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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

YOUNAN DAWOOD,

Cross-complainant and Respondent,

v.

YELLOW CANARY ENTERPRISES,
INC., et al.,

Cross-defendants and Appellants.

G045428

(Super. Ct. No. 30-2010-00405591)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Motion to dismiss denied. Reversed.

Law Office of Michael Creamer and Michael Creamer for Cross-defendants and Appellants.

Allione & Associates and Paul Allione for Cross-complainant and Respondent.

Yellow Canary Enterprises, Inc. (Yellow Canary), Alan Hasso (Alan), and Daniel Hasso (Daniel) (hereinafter collectively referred to in the singular as Yellow Canary, unless the context indicates otherwise), appeal from an order after the trial court dismissed without prejudice their special motions to strike¹ Younan Dawood's cross-complaint. Yellow Canary argues the court erred in dismissing the special motions to strike on procedural grounds, the issue is not moot, and it is entitled to sanctions because Dawood's motion to dismiss is frivolous. Dawood contends the appeal is moot because he voluntarily dismissed his cross-complaint, and alternatively, the court properly denied without prejudice the special motions to strike because Yellow Canary filed multiple motions.

As we explain below more fully, Yellow Canary's filing of the notice of appeal stayed all proceedings and the dismissal of Dawood's cross-complaint is vacated. Additionally, we conclude the court erred in dismissing without prejudice the special motions to strike on the grounds the combined total of the three motions exceeded the page limit rules. We deny Dawood's motion to dismiss and Yellow Canary's request for sanctions and reverse the order.²

FACTS

In April 2000, a trial court entered a default judgment in favor of Yellow Canary and against, as relevant here, the D. Robert Johnson Family Projects in an amount over \$2 million. The following year, the trial court ordered The REMM Group as receiver to handle all matters relating to the judgment debtors' properties.

¹ Code of Civil Procedure section 425.16 authorizes a special motion to strike a Strategic Lawsuit Against Public Participation (SLAPP) action, and is referred to as the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1 (*Navellier*)). All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

² Because of our holding, we need not address the parties' arguments concerning the substantive merits of the special motions to strike.

In July 2010, the trial court reappointed The REMM Group as receiver. The court's order reappointing The REMM Group expanded its authority concerning the D. Robert Johnson Family Projects.

In September 2010, The REMM Group, as receiver for the D. Robert Johnson Family Projects, filed a complaint against Dawood³ for: (1) breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and/or conspiracy to breach fiduciary duty; and (2) breach of contract. On January 26, 2011, Dawood answered the complaint and withdrew his previously filed demurrer.

The REMM Group, as Receiver for the D. Robert Johnson Family Projects, filed a first amended complaint against Dawood and others (see footnote 2 *ante*) for: (1) breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and/or conspiracy to breach fiduciary duty; (2) violation of Penal Code section 503 (embezzlement), aiding and abetting embezzlement, conspiracy to embezzle; (3) breach of contract; and (4) declaratory relief.

Dawood filed a cross-complaint against The REMM Group, as receiver for the D. Robert Johnson Family Projects, Robert M. Taylor, Yellow Canary, Daniel, and Alan alleging the following causes of action: (1) intentional misrepresentation; (2) negligent misrepresentation; (3) negligence; and (4) declaratory relief.

Daniel filed a special motion to strike Dawood's cross-complaint pursuant to Code of Civil Procedure section 425.16. The motion is 11 pages and was signed by Daniel's attorney, Michael Creamer. The motion includes declarations from Daniel and Creamer and includes four exhibits totaling 42 pages.

³ The complaint also named the following: Amir Dawood, Jamal Dawood, Capital Finance Inc., CKR Resources & Development, Inc., Global Finance, Promed Management, Inc., D. Robert Johnson, Cameron Johnson, Vance Johnson, Joana Johnson, Jesse Johnson, Wynema Johnson, and Sana Quijada.

Alan also filed a special motion to strike Dawood's cross-complaint pursuant to section 425.16. The motion itself is 11 pages and was signed by Alan's attorney, Lisa L. Schultz. The motion includes declarations from Alan and Schultz. The motion includes seven exhibits totaling 72 pages.

After a case management conference, the trial court vacated the previously set hearings on Daniel's and Alan's special motions to strike and assigned the matter to Judge Luis A. Rodriguez. The next day, Dawood opposed Daniel's special motion to strike.⁴

Yellow Canary also filed a special motion to strike Dawood's cross-complaint pursuant to section 425.16. The motion is 10 pages and was signed by Yellow Canary's attorney, Creamer. The motion includes a declaration from Yellow Canary's attorney, Creamer and includes two exhibits totaling 19 pages.

Daniel replied to Dawood's opposition.⁵ Three days later, Dawood opposed Daniel's, Alan's, and Yellow Canary's special motions to strike. The opposition was supported by numerous declarations. Yellow Canary replied to Dawood's opposition. The next day, Daniel filed a supplemental reply to Dawood's opposition.

After posting its tentative decision, the trial court conducted a hearing on the special motions to strike on June 16, 2011. In a minute order, the trial court ruled as follows: "Cross-defendants' Anti-SLAPP motions are DENIED without prejudice for violation of page limitations. Although divided into three separate pleadings, it is clear from the content and failure to address the claims against the moving parties separately that this was just a device to avoid the page limitations of [California Rules of Court,

⁴ Yellow Canary claims this document was not filed. We have electronically reviewed the superior court file and take judicial notice of it. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) The opposition includes an electronic file date stamp of May 10, 2011.

⁵ Yellow Canary again claims this reply was not filed. The superior court file shows the reply with a file date of June 3, 2011.

rule 3.1113(d)]. The court exercises its discretion to refuse to consider the pleadings under [California Rules of Court, rules 3.1113(g) & 3.1300(d)].”

On June 24, 2011, Dawood moved to dismiss without prejudice his cross-complaint. The request for dismissal was electronically file stamped that same day at 10:23 a.m. Yellow Canary, Alan, and Daniel timely appealed. The notice of appeal was file stamped June 24, 2011; there was no time stamp.⁶

DISCUSSION

Motion to Dismiss

Dawood claims we should dismiss the appeal as moot because he voluntarily dismissed his cross-complaint. Yellow Canary responds the appeal is not moot because a plaintiff cannot voluntarily dismiss a complaint after a defendant has filed a special motion to strike, and the filing of a notice of appeal stays all further proceedings. Yellow Canary also asserts Dawood’s motion to dismiss is frivolous and requests \$2,000 in sanctions based on the following: Dawood did not address relevant authority; Dawood misrepresented the relief being sought on appeal; and Dawood filed the motion to dismiss as a delay tactic. We deny the motion to dismiss.

An appeal from the denial of a SLAPP motion automatically stays all further trial court proceedings on the merits of the causes of action affected by the motion. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 194.) Thus, for example, a plaintiff cannot avoid appellate review simply by filing an amended complaint. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055-1056.) Or here, by dismissing a complaint.

Yellow Canary, Allan, and Daniel filed a notice of appeal. The notice of appeal is date stamped June 24, 2011, but it is not time stamped. As we indicate above, we have electronically reviewed the superior court file. In addition to the notice of

⁶ We ordered the parties to file supplemental letter briefing on the effect of the filing of the notice of appeal before the request for dismissal has on this appeal.

appeal, the superior court file includes a payment receipt for the transcript on appeal. The transaction date of the payment receipt is June 24, 2011. The transaction time of the payment receipt is “09:07:46 AM.” The notice of filing of the notice of appeal was date stamped by the same clerk who prepared the payment receipt. Based on these documents, we can reasonably conclude Yellow Canary filed the notice of appeal sometime before 9:07 a.m.

Dawood voluntarily dismissed his cross-complaint on the same day, June 24, 2011. According to the time stamp, the request for dismissal was filed at “10:23:00 AM.” Thus, based on the record before us, we conclude Yellow Canary filed the notice of appeal before Dawood filed the request for dismissal.

In his supplemental letter brief, Dawood contends “circumstances suggest that the [r]equest [for dismissal] may have been filed first.” Dawood relies on a computer printout reflecting the time (before 9:07 a.m.) he created the request for dismissal document and a letter to opposing counsel that he created after (9:37 a.m.). Dawood states “[he] believe[s] that [his] submission to the court was most likely prior to 9:00 a.m.” Alternatively, Dawood asserts that because documents are filed in different manners, in person, fax, electronically, drop off box, the documents should be considered concurrently filed.

As to his first claim, California Rules of Court, rule 2.259(a)(1), provides, “When a court receives an electronically submitted document, the court must promptly send the electronic filer confirmation of the court’s receipt of the document, indicating the date and time of receipt. A document is considered received at the date and time the confirmation of receipt is created.” California Rules of Court, rule 2.259(a)(2), states that “If the document received by the court under (1) complies with filing requirements and all required filing fees have been paid, the court must promptly send the electronic filer confirmation that the document has been filed. The filing confirmation must indicate the date and time of filing and is proof that the document was filed on the date and at the

time specified.” California Rules of Court, rule 2.259(a)(3), requires the court to “send receipt and filing confirmation to the electronic filer at the electronic service address the filer furnished to the court”

Here, Dawood attempts to prove he electronically submitted his request for dismissal before 9:07 a.m. based on his self-generated computer records. We do not have before us a confirmation of receipt of the electronically submitted request for dismissal.

With respect to his second claim, assuming for sake of argument the documents were filed the same day but neither document was time stamped, which document controls. It is well settled that “‘a defendant who is voluntarily dismissed, with or without prejudice, after filing [an anti-SLAPP motion], is nevertheless entitled to have the merits of such motion heard as a predicate to a determination of the defendant’s motion for attorney’s fees and costs’” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1364-1365.) Regardless of which document we conclude has priority, the matter must be remanded to the trial court for further proceedings to conclude whether any party is entitled to attorney fees. Such a determination requires “adjudication of the merits of a defendant’s motion to strike.” (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 752.)

Based on the record before us, we conclude Yellow Canary filed its notice of appeal before Dawood filed his request for dismissal. Because the trial court lost jurisdiction when the notice of appeal was filed, we vacate the dismissal order entered while Yellow Canary’s appeal was pending. (*Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 476, fn. 3.)

On a related matter, Yellow Canary requests sanctions in the amount of \$2,000 because it claims Dawood’s motion to dismiss was frivolous. Dawood cited legal authority to support his contention that his voluntarily dismissal of the cross-complaint afforded Yellow Canary the relief it sought. That this court, or Yellow Canary, disagrees with his contentions or concludes the cases he relies on inapposite does not render the motion to dismiss frivolous. And it does not appear Dawood filed his motion to dismiss

solely for the purpose of delay. Dawood's argument that his request for dismissal of his cross-complaint rendered moot the appeal was not patently unreasonable.

Anti-SLAPP Motions

Yellow Canary argues the trial court erred in combining the number of pages of its, Daniel's, and Alan's special motions to strike and then dismissing without prejudice the motion because they exceeded the page limit. Yellow Canary argues its due process rights were violated because the court's ruling is onerous on defendants because it forces defendants with separate counsel to coordinate proceedings with each other and effectively denies defendants the right to separate counsel. We agree.

Creamer filed a special motion to strike first on behalf of Daniel and later on behalf of Yellow Canary. At that stage of the proceedings, Creamer did not represent Alan. Schultz filed a special motion to strike on behalf of Alan. Alan's special motion to strike was 11 pages.

Dawood cites to no authority and we found none that requires individual defendants to file a single combined special motion to strike. Additionally, it does not appear the trial court ordered the individual defendants to file a single combined special motion to strike. The court's decision to combine the number of pages in each special motion to strike and then deny without prejudice the motions because they exceeded the page limit effectively usurped Alan's right to have his own counsel who would zealously represent his interests.

Such a ruling would have the effect of abrogating a party's right to be represented by counsel of his own choice. Additionally, such a ruling would have the effect of preventing counsel from zealously representing a client in a situation where the client is situated differently from the client's co-defendants. We can envision no justification for forbidding a party who is represented by his own counsel from filing a special motion to strike where there are co-defendants who also filed such a motion(s).

Because we conclude the trial court erred in combining the number of pages of the three motions to strike and concluding they exceeded the applicable page limit, we must reverse the court's order dismissing without prejudice the three motions.

DISPOSITION

The motion to dismiss is denied. The dismissal of the cross-complaint is vacated. The motion for sanctions is denied. The order is reversed. Appellants are awarded their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.