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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JOHN J. KORESKO,

Plaintiff and Appellant,

v.

ROEL DE LA ROSA et al.,

Defendants and Respondents.

F064375

(Super. Ct. No. S-1500-CV-271013)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

John J. Koresko, in pro. per., for Plaintiff and Appellant.

Kulik, Gottesman & Siegel and Joseph R. Serpico for Defendants and Respondents Liz Kachmar and Peggy Drought.

No appearance by Defendant and Respondent Roel De La Rosa.

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Plaintiff and appellant, John J. Koresko, challenges two judgments awarding costs to certain defendants as the prevailing parties in an action arising out of a private road improvement project. After appellant dismissed respondents, Peggy Drought and Liz

Kachmar, from the action with prejudice, the trial court awarded those defendants \$2,930.75 in costs. Following judgment being entered in favor of respondent, Roel De La Rosa, the court ordered that he was to recover his costs.

Appellant contends that Peggy Drought and Liz Kachmar were not entitled to costs because of improper behavior. According to appellant, counsel for Drought and Kachmar engaged in bad faith litigation tactics. Appellant further argues that costs should not have been awarded without a finding that the action was frivolous or brought for the purpose of harassment. Regarding De La Rosa, appellant contends that the costs award condones De La Rosa's bad behavior as alleged in the complaint.

As the prevailing parties, respondents are entitled to costs as a matter of law. Moreover, with respect to Peggy Drought and Liz Kachmar, appellant failed to file a motion to tax costs and thus has waived his right to object. Accordingly, the judgments will be affirmed.

BACKGROUND

Appellant owns property in a separate development community and, as an owner, is a member of an incorporated association known as Mountain Valley Association (MVA). MVA consists of over 200 approximately two and one-half acre lots. These lots were initially connected by unimproved dirt roads. MVA members pay a yearly assessment to maintain these roads. MVA is governed by a board of directors elected by the MVA members.

Between 2005 and 2009, MVA entered into five agreements with the Kern County Air Pollution Control District (District) to receive grant funds for road paving projects. The purpose of paving was to reduce dust air pollution. The MVA road committee chairman was C. Geoff Drought. Through C. Geoff Drought, MVA entered into contracts with various contractors during the years in question to pave certain of the dirt roads with ground asphalt shingles.

According to appellant, while he was both an officer and director of MVA, he had reason to believe that the contracts entered into with the paving contractors were oral. Appellant further claims that he determined that the MVA proposals to the District contained false claims. Additionally, appellant asserts that the contractors did not comply with the MVA contracts.

Appellant filed the underlying action in propria persona against the paving contractors, including De La Rosa, individual past and current members of the MVA board of directors, including Peggy Drought and Liz Kachmar, and the sureties that provided performance bonds for the contractor defendants. Appellant alleged causes of action against the contractors for breach of oral contract, fraud and deceit, negligent construction, strict liability, unjust enrichment, and violations of the contractor's license law and building code. Against Peggy Drought, and her husband, C. Geoff Drought, appellant alleged causes of action for breach of fiduciary duty, fraud, and conspiracy. Against Liz Kachmar, appellant alleged causes of action for fraud and conspiracy.

Appellant purported to be suing on behalf of the State of California and submitted the complaint to the Attorney General for review and intervention. However, both the Attorney General and county counsel declined to intervene. Moreover, appellant did not allege that defendants had violated the False Claims Act (Gov. Code, § 12650 et seq.) as is required to bring an action on behalf of the state as a qui tam plaintiff. (Gov. Code, § 12652.)

In April 2011, appellant served C. Geoff Drought and Peggy Drought with the summons and complaint. On May 31, 2011, C. Geoff Drought died. Thereafter, the Droughts responded to the complaint by filing a demurrer and motion to strike. On July 26, 2011, the trial court granted the motion to strike and sustained the demurrer, both with leave to amend.

On August 5, 2011, Liz Kachmar filed a demurrer to the complaint and a motion to strike. Shortly thereafter, on August 11, 2011, appellant dismissed the complaint as to C. Geoff Drought, Peggy Drought and Liz Kachmar with prejudice.

The Droughts and Kachmar filed a memorandum of costs. The trial court found that Drought and Kachmar were entitled to costs as the prevailing parties and that appellant had not filed a motion to tax costs. The court then entered judgment awarding costs to Drought and Kachmar in the amount of \$2,930.75.

On September 13, 2011, appellant filed an untimely first amended complaint without leave of court. In this complaint, appellant alleged that he was bringing the action for the benefit of MVA and named only the contractors and the sureties that provided the performance bonds as defendants. Appellant also named MVA as a “nominal defendant.”

De La Rosa filed a demurrer and motion to strike the first amended complaint. The trial court sustained the demurrer and granted the motion to strike. The court then entered judgment in favor of the defendants and ordered that the defendants were to recover their costs.

DISCUSSION

1. *Drought and Kachmar are entitled to costs as a matter of law.*

The right to recover costs is purely a creature of statute, and the applicable statute defines the extent of this right. (*Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1279.) Here, the relevant statute is Code of Civil Procedure section 1032.

Under Code of Civil Procedure section 1032, subdivision (b), a prevailing party is entitled as a matter of right to recover costs except as otherwise expressly provided by statute. Thus, unless another statute provides otherwise, the court has no discretion to deny costs to the prevailing party. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 129.)

“Prevailing party” includes “a defendant in whose favor a dismissal is entered.” (Code Civ. Proc., § 1032, subd. (a)(4).) Where, as here, a plaintiff voluntarily dismisses

a defendant with prejudice, that defendant qualifies as a prevailing party. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 150.)

Moreover, whether the individual defendants paid the costs out of their own pockets or an insurer paid the costs on their behalf is irrelevant. In either event, the defendants are entitled to costs. (*Skistimas v. Old World Owners Assn.* (2005) 127 Cal.App.4th 948, 952.)

Appellant argues Drought and Kachmar were not entitled to costs because their attorney defended the action in bad faith and knowingly increased the costs. However, counsel's litigation tactics are irrelevant to a prevailing party's entitlement to costs. Unless a statute provides otherwise, the prevailing party is entitled to costs as a matter of law. As to the amount awarded, appellant failed to file a motion to tax costs. Accordingly, appellant waived his right to object. (*Santos v. Civil Service Bd.* (1987) 193 Cal.App.3d 1442, 1447.)

Relying on Government Code section 12652, subdivision (g)(9), appellant asserts that respondents could not recover costs without a finding that the claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." Under section 12652, subdivision (g)(9), if such a finding is made in an action brought by a qui tam plaintiff, the court may award to the defendant its "reasonable attorney's fees and expenses" against that plaintiff. Appellant argues that, because such a finding was not made, the costs award must be reversed.

However, as noted above, this was not a qui tam action. Appellant did not allege any violations of the False Claims Act. (Gov. Code, § 12650 et seq.) Additionally, the discretionary power of the court to award attorney fees and expenses under Government Code section 12652, subdivision (g)(9), does not abrogate a prevailing defendant's right to costs under Code of Civil Procedure section 1032, subdivision (b). The False Claims Act does not expressly provide that a prevailing party is not entitled to costs. Further, under the False Claims Act, expenses are not synonymous with costs. For example,

Government Code section 12652, subdivision (g)(8), provides that if the qui tam plaintiff prevails, all of the plaintiff's reasonable "expenses, costs and fees" are to be awarded against the defendant. Accordingly, Drought and Kachmar were entitled to costs as a matter of law.

2. *De La Rosa is entitled to costs.*

Appellant argues De La Rosa should not be entitled to costs because such an award would condone his bad behavior as alleged in the complaint. As discussed above, as a prevailing defendant, De La Rosa is entitled to costs as a matter of right. De La Rosa's alleged behavior is totally irrelevant.

3. *Respondents' motion for sanctions.*

Drought and Kachmar have moved this court for an order awarding sanctions against appellant for filing a frivolous appeal.

Code of Civil Procedure section 907 provides that the reviewing court may add damages to the costs on appeal when it appears that the appeal was "frivolous or taken solely for delay." An appeal is frivolous "when it is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit--when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

The arguments presented in this appeal are totally without merit. No reasonable attorney could have concluded that there was any merit in appellant's claims. Accordingly, we find that the appeal is frivolous.

However, appellant is not an attorney. While courts have imposed sanctions on appellants who prosecuted appeals in propria persona, those appellants were either attorneys or had legal backgrounds and/or had substantial assets. (Cf. *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1559; *In re Marriage of Stich* (1985)

169 Cal.App.3d 64, 75-78; *Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 310-313.)

Here there is no indication in the record that appellant has any legal background or that he has substantial assets. Accordingly, we decline to award sanctions. As noted by the court in *Kabbe v. Miller* (1990) 226 Cal.App.3d 93, 98, “We do not believe it is appropriate to hold a propria persona appellant to the standard of what a ‘reasonable attorney’ should know is frivolous *unless and until that appellant becomes a persistent litigant.*” (Italics added.)

DISPOSITION

The judgments are affirmed. Costs on appeal are awarded to respondents.¹

LEVY, J.

WE CONCUR:

WISEMAN, Acting P.J.

POOCHIGIAN, J.

¹ Appellant submitted an “Appendix” that this court deemed to be a request for judicial notice. This request for judicial notice is denied on the ground that the documents are irrelevant to this appeal.