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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HOT SPOT INVESTMENT COMPANY,

Plaintiff and Respondent,

v.

CAPITOL INVESTMENT COMPANY,

Defendant and Appellant.

H040269

(Santa Clara County

Super. Ct. No. 1-12-CV-231172)

Appellant Capitol Investment Company brought a special motion to strike the complaint brought by its commercial tenant, Hot Spot Investment Company, under the anti-SLAPP statute, Code of Civil Procedure section 425.16 (hereafter section 425.16). The court partially granted the motion, and just over six months later, the court entered plaintiff's voluntary dismissal of the remaining claims. Appellant sought attorney fees, but the superior court denied the motion as untimely.

Appellant contends that it was entitled to both fees and costs pursuant to section 425.16, subdivision (i), and Civil Code section 1717. Respondent has not filed a brief or otherwise participated in the proceedings on appeal. Nevertheless, we have concluded that attorney fees and costs related to the anti-SLAPP motion were not available to appellant once the period prescribed in California Rules of Court, rule 3.1702,¹ expired, and that as to the remaining claims, appellant was not the prevailing party. We therefore must affirm the order.

¹

All further references to rules are to the California Rules of Court.

Background

The parties' dispute arose during the term of a commercial lease that allowed respondent, as tenant, to operate a sandwich and coffee shop. Appellant initiated the litigation in an unlawful detainer action against respondent, alleging violations of city ordinances. That action was dismissed without prejudice at appellant's request; but before appellant brought a new action, respondent filed its own complaint, asserting breach of the lease and eight other claims against appellant and two property managers.

Appellant moved to strike respondent's complaint under section 425.16, the anti-SLAPP statute. On October 30, 2012 the superior court granted the motion, striking all causes of action except the eighth cause of action for declaratory relief and the ninth, a request for injunctive relief. Those two claims, the court ruled, were outside the scope of the statute.² The order was served on all parties by mail that day.

According to appellant, judgment was entered in its favor on the unlawful detainer action on March 25, 2013.³ On April 2, 2013, respondent obtained a voluntary dismissal of the remaining two claims in its complaint. On May 8, 2013, having learned informally of the dismissal,⁴ appellant moved for statutory attorney fees pursuant to section 425.16, subdivision (c)(1), and contractual attorney fees pursuant to a provision of the lease. Supplemented by a memorandum of costs, the motion requested fees and costs of

² The court explained that the eighth cause of action for declaratory relief "does not arise from Defendant[s'] protected activities, but from an actual, present controversy between the parties regarding the parties' rights and obligations under the lease Finally, the SLAPP statute does not apply to Plaintiff's request for injunctive relief, even though Plaintiff incorrectly labeled its request a 'cause of action.' "

³ The judgment itself is not in the appellant's appendix; rather, in an attachment to its motion for attorney fees appellant's attorney declared that all of the factual statements in the motion, including the existence of the March 25 judgment, were "true and correct."

⁴ Appellant's counsel advised the court that the dismissal order or notice of entry had not been served; he was unaware of the order until he received an e-mail from opposing counsel on April 23, 2013.

\$56,062.50. Respondent opposed the motion on the grounds that it was untimely and that it sought fees unrelated to the anti-SLAPP motion.

The superior court agreed with respondent's first point, and on August 9, 2013 it denied appellant's motion for attorney fees as untimely under rule 3.1702. On August 27, 2013, appellant filed a motion to "vacate, correct, reconsider, or, alternatively clarify" the August 9 order; but while that motion was pending, appellant filed its October 11, 2013 notice of appeal.⁵

Discussion

Appellant contends that the August 9, 2013 order denying statutory and contractual attorney fees was erroneous as a matter of law because its motion was timely. The focus of its argument is rule 3.1702(b)(1), which states: "A notice of motion to claim attorney's fees for services up to and including the rendition of judgment in the trial court—including attorney's fees on an appeal before the rendition of judgment in the trial court—must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108 in an unlimited civil case or under rules 8.822 and 8.823 in a limited civil case." Appellant argues that it had until the judgment of dismissal to file its motion for fees, under both section 425.16 and the attorney fees provision of the lease.⁶

⁵ Respondent served its opposition to the motion on September 25, 2011, followed by appellants' reply on October 3, 2013, eight days before the notice of appeal. The court thereafter issued a tentative ruling on the reconsideration motion; but according to appellant, its attorney advised the court that appellant had already filed a notice of appeal, and the court thereafter did not enter a final order on the motion.

⁶ The pertinent provision of the lease stated: "In the event of any action or proceeding brought by either party against the other under this Lease the prevailing party shall be entitled to recover for the fees and costs of its attorneys in such action or proceeding, including costs of appeal, if any, in such amount as the court may adjudge reasonable as attorney's fees and costs. In addition, should it be necessary for Landlord to employ legal counsel to enforce any of the provisions herein contained, Tenant agrees to pay all attorney's fees and court costs reasonably incurred."

1. Statutory Attorney Fees for Successful Anti-SLAPP Motion

Appellant contends that its motion for attorney fees was timely because it was made within 60 days of the April 2, 2013 judgment dismissing the remaining causes of action in respondent's complaint. It is mistaken. In accordance with rule 3.1702(b)(1), attorney fees for a successful anti-SLAPP motion must be claimed "within the time for filing a notice of appeal under rules 8.104 and 8.108 in an unlimited civil case" Rule 8.104 sets the time for filing a notice of appeal at 60 days from the earliest of service of a file-stamped copy of the judgment, service of notice of entry of judgment, or 180 days from the entry of judgment. For this purpose, "judgment" includes an appealable order. (Rule 8.104(e).) Section 425.16, subdivision (i), and Code of Civil Procedure section 904.1, subdivision (a)(13), deem an order granting or denying an anti-SLAPP motion appealable.

Under these provisions, appellant had 60 days from October 30, 2012, the date on which the order granting its anti-SLAPP motion was served. Appellant did not file its request for fees until May 8, 2013, long past the deadline. The superior court properly denied the motion as untimely.

Appellant protests, however, that the anti-SLAPP order was not a judgment for purposes of rule 3.1702(b)(1), but was only "an interlocutory (or prejudgment) order," thus making the rule inapplicable. We disagree. Rule 3.1702(a) plainly states that the rule applies to attorney fees under both statute and contract. The 60-day allowance for an appeal from a "judgment" under rule 8.104 encompasses an appealable order. (Rule 8.104(e).) No exceptions are stated in either rule for orders made under section 425.16. (See *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247 [order granting anti-SLAPP motion was final when made and thus appealable, even though court had not yet ruled on defendant's request for attorney fees]; accord, *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 992 [failure to appeal from order granting anti-SLAPP motion precludes appellate review of ruling]; see also *Russell v.*

Foglio (2008) 160 Cal.App.4th 653, 659-660 [failure to file timely notice of appeal from order granting anti-SLAPP motion deprives appellate court of jurisdiction to review order].)

Appellant maintains that the 60-day period should be measured from the April 2, 2013 judgment of dismissal, which would make its motion timely. It relies primarily on *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, *Doe v. Luster* (2006) 145 Cal.App.4th 139, and *American Humane Ass'n v. L.A. Times Communications* (2001) 92 Cal.App.4th 1095 (*American Humane*). These decisions, however, do not support appellant's position. *American Humane* merely confirmed that the fee request accompanying a motion to strike need not include a documentation of the amounts, and that the request itself may be made in a separate motion. The court's holding was supported by common sense and pragmatism as well as statutory law and the Rules of Court, because "the total cost of the special motion to strike and any related discovery permitted by the court can be more accurately computed if a section 425.16, subdivision (c) motion for fees is filed after the [fee and cost] request is granted." (92 Cal.App.4th at p. 1104; accord, *Doe v. Luster, supra*, 145 Cal.App.4th at p. 144.) The appellate court did not weigh in on the issue of timeliness after an order granting the special motion to strike, because the court below had—erroneously—*denied* the anti-SLAPP motion.

Doe v. Luster, supra, 145 Cal.App.4th 139 is also not helpful to appellant. There the plaintiff successfully resisted the anti-SLAPP motion, thereby averting dismissal. She sought attorney fees in a timely motion, but the trial court denied the request in an interlocutory order which was not appealable. The *Doe* court did affirm the appealability of the anti-SLAPP order itself. It also noted, citing *American Humane*, that the party filing the anti-SLAPP motion need not request attorney fees in the same moving papers, but may file a "separate, subsequently filed noticed motion. [Citation.] Indeed, it would seem better practice to defer the fee application until the motion to strike has been

decided since the fees and costs actually incurred can be determined only after the hearing.” (*Id.* at p. 144.) However, the holding in *Doe* was confined to the appealability of the interlocutory order in which plaintiff was denied her attorney fees. The court there emphasized that the intent of the appeal provision in section 425.16, subdivision (i), applies to “the court’s ruling on the special motion to strike itself, not to make related, but ancillary rulings or orders separately appealable.” (*Doe v. Luster, supra*, at p. 146.) The court did not even mention the Rules of Court, much less apply them to filing deadlines in anti-SLAPP cases.

In *Carpenter*, as in *Doe*, the trial court *denied* the defendant’s anti-SLAPP motion, leaving the litigation to proceed through an appeal of the order. Furthermore, in *Carpenter* there was no notice of entry of the order, but only a notice of ruling, which did not trigger the 60-day period. (*Carpenter, supra*, 151 Cal.App.4th at p. 463, fn. 8.) The *Carpenter* court nonetheless regarded rule 3.1702 as ambiguous in referring to “ ‘fees for services *up to and including the rendition of judgment* in the trial court.’ ” (*Carpenter, supra*, at p. 464.) In its interpretation of that language, the rule “applies only to a motion to recover *all* prejudgment attorney fees incurred in an action, and contemplates the filing of such a motion at the conclusion of the lawsuit.” (*Ibid.*) The rule did not, in the *Carpenter* court’s view, apply to a motion for fees for services leading to the anti-SLAPP order because that is a “ ‘claim for services’ rendered *before* ‘the rendition of judgment.’ ” It is not a claim ‘for services *up to and including* the rendition of judgment,’ and therefore does not fit within the plain language of rule 3.1702.” (*Ibid.*) The appellate court thus concluded that the time limits prescribed in rule 3.1702 do not begin to run until entry of a final judgment in the litigation, “not entry of a prejudgment appealable order.” (*Carpenter, supra*, at p. 468.)

Even if we accept the *Carpenter* court's interpretation of rule 3.1702 as applicable only to fees sought for fees incurred in the entire proceeding, *including* the judgment,⁷ we nonetheless view the section 425.16 order as an appealable order that qualifies as a judgment under rule 8.104(e). The order is thus subject to the time limits set forth in rule 3.1702. We therefore decline to extend the *Carpenter* reasoning to the present procedural setting, where the order *granting* appellant's special motion to strike effectively terminated the action with the exception of the requests for declaratory and injunctive relief. That result entitled appellant to its attorney fees as the prevailing party. (See *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340 ["a party who partially prevails on an anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion"].) Its request for such fees, however, had to be filed by December 31, 2012. Accordingly, we agree with the superior court that statutory fees were not available to appellant once the allowable period for claiming them expired.

2. Contractual Attorney Fees

The same result attends the causes of action for which appellant seeks attorney fees under the lease. Rule 3.1702(a) pertains equally to "claims for attorney's fees provided for in a contract." However, the claims for declaratory and injunctive relief survived the October 30, 2012 ruling because the trial court found that they were outside the scope of the anti-SLAPP statute. When a cause of action relates to a contract claim, the prevailing party would normally be entitled to recover attorney fees for that cause of action under Civil Code section 1717 (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.) Here, however, even if its motion was timely, appellant may not recover

⁷ We cannot help noticing that the text of rule 3.1702(b)(1) is preceded by the heading "Attorney's fees before trial court judgment."

attorney fees because respondent voluntarily dismissed the declaratory relief cause of action along with the request for injunctive relief, leaving no claims in respondent's complaint to be adjudicated. The action was effectively terminated. Civil Code section 1717, subdivision (b)(2) precludes recovery of attorney fees in such cases: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."⁸ Thus, inasmuch as the remaining causes of action are based on the lease and therefore sound in contract, "section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees.*" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 617, italics omitted.)

The rationale underlying this rule is sound: "Although a plaintiff may voluntarily dismiss before trial because he learns that his action is without merit, obviously other reasons may exist causing him to terminate the action. For example, the defendant may grant plaintiff—short of trial—all or substantially all relief sought, or the plaintiff may learn the defendant is insolvent, rendering any judgment hollow Moreover, permitting recovery of attorney fees by defendant in all cases of voluntary dismissal before trial would encourage plaintiffs to maintain pointless litigation in moot cases or against insolvent defendants to avoid liability for those fees." (*International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 224; *Santisas v. Goodin, supra*, 17 Cal.4th at p. 613.) Appellant's entitlement to contractual fees for its attorney's services in the unlawful detainer action is not before us. We hold only that it may not recover those incurred in the defense of respondent's action.

⁸ We invited supplemental briefing from the parties addressing the effect of section 1717, subdivision (b)(2), on recovery of contractual attorney fees for the eighth and ninth causes of action. Appellant's reply did not address the question asked.

3. *Costs*

“A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first.” (Rule 3.1700(a)(1).) Appellant was the prevailing party in the anti-SLAPP proceeding, but the court’s order—which section 664.5 deems a judgment⁹—was filed more than 60 days before appellant filed its memorandum of costs. Costs for the eighth and ninth causes of action, as noted above, were not recoverable because appellant was not the prevailing party on these claims.

Disposition

The order is affirmed.

⁹ Code of Civil Procedure section 664.5, subdivision (c), pertaining to notices of entry of judgment, explains that “[f]or purposes of this section, ‘judgment’ includes any judgment, decree, or signed order from which an appeal lies.”

ELIA, J.

WE CONCUR:

PREMO, Acting P. J.

MIHARA, J.