

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DALE LAUE,

Plaintiff and Appellant,

v.

LILIANA A. ORTIZ,

Defendant and Respondent.

H041044

(Santa Clara County

Super. Ct. No. CV250570)

Defendant Liliana A. Ortiz prevailed on her special motion to strike plaintiff's first amended complaint pursuant to Code of Civil Procedure section 425.16,¹ the so called anti-SLAPP statute.² Later, the trial court issued a separate order awarding attorney fees and costs to defendant pursuant to section 425.16, subdivision (c)(1). Plaintiff Dale Laue, in propria persona, now purports to appeal from this subsequent, separate order.³

In this appeal, plaintiff principally argues that the attorney fee and costs order is void by operation of law because, on perfection of his appeal from the earlier order granting defendant's anti-SLAPP motion, the trial court lost subject matter jurisdiction. He argues that timely appeal of that order awarding attorney fees and costs automatically

¹ All further statutory references are to the Code of Civil Procedure unless otherwise stated.

² "SLAPP is an acronym for 'strategic lawsuit against public participation.' (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57)" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 815, fn. 1.)

³ Plaintiff separately appeals from the earlier order granting defendant anti-SLAPP motion in *Laue v. Ortiz* case No. H040705.

stayed its enforcement without any undertaking. Lastly, he argues that, if this court reverses the trial court's order granting defendant's anti-SLAPP motion in the related appeal, the order awarding attorney fees and costs must be "reversed and vacated."

We asked the parties to address in supplemental briefing the issue whether the separate attorney fees and costs award under section 425.16, subdivision (c)(1), is an appealable order. Plaintiff now argues that since he "contends that the trial court lacked subject matter jurisdiction over the [anti-SLAPP] proceeding after [he] filed a notice of appeal, and since the prevailing party is based on the outcome of appeal H040705, the ORDER awarding attorney's fees and costs is . . . an appealable order." He also argues that the order is appealable because it is a final collateral order.

We conclude that we must dismiss this purported appeal on our own motion because the order from which plaintiff appeals is a nonappealable order.

Discussion

Section 425.16, subdivision (i), provides: "An order granting or denying a special motion to strike shall be appealable under Section 904.1." Section 904.1, subdivision (a)(13), allows an appeal "[f]rom an order granting or denying a special motion to strike under Section 425.16." This appeal is not an appeal from such an order.

Section 904.1 also provides in part that an appeal may be taken "[f]rom a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222" (§ 904.1, subd. (a)(1)) and "[f]rom an order made after a judgment made appealable by paragraph (1)." (§ 904.1, subd. (a)(2).) "A judgment is the final determination of the rights of the parties in an action or proceeding." (§ 577.) In this case, the challenged order awarding attorney fees and costs pursuant to section 425.16, subdivision (c)(1), is neither a judgment nor "an order made after judgment made appealable by [section 904.1, subdivision (a)(1)]." Where all causes of action are

stricken as the result of a successful anti-SLAPP motion, a judgment of dismissal finally disposing of the action must follow. The record before us contains no such judgment.

“Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.” (Code Civ. Proc., § 1003.) An order granting or denying a special motion to strike under section 425.16 is clearly made appealable by statute (§§ 425.16, subd. (i); 904.1, subd. (13)), but such order is not a judgment. (Cf. *Berri v. Superior Court* (1955) 43 Cal.2d 856, 860 [there is no appeal from a ruling on a demurrer but only from the ensuing judgment of dismissal].)

“The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126) A trial court’s order is appealable only when made so by statute. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696)” (*Doe v. Luster* (2006) 145 Cal.App.4th 139, 145 (*Doe*).) “A reviewing court must raise the issue [of appealability] on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1. [Citations.]” (*Jennings v. Marralle, supra*, 8 Cal.4th at pp. 126-127.)

In *Doe, supra*, 145 Cal.App.4th 139, the trial court denied both defendants’ anti-SLAPP motions. (*Id.* at p. 142.) Over three months later, the court subsequently denied plaintiff Doe’s motion for attorney fees and costs. (*Ibid.*) The Court of Appeal, Second Appellate District, Division Seven, concluded that the order denying the motion for attorney fees and costs was not immediately appealable. First, it observed: “[S]ection 425.16, subdivision (i), provides, ‘An order granting or denying a special motion to strike shall be appealable under Section 904.1.’ Neither that statutory provision nor any other authorizes an immediate appeal from the award or denial of attorney fees to the prevailing moving party or from the denial of attorney fees to the prevailing party opposing a special motion to strike.” (*Id.* at pp. 145-146; see § 904.1.) Second, the court stated that “[t]he Legislature’s concern [in enacting the special appeal provision] was that

the inability to appeal immediately from the denial of a meritorious special motion to strike defeated the protective purpose of section 425.16.” (*Doe, supra*, at p. 147.) It pointed out that “[n]o such similar purpose is served by permitting an immediate appeal from an interlocutory order granting or denying attorney fees following the trial court’s ruling on a special motion to strike.” (*Ibid.*)

Both parties on appeal ask us not to follow *Doe*. Parties cannot confer jurisdiction upon the appellate court by consent, stipulation, estoppel, or waiver. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666.) Accordingly, we must decide whether a subsequent, separate order awarding attorney fees and costs pursuant to section 425.16, subdivision (c)(1), is an appealable order.

Plaintiff cites *Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244 (*Ellis*). In that case, the defendant’s notice of appeal indicated it was appealing from the separate order awarding attorney fees to the prevailing party on the anti-SLAPP motion. (*Id.* at p. 250.) In its opinion, the Court of Appeal, Third Appellate District stated: “An appeal may be taken from an order awarding attorney fees for a successful anti-SLAPP motion. (See, e.g., *Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 535, 536-537) Subdivision (a)(13) of Code of Civil Procedure section 904.1 provides that an order granting an anti-SLAPP motion is appealable. Thus, the Code of Civil Procedure reflects the final and dispositive nature of an order granting an anti-SLAPP motion. Although denominated an ‘order,’ the granting of an order dismissing a case on the basis of the anti-SLAPP statute has the same effect as a final judgment. When the trial court issues an appealable order akin to a final judgment, a party may appeal from a subsequent order granting or denying a request for an award of attorney fees and costs as an ‘order after judgment’—or, here, more aptly described as an order after an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(2); see *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 805) Consequently, the order awarding

attorney fees . . . is an appealable order. (*Mallard v. Progressive Choice Ins. Co.*, *supra*, 188 Cal.App.4th at p. 535 . . .)⁴ (*Id.* at pp. 250-251.)

We respectfully disagree with *Ellis*. In *Mallard v. Progressive Choice Ins. Co.*, *supra*, 188 Cal.App.4th 531 (*Mallard*), a case upon which *Ellis* relied, there was no issue of appealability. In *Mallard*, “[t]he trial court granted the anti-SLAPP motion and *ordered the complaint dismissed with prejudice* as to both defendants” and “Mallard appealed.” (*Id.* at p. 536, italics added.) Thereafter the trial court granted a motion for attorney fees and costs under section 425.16, subdivision (c), and Mallard separately appealed from that order. (*Mallard, supra*, at p.536)

Ibid.) In *Mallard*, the written order of dismissal qualified as a judgment (§ 581d, see § 577), therefore, the order awarding attorney fees and costs was undisputedly an appealable order since it was “an order made after a judgment made appealable by paragraph (1)” of subdivision (a) of section 904.1.

Relying upon two different cases, defendant claims that this case is properly before us because “when Anti-SLAPP orders have been challenged on the merits, . . . any Anti-SLAPP fee order is also immediately appealable.” In the first case, *Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265 (*Baharian-Mehr*), the defendant “filed a special motion to strike [certain] causes of action . . . , arguing that they arose from the constitutionally protected activity.” (*Id.* at p. 270, fn. omitted.) “The court denied the motion, finding that ‘the gravamen of this case is a business dispute between owners and not activity protected by . . . the anti-SLAPP statute.’” The court also found that the motion to strike was frivolous, ‘in that there was no reasonable basis for the moving party

⁴ *Otay River Constructors v. San Diego Expressway, supra*, 158 Cal.App.4th at p. 801 held that “the order denying [the plaintiff’s] petition to compel arbitration was essentially a judgment on the only issue before the trial court; accordingly, [the defendant] could properly appeal from the order denying its motion for an award of attorneys fees and costs under subdivision (e) of section 1294, which allows the appeal from ‘[a] special order after final judgment.’” Section 1294 does not apply here.

to assert that . . . the gravamen of this case arose from [protected] activity’ The court therefore ordered [defendant] Smith to pay \$1,500 in attorney fees to Baharian-Mehr.”⁵ (*Ibid.*)

In *Baharian-Mehr, supra*, 189 Cal.App.4th 265, the Court of Appeal, Fourth Appellate District, Division Three, *agreed* “with the holding in *Doe* that a separate attorney fee order should not be heard on interlocutory appeal” (*Id.* at p. 274.) The appellate court concluded, however, that where “the issue of whether the anti-SLAPP motion should have been granted is properly before the appellate court” pursuant to section 425.16, subdivision (i), a court of appeal has jurisdiction to review both the lower court’s ruling granting the defendant’s special motion to strike and a contemporaneous award of attorney fees and costs under section 425.16, subdivision (c)(1). (*Baharian-Mehr, supra*, at. 275.)

The court reasoned: “In *Moore v. Shaw* (2004) 116 Cal.App.4th 182, [10 Cal.Rptr.3d 154] (*Moore*), the defendants appealed the denial of their anti-SLAPP motion, and the plaintiff cross-appealed the denial of his request for attorney fees. (*Id.* at p. 186.) The appellate court affirmed the denial of the motion and reversed the trial court’s decision not to award fees, finding the request should have been granted. The appeal of the attorney fee award was part and parcel of the appeal on the anti-SLAPP motion itself. Not only was the decision part of the same order, but evaluating the trial court’s decision on the attorney fee motion required a thorough review of the merits of

⁵ Section 425.16, subdivision (c)(1), provides in part: “If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.” Subdivision (a) of section 128.5 states in part: “A trial court may order a party, the party’s attorney, or both to pay the reasonable expenses, including attorney’s fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” In this case, the trial court relied upon a different portion of section 425.16, subdivision (c)(1), generally establishing that “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.”

the motion. Addressing the merits of the motion at an early stage of the case while leaving the attorney fee issue for some date far in the future artificially separates two intertwined issues. Further, it potentially constitutes a waste of judicial resources, if, at that far later date, the only issue left to be decided is attorney fees on the long-ago anti-SLAPP motion.” (*Baharian-Mehr, supra*, 189 Cal.App.4th at p. 274.) It concluded: “In cases where, as here, the issue of whether the anti-SLAPP motion should have been granted is properly before the appellate court, it would be absurd to defer the issue of attorney fees until a future date, resulting in the probable waste of judicial resources. When the first issue is properly raised, appellate jurisdiction over both issues under section 425.16, subdivision (i) is proper.” (*Id.* at p. 275.)

As evident, *Baharian-Mehr, supra*, 189 Cal.App.4th 265 does not stand for the proposition that a later, separate attorney fee and cost award made pursuant section 425.16, subdivision (c)(1), not contemporaneous with an order granting or denying a special motion to strike, is an appealable order. Neither does *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, the second case cited by defendant, support such a notion.

In *Chitsazzadeh v. Kramer & Kaslow, supra*, 199 Cal.App.4th 676, the Court of Appeal, Second Appellate District, Division Three, merely stated in a footnote: “We regard the order striking the special motion to strike as a denial of the motion, and therefore an appealable order. (§§ 425.16, subd. (i), 904.1, subd. (a)(13).) An attorney fee award in connection with the denial of a special motion to strike is sufficiently interrelated with the denial that the fee award is reviewable on appeal from the order denying the special motion to strike. (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 275 . . . but see *Doe v. Luster* (2006) 145 Cal.App.4th 139, 145-150.)” (*Id.* at p. 680, fn. 2.)

Both parties alternatively suggest that the attorney fees and cost award may be immediately appealable under the collateral order exception to the one final judgment

rule. “[T]he ‘one final judgment’ rule, [is] a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case. ‘The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case.’ [Citations.]” (*Griset v. Fair Political Practices Com. supra*, 25 Cal.4th at p. 697.)

The Supreme Court fairly recently stated: “Given the one final judgment rule’s deep common law and statutory roots and the substantial policy considerations underlying it, we are reluctant to depart from its principles and endorse broad exceptions that might entail multiple appeals absent compelling justification. ‘[E]very exception to the final judgment rule not only forges another weapon for the obstructive litigant but also requires a genuinely aggrieved party to choose between immediate appeal and the permanent loss of possibly meritorious objections.’ (*Kinoshita v. Horio* [(1986)] 186 Cal.App.3d at p. 967.) Accordingly, ‘exceptions to the one final judgment rule should not be allowed unless clearly mandated.’ (*Ibid.*)” (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 757.)

The Supreme Court has explained that “where there is a final determination of some collateral matter distinct and severable from the general subject of the litigation, even though litigation of the main issues continues, an appeal nevertheless is authorized. [Citation.]” (*Southern Pacific Co. v. Oppenheimer* (1960) 54 Cal.2d 784, 786.) In *In re Marriage of Skelley* (1976) 18 Cal.3d 365 (*Skelley*), a dissolution case in which the wife appealed from the superior court’s order reducing temporary spousal support and denying attorney fees, the Supreme Court applied the collateral order exception to the one final judgment rule to review the issues. (*Id.* at p. 367.)

In *Skelley, supra*, 18 Cal.3d 365, the Supreme Court described the collateral order exception: “When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing

payment of money or performance of an act, direct appeal may be taken. [Citations.] This constitutes a necessary exception to the one final judgment rule. Such a determination is substantially the same as a final judgment in an independent proceeding. [Citations.]” (*Id.* at p. 368; see *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119, but see *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 899-904.)

The Supreme Court observed in *Skelley*: “An order for support is operative from the moment of pronouncement. And a final judgment excluding future support does not preclude recovery of all money due under a prior temporary support order. [Citations.]” (*Skelley, supra*, 18 Cal.3d at p. 369.) The court determined that temporary support orders are directly appealable collateral orders. (*Id.* at pp. 368-370.)

In *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, an anti-SLAPP case, the “trial court granted Singletary’s anti-SLAPP motion as to the City’s fourth cause of action (unfair business practices) and the sixth cause of action (injunctive relief), but denied the motion in all other respects. (Code Civ. Proc., § 425.16.) The trial court awarded Singletary \$5,750 for attorney’s fees, and \$80 for costs.” (*Id.* at p. 757, fn. omitted.) The Court of Appeal, Fourth Appellate District, Division Two, determined that “since the attorney fee order is (1) independent of the main causes of action, and (2) involves the payment of money by the appellant, . . . it qualifies for the collateral order exception, and is directly appealable.” (*Id.* at p. 782.)

This case is distinguishable from *Singletary* in that the trial court granted defendant’s anti-SLAPP motion as to all causes of action. Accordingly, a judgment of dismissal entirely terminating the litigation must follow. The award of attorney fees and costs under section 425.16, subdivision (c)(1), which was made subsequent to the order granting defendant’s special motion to strike, was not a final order collateral to continuing litigation of the main issues. It was properly reviewable only on appeal from a judgment of dismissal.

This court is required to dismiss a purported appeal from a nonappealable order on its own motion. (See *Cole v. Rush* (1953) 40 Cal.2d 178 (*per curiam*)). Accordingly, we will dismiss this appeal.

DISPOSITION

The appeal is dismissed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.