Civ. Proc., § 418.10, subd. (a)(1); subsequent undesignated section reference are to this Code.) In support of the motion, Paula submitted a declaration in which she asserted she: (1) was a Utah resident; (2) was not in California during the occurrence of the events underlying Emerald's action; (3) had no involvement in the drafting or filing of the petition for

divorce; and (4) did not make any calls to or otherwise direct any actions toward individuals in California with respect to the events underlying Emerald's action. According to Paula, her only connection to California was receipt of a telephone call from her sister Sandra inquiring about an appropriate assisted living facility for their father in Utah.

While her motion to quash was pending, Paula and other defendants in the underlying action filed a motion for sanctions against Emerald. (§ 128.7.) They contended, based on the preclusive effect of certain documents filed in the Utah court proceedings, that Emerald's action was frivolous and was instituted to harass them and to extort an unjust settlement.

Emerald opposed Paula's motion to quash. Emerald contended Paula forfeited any objection to personal jurisdiction by contesting the merits of Emerald's claims in both the motion to quash and the motion for sanctions. Emerald also argued Paula had sufficient minimum contacts with California to support personal jurisdiction over her.

The trial court denied Paula's motion to quash. The court ruled Paula "waived the issue [of personal jurisdiction] in [her] motion by arguing the merits of the action. Further, [Paula] made a general appearance in filing a motion for sanctions which specifically addresses the merits of the action."

Paula petitioned this court for a writ of mandate to require the trial court to quash service of summons. (§ 418.10, subd. (c).) We issued an order to show cause and advised the parties oral argument would be waived if no party requested it. No party has requested oral argument.

DISCUSSION

Paula contends the trial court erred in ruling she waived her objection to personal jurisdiction by discussing the merits of Emerald's action in both the motion to quash and the later-filed motion for sanctions. According to Paula, a defendant who files a motion to quash does not make a general appearance and thereby waive the jurisdictional objection simply by discussing the merits of the underlying action in the motion to quash itself or in another motion filed after the motion to quash is filed but before it is decided. We agree.

We first consider whether Paula waived her objection to personal jurisdiction by discussing the merits of Emerald's claims in the motion to quash. In that motion, Paula argued the trial court had no personal jurisdiction over her because: (1) she is a Utah resident and was not in California when any of the events of which Emerald complains occurred; (2) she did not perform any of the acts or direct anyone to perform any of the acts of which Emerald complains; and (3) she did not conduct any activities in California or otherwise avail herself of the benefits of California law. As part of this argument, Paula pointed out that although Emerald had named her as a defendant in all causes of action and accused her of conspiring with the other defendants to kidnap Homer, divert funds and prosecute fraudulent divorce proceedings, Emerald had not alleged any specific conduct by Paula that would subject her to liability.

This type of discussion of the merits of a plaintiff's claims is often essential in a defendant's motion to quash for lack of personal jurisdiction and does not constitute a waiver of the jurisdictional objection. Where, as here, a defendant not present in a state

and without substantial and systematic contacts with the state challenges a state court's personal jurisdiction, the court must consider the nature of the defendant's contacts with the state and their relationship to the plaintiff's claim in order to decide whether the connection between the contacts and the claim is substantial enough to support jurisdiction. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 446, 452; *Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 233.) Further, because the facts concerning the defendant's contacts with the state frequently overlap the facts relevant to the merits of the plaintiff's claim, it is to be expected that the defendant's showing on the motion to quash will attempt to negate the claim. (*Malone v. Equitas Reinsurance Ltd.* (2000) 84 Cal.App.4th 1430, 1441.) We therefore "reject [the] argument that [Paula] waived [her] objection to personal jurisdiction by discussing the merits of the case in [the] motion to quash service of summons." (*Ibid.*)

We next consider whether Paula waived her objection to personal jurisdiction by discussing the merits of Emerald's claims in the motion for sanctions. In that motion, which was filed after the motion to quash was filed but before it was denied, Paula and other defendants argued that certain documents filed in the Utah divorce and conservatorship proceedings precluded Emerald's claims in the underlying action, and that in refusing to dismiss that action Emerald was "using the legal process for harassment and in an attempt to extort an unjust settlement." As a sanction for this purportedly improper conduct, Paula sought an award of attorney fees. (§ 128.7, subd. (d).)

The assertions in the motion for sanctions that Emerald's claims were precluded and sanctions should be awarded for her pursuit of such meritless claims did not constitute a waiver of Paula's objection to personal jurisdiction. Once a defendant has moved to quash for lack of personal jurisdiction, "no act" by the defendant performed at or after the time the motion to quash is filed, "including filing an answer, demurrer, or motion to strike[,] constitutes an appearance" *until the court enters an order denying the motion* (or, if the defendant petitions a reviewing court for a writ of mandate to challenge the denial, *until the writ proceeding is final*). (§ 418.10, subd. (e)(1), (2); see *Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414, 426 (*Air Machine*) [§ 418.10, subd. (e) applies when motion to quash is filed before or at same time as other act by defendant].) While the jurisdictional issue remains pending, a defendant who has moved to quash and also answers, demurs, moves to strike or takes "*other actions related to the merits*" (*State Farm General Ins. Co. v. JT's Frames, Inc.* (2010) 181 Cal.App.4th 429, 441, italics added (*JT's Frames*)) "will *not* be deemed to have 'generally appeared' in the action, but instead will be deemed to have 'specially appeared' and not waived [the] jurisdictional challenge" (*Air Machine*, at p. 426; see also *Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 345 (*Roy*) ["Nothing could be clearer: a defendant may move to quash coupled with *any* other action without being deemed to have submitted to the court's jurisdiction."]). Subdivision (e) of section 418.10 thus provides a *temporary* safe harbor that prevents a waiver of objections to personal jurisdiction by delaying recognition of a defendant's participation in the litigation as a general appearance until after the jurisdictional issue has been finally resolved. (*JT's Frames*, at p. 441 & fn. 13.)

Here, Paula filed the motion for sanctions *after* she filed the motion to quash, but *before* the trial court denied that motion. In moving in this sequence, she brought herself within the temporary safe harbor of section 418.10, subdivision (e), and she may not be deemed to have generally appeared in the underlying action simply because she filed a motion for sanctions that challenged the merits of Emerald's claims while the jurisdictional issue remained pending. (*Air Machine, supra*, 186 Cal.App.4th at p. 428; *JT's Frames, supra*, 181 Cal.App.4th at p. 441 & fn. 13.) Accordingly, the trial court erred in ruling Paula "made a general appearance in filing a motion for sanctions which specifically addresses the merits of the action."

We are not persuaded by the arguments advanced in Emerald's return to uphold the trial court's jurisdictional ruling. According to Emerald, Paula entered a general appearance when she violated the general rule that a defendant objecting to personal jurisdiction must specially appear for that purpose only and must stay out of the case for all other purposes. Specifically, Emerald contends Paula made a general appearance by not strictly limiting her arguments to lack of jurisdiction in the motion to quash and the motion for sanctions and instead contesting the merits of Emerald's claims. In support of this argument, Emerald relies on several cases (e.g., *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1036-1037; *California Dental Assn. v. American Dental Assn.* (1979) 23 Cal.3d 346, 352; *Shelley v. Casa de Oro, Ltd.* (1933) 133 Cal.App. 720, 723), all of which were decided before the temporary safe harbor provided by subdivision (e) was added to section 418.10 in 2002 (see Stats. 2002, ch. 69, § 1; *Air Machine, supra*, 186 Cal.App.4th at p. 420).

The point of the amendment to that statute, however, was to modify the rule stated in the cases Emerald relies on. As we and other courts have noted, the Legislature added subdivision (e) to section 418.10 in order to reduce the risks of waiver of an objection to personal jurisdiction created by the many traps for the unwary that existed in the case law decided before the statutory amendment. (*Air Machine, supra*, 186 Cal.App.4th at p. 426; *JT's Frames, supra*, 181 Cal.App.4th at p. 441 & fn. 13; *Roy, supra*, 127 Cal.App.4th at p. 342.) The Legislature specified the circumstances under which a defendant preserves a jurisdictional objection by providing that "no act" taken by the defendant constitutes a general appearance *as long as the defendant previously or simultaneously moves to quash and the jurisdictional issue is still pending*. (§ 418.10, subd. (e); *Air Machine*, at p. 426.) Among the acts a defendant who has moved to quash may perform during the pendency of the personal jurisdiction issue without entering a general appearance are "filing an answer, demurrer, or motion to strike" (§ 418.10, subd. (e)(1)) and serving an offer to compromise under section 998 (*Air Machine*, at p. 428) — *all of which are acts relating to the merits of the action*. Hence, the trial court erred in ruling Paula had generally appeared in the underlying action simply because she challenged the merits of Emerald's claims in the motion to quash and the subsequent motion for sanctions.

In closing, we emphasize section 418.10, subdivision (e) is *not a permanent safe harbor* for defendants who file a motion to quash for lack of personal jurisdiction and then proceed to litigate the merits of the action. "[S]ubdivision (e) does not change the essential rule that '[a] defendant submits to the court's jurisdiction by making a general

appearance in an action' by 'participat[ing] in the action in a manner which recognizes the court's jurisdiction.' [Citations.] *It merely delays the effect of such actions until the motion to quash is denied or, if the defendant seeks writ review, until proceedings on the writ have concluded. Once the motion is denied or writ proceedings have concluded, the actions undertaken by the defendant while the motion or writ was pending that recognized the trial court's jurisdiction will be 'deemed' to constitute a general appearance, and no further objection to jurisdiction will be permitted.*" (*JT's Frames, supra*, 181 Cal.App.4th at p. 441, italics added.)

DISPOSITION

Let a writ of mandate issue commanding the superior court to vacate its December 19, 2011 minute order denying Paula's motion to quash service of summons for lack of personal jurisdiction, and to conduct further proceedings on the motion without regard to whether Paula waived her jurisdictional objection by discussing the merits of Emerald's action in the motion to quash or in the motion for sanctions filed October 5, 2011. Paula is entitled to recover the costs she incurred in this writ proceeding. (Cal. Rules of Court, rule 8.493(a)(2).)

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.