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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TONY ING, et al.,

Cross-Complaints and Respondents,

v.

KEITH A. FINK, et al.,

Cross-Defendants and Appellants.

G045777

(Super. Ct. No. 30-2010-00418371)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

J.J. Little & Associates and James J. Little; Keith A. Fink & Associates, Keith A. Fink, Olaf J. Muller, and Jennifer H. Yeung for Cross-Defendants and Appellants.

Wendyfer Zhong, Tony Ing, and Samuel K.K. Chung, in propria persona for Cross-Complaints and Respondents.

Attorney Keith A. Fink and his law firm, Keith A. Fink & Associates (hereafter collectively and in the singular referred to as “Fink”), appeal from an order denying his request for attorney fees and costs incurred in preparing a special motion to strike (anti-SLAPP motion) a cross-complaint under Code of Civil Procedure section 425.16.<sup>1</sup> The cross-complainants filed a request for voluntary dismissal of their cross-complaint the same day Fink filed his anti-SLAPP motion. The trial court concluded there was no way to determine which was filed first—the request for dismissal or the anti-SLAPP motion—and as moving party the burden was on Fink to demonstrate he filed his anti-SLAPP motion first. Because he could not, the court concluded Fink could not recover his attorney fees and costs pursuant to section 425.16, subdivision (c). Fink contends this was error. We disagree and affirm the order.

#### FACTS AND PROCEDURE

The respondents in this appeal are former clients of Fink’s: Genesis Developments & Investments, Inc.; Thomas Tuan Tong Lee, M.D.; Thomas Tuan Tong Lee, M.D., Inc.; New Horizons Medical Group, Inc.; Tony Ing; Wendyfer Zhong; Samuel K.K. Chung; and P&N Healthcare Conglomerate.<sup>2</sup> In 2008, Fink sued Genesis in Los Angeles County Superior Court for nonpayment of attorney fees (*Keith A. Fink et al., v. Genesis Developments & Investments, Inc., et al.*, LASC Case No. BC395752, hereafter the Fink litigation). Genesis was represented in the Fink litigation by the law firm Barnes, Crosby, Fitzgerald & Zeman, LLP (hereafter Barnes Crosby) until late 2009.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure.

<sup>2</sup> Only Ing, Zhong, and Chung have appeared on this appeal. For convenience, we will hereafter refer to all the respondents collectively and in the singular as “Genesis,” unless the context indicates otherwise.

In October 2010, Barnes Crosby commenced the instant action by filing a complaint against Genesis for nonpayment of attorney fees incurred in defending Genesis in the Fink litigation. On December 6, 2010, Genesis filed the cross-complaint at issue containing causes of action against Barnes Crosby for legal malpractice and breach of fiduciary duty. The cross-complaint also contained a cause of action against Fink for implied indemnity, the gist of the allegations being that Fink's negligence was the cause of any damages to Barnes Crosby. Fink's attorney in this litigation states the Genesis cross-complaint was filed and served on Fink five days into trial in Los Angeles County Superior Court in the Fink litigation.

On January 18, 2011, Genesis filed a request for dismissal of the entire cross-complaint without prejudice, and the dismissal was entered by the clerk that same day. Also on January 18, 2011, Fink filed: (1) a demurrer to the cross-complaint; (2) a motion to strike the cross-complaint's request for punitive damages; and (3) an anti-SLAPP motion. All three documents had proofs of service showing they were deposited in the mail to Genesis's counsel on January 14, 2011, which was a Friday. All were set for hearing on March 23, 2011.

On February 9, 2011, Fink filed an ex parte motion to advance the hearing date on his anti-SLAPP motion, which was denied. In his declaration, Fink's attorney stated that on January 18, 2011, he informed Genesis's counsel he had prepared an anti-SLAPP motion and sent it to be filed, which prompted Genesis's counsel to "race[] to the courthouse" to dismiss the cross-complaint.

Fink's motions came on for hearing on March 23, 2011. In its minute order, the court stated the three motions (including the anti-SLAPP motion) were moot because the cross-complaint had been dismissed. It stated its ruling was without prejudice to Fink filing a motion for attorney fees and costs under the anti-SLAPP statute.

On May 27, 2011, Fink filed his motion seeking \$23,498 in attorney fees for preparing his anti-SLAPP motion. Respondents Ing, Zhong, and Chung, represented

by separate counsel, filed a terse opposition stating only that because Fink did not file his anti-SLAPP motion *before* the request for voluntary dismissal was filed, the trial court could not consider the attorney fees request. Fink filed a supplemental declaration from his attorney who stated he informed Genesis's counsel on the morning on January 18, that "[his] office had already prepared and filed the [anti-] SLAPP motion" following which Genesis's counsel filed his request for dismissal.

At the hearing on Fink's attorney fees motion, his attorney argued Genesis's counsel knew the anti-SLAPP motion was on its way to be filed, and the request for dismissal was filed in response. While essentially conceding there was no evidence the anti-SLAPP motion was filed first, Fink's counsel argued there was also no evidence to the contrary, i.e., that it was not filed first. Accordingly, he asserted the burden should be placed on Genesis to demonstrate it filed its request for dismissal first because "[it's] raising it as an affirmative defense." Counsel for Ing, Zhong, and Chung argued that as moving party, Fink had the burden to demonstrate the trial court still had jurisdiction.

### *Ruling*

The trial court denied Fink's motion for attorney fees and costs. The court commented there was a factual issue as to which document was filed first, the anti-SLAPP motion or request for dismissal of the cross-complaint. It found the factual issue could not be resolved—both papers were filed the same day, neither was time-stamped, and the court operations manager for the civil division advised the trial court "it [was] not possible to tell which document was received, or filed, first." The court stated it was relying on the Supreme Court's ruling in *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 383 (*S.B. Beach Properties*), which held that when the plaintiffs voluntarily dismissed their action before the defendants attempted to file an anti-SLAPP motion, the defendants could not recover attorney fees and costs pursuant to section 425.16, subdivision (c).

In ruling, the trial court noted there was no actual evidence the anti-SLAPP motion was filed first. Fink’s counsel’s “account . . . was not inconsistent with a scenario whereby [Genesis’s] counsel, having been apprised of the soon-to-be filed motion (which, according to moving parties, was mailed to him four days before it was filed), quickly prepared a [r]equest [f]or [d]ismissal and filed it before the [anti-SLAPP] motion was filed.” The court concluded that as the moving party, the burden was on Fink to demonstrate his motion was filed *before* the request for dismissal and he had not met that burden. The court commented it was “not unsympathetic to [Fink’s] expenditure of money to vindicate [his] rights,” but the Supreme Court had drawn “a bright line in [*S.B. Beach Properties*],” and unless it could be shown the anti-SLAPP motion was filed before the dismissal, the trial court could not consider the attorney fees request.

#### DISCUSSION

Fink contends the trial court erred by denying his motion for attorney fees and costs incurred in preparing his anti-SLAPP motion. We disagree.

The trial court correctly concluded *S.B. Beach Properties, supra*, 39 Cal.4th 374, controls the outcome of this case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In that case, the Supreme Court explained, “A defendant who is the ‘prevailing [party] on’ [an anti-SLAPP] motion is ‘entitled to recover his or her attorneys fees and costs.’ (§ 425.16, subd. (c).)” (*S.B. Beach Properties, supra*, 39 Cal.4th at p. 377.) When a plaintiff voluntarily dismisses a complaint *after* the defendant files an anti-SLAPP motion but before the court hearing on the motion, the trial court lacks jurisdiction to grant the relief sought in the anti-SLAPP motion (i.e., strike the complaint), but it retains limited jurisdiction to rule on the motion so as to award section 425.16 attorney fees to the defendant. (*S.B. Beach Properties, supra*, 39 Cal.4th at p. 381, fn. 2; see also *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 908, fn. 4.) However, if the plaintiff voluntarily dismisses its action *before* the anti-SLAPP motion is filed, the defendant *may not* recover attorney fees and costs pursuant to section

425.16, subdivision (c). (*S.B. Beach Properties, supra*, 39 Cal.4th at p. 383; see also *Chambers v. Miller* (2006) 140 Cal.App.4th 821, 825 [trial court may not award attorney fees if complaint dismissed *before* anti-SLAPP motion filed].) This is so even when the plaintiff filed its voluntary dismissal after learning the defendant planned on filing an anti-SLAPP motion. (*S.B. Beach Properties, supra*, 39 Cal.4th at p. 382.)

*S.B. Beach Properties* held the statutory language unambiguously requires “the filing of a *viable* anti-SLAPP motion [is] a prerequisite to recovering any fees and costs.”

(*S.B. Beach Properties, supra*, 39 Cal.4th at p. 379, italics added.) If the complaint has already been dismissed, the anti-SLAPP motion is not viable.

Fink argues *S.B. Beach Properties* is easily distinguished because in that case plaintiff’s voluntary dismissal was filed the day before defendant’s anti-SLAPP motion. Accordingly, while the court clerk initially accepted defendant’s motion for filing, it refused to calendar it for hearing and later rejected defendant’s additional filings because the complaint had been already been dismissed. (*S.B. Beach Properties, supra*, 39 Cal.4th at p. 378.) Fink points out that here the clerk did not reject his anti-SLAPP motion, but accepted it for filing and calendared it for hearing, thus we should presume his motion preceded the dismissal. We are unimpressed by the distinction. The trial court clarified there simply was no way to know which document was filed first. *S.B. Beach Properties* requires a *viable* anti-SLAPP motion be on file *before* the voluntary dismissal for the trial court to retain jurisdiction to consider attorney fees and costs. (*S.B. Beach Properties, supra*, 39 Cal.4th at p. 379, italics added.) It set this as a “bright line” rule applicable even though a defendant has incurred “legal fees and expenses in preparing an anti-SLAPP motion, before the voluntary dismissal of the action,” which rule is “fully consistent with the terms and purposes [of the anti-SLAPP law] and has the additional benefit of discouraging prolonged litigation solely over the matter of fees and costs.” (*Id.* at pp. 382-383.)

Relying on cases concerning California courts' exercise of personal jurisdiction over litigants who have submitted to jurisdiction by filing suit in California (see *Adam v. Saenger* (1938) 303 U.S. 59, 67-68 [by commencing action, nonresident plaintiff submits to the court's personal jurisdiction on cross-complaint filed by defendant]; *Nobel Farms, Inc. v. Pasero* (2003) 106 Cal.App.4th 654, 659 [same]), Fink argues the trial court should not have imposed the burden on him to establish his anti-SLAPP motion was filed first. He argues that because Genesis invoked the trial court's jurisdiction by filing a cross-complaint against him, the burden was on Genesis to establish jurisdiction had been lost. But this is not a matter of personal jurisdiction over a party. It is an issue of statutory entitlement to attorney fees and costs. As the moving party, the burden was on Fink to establish he was entitled to attorney fees and costs. (See *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320 ["As the moving party, the prevailing defendant seeking fees and costs "bear[s] the burden of establishing entitlement to an award"""]; see also *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020 [same].) He did not, and thus, the trial court properly denied his motion. Because we affirm the trial court's order, we need not consider Fink's remaining arguments concerning the merits of his anti-SLAPP motion (i.e., that because it would have been granted, he was entitled to attorney fees).

#### DISPOSITION

The order is affirmed. In the interests of justice, the parties shall bear their own costs on this appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.