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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

AMPEX CORPORATION et al.,
Plaintiffs and Respondents,
v.
SCOTT CARGLE,
Defendant and Appellant.

A099344

(Contra Costa County
Super. Ct. No. C01-03627)

Appellant Scott Cargle seeks review of the trial court's denial of his request for attorney fees pursuant to the anti-SLAPP[1] statute, Code of Civil Procedure[2] section 425.16. The trial court concluded it lacked jurisdiction "to do anything in this case" because plaintiffs[3] had already voluntarily dismissed their libel action against him. We conclude that the trial court retained jurisdiction to rule on the motion for attorney fees despite the voluntary dismissal. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

On September 7, 2001, respondents filed a libel suit against "Doe 1 aka 'exampex' on Yahoo!" (Exampex) in California. Ampex and Yahoo! are located in

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[1] SLAPP stands for Strategic Lawsuits Against Public Participation.

[2] All statutory references are to the Code of Civil Procedure.

[3] Plaintiffs, respondents herein, are Ampex Corporation (Ampex) and Edward J. Bramson.

California. The gist of the complaint was that Exampex posted defamatory messages on an Internet message board for Ampex operated by Yahoo!.

Respondents served a subpoena on Yahoo! seeking information related to the identity and location of Exampex. On October 10, 2001, appellant moved to quash the subpoena and for leave to proceed anonymously. Ultimately the trial court denied the motion.

On January 9, 2002, respondents requested, and the clerk entered, the default of Exampex which the court, on its own motion, set aside on January 22, 2002. Meanwhile, on January 10, 2002, appellant filed a section 425.16[4] motion to strike, coupled with a request for attorney fees and costs.

Upon learning appellant's identity in the proceedings, respondents dismissed the California lawsuit without prejudice on March 27, 2002, and proceeded against him in New York. At the subsequent hearing on appellant's motion to strike and for attorney fees, the court determined that the voluntary dismissal stripped it of jurisdiction to consider the motion. This appeal followed.

II. DISCUSSION

A. *The Trial Court Retained Jurisdiction to Award Attorney Fees Following Voluntary Dismissal of the Underlying Action.*

Section 425.16, subdivision (c) (hereafter section 425.16(c)) states: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. 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

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[4] This statute provides in part: "(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

prevailing on the motion, pursuant to Section 128.5." Appellant maintains that the trial court mistakenly concluded it lost jurisdiction to rule on his attorney fee motion following dismissal of the complaint. Appellant is right.

Generally, a plaintiff's exercise of the voluntary right to dismiss severs the court's power to enter further orders in the dismissed action. (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784.) However, reviewing courts consistently have held that the trial court may award section 425.16(c) attorney fees even after a voluntary dismissal.

Coltrain v. Shewalter (1998) 66 Cal.App.4th 94 was the first case to address this matter. There, the trial court determined the defendants were the prevailing parties and awarded them attorney fees under section 425.16(c) after the plaintiffs voluntarily dismissed their complaint with prejudice in response to an anti-SLAPP motion. The reviewing court held that when the plaintiff voluntarily dismisses a *purported* SLAPP suit while a special motion to strike is pending, the trial court retains discretion to determine if the defendant is the prevailing party for purposes of attorney fees under section 425.16(c). (*Coltrain v. Shewalter, supra,* at p. 107.) The reviewing court in *Liu v. Moore* (1999) 69 Cal.App.4th 745 concurred that a defendant who is voluntarily dismissed, with or without prejudice, after filing a section 425.16 motion to strike, is entitled to determination of his or her motion for attorney fees. The dismissed party may still have the collateral statutory rights which the court must determine and enforce. (*Liu v. Moore, supra,* at p. 751 & fn. 3.)

Coltrain and *Liu* differ, however, as to the standard for deciding the attorney fee request. *Coltrain* does not call for a judicial determination that the dismissed action in fact was a SLAPP suit subject to a motion to strike. Rather, it focuses on the prevailing party determination: "In making that determination, the critical issue is which party realized its objectives in the litigation. Since the defendant's goal is to make the plaintiff go away with its tail between its legs, ordinarily the prevailing party will be the defendant. The plaintiff, however, may try to show it actually dismissed because it had substantially achieved its goals through a settlement or

other means, because the defendant was insolvent, or for other reasons unrelated to the probability of success on the merits." (*Coltrain v. Shewalter*, *supra*, 66 Cal.App.4th at p. 107.)

Rather than emphasizing the plaintiff's reasons for voluntarily dismissing a complaint, *Liu* requires adjudication of the merits of the anti-SLAPP motion as an essential precondition to ruling on the defendant's request for fees. According to *Liu*, a fee award is justified only when (1) the defendant shows that the plaintiff's action comes within the purview of section 425.16, subdivision (b), and (2) the plaintiff is unable to establish a reasonable probability of success. (*Liu v. Moore*, *supra*, 69 Cal.App.4th at p. 752.)

Following *Liu*, the court in *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218 concurred that "[t]he fee motion is wholly dependent upon a determination of the merits of the SLAPP motion." In other words, the ruling on the merits drives determination of a defendant's right to attorney fees under section 425.16(c).

Respondents' dismissal of the complaint did not deprive the court of jurisdiction to decide appellant's request for attorney fees on his section 425.16 motion. However, any entitlement to fees will stem from an adjudication of the merits of appellant's motion as set forth in *Liu*.

B. *Appellant's Default Was Properly Set Aside.*

Respondents urge nonetheless that appellant's motion to strike was a nullity because it was filed while he was in default. We disagree.

First, section 474 prohibits a default or default judgment from being entered against a Doe defendant unless the summons or other process bears on its face a notice of the fictitious designation; proof of service states the fictitious name and that the required notice was given; and the complaint was amended to state the defendant's true name. Section 474 is mandatory, not directory. "[I]ts effect is to deprive the court of the right to proceed against a defendant served with such a

defective summons . . . ." (*Armstrong v. Superior Court* (1956) 144 Cal.App.2d 420, 424.) Here, there was no service of summons, let alone compliance with this statute.

Second, the clerk had no power to enter the default and thus the court properly set it aside. The clerk's authority to enter a default derives from section 585, which conditions the entry upon determination of proof of service of summons and failure to file a timely answer. (§ 585, subd. (a).) Here, the request to enter the default of Exampex stated that Exampex "made a general appearance on 10/10/01, which legal [*sic*] constitutes personal service under CCP 410.50 (Please See Attached Declaration of Michael D. Prough)." (Italics omitted.) Proof of service was absent from the face of the record because it did not exist and hence the clerk acted in excess of the limited ministerial power conferred by section 585. (See *Westport Oil Co. v. Garrison* (1971) 19 Cal.App.3d 974, 977-978 [clerk's act of entering default was void because pleading was not personally served as then required by § 585].) Moreover, entry of default in this case required the exercise *of judicial discretion* to evaluate whether appellant had made a general appearance that substituted for service of summons. Section 585 bestows no such discretion on the clerk. (See *Potts v. Whitson* (1942) 52 Cal.App.2d 199, 207 [clerk has no discretion to conclude that responsive pleading is insufficient]; *Wisdom v. Ramirez* (1985) 177 Cal.App.3d Supp. 1, 8, disapproved on another point in *Janssen v. Luu* (1997) 57 Cal.App.4th 272, 275, 278 [clerk not authorized to peruse document to determine whether it constituted, or should be construed as, an answer, instead of relying on label].) So, too, we conclude the clerk had no judicial discretion to evaluate the attorney's declaration and accept it in lieu of proof of service of summons.

Third, in any event appellant did not make a general appearance when he moved to quash the Yahoo! subpoena and thus section 410.50, equating a general appearance by a party with personal service of summons, does not apply. (See § 410.50, subd. (a).) Under section 1014, a defendant appears in an action when he or she "answers, demurs, files a notice of motion to strike, files a notice of motion to transfer . . . , moves for reclassification . . . , gives the plaintiff written notice of

appearance, or when an attorney gives notice of appearance for the defendant." The statutory list does not include a motion to quash a third party subpoena, and although the list is not exclusive (*Sanchez v. Superior Court* (1988) 203 Cal.App.3d 1391, 1397), it is illustrative. Each identified act is one that can only be requested by a party to the action. This is in keeping with the notion that the term general appearance pertains to acts which, under all the circumstances, are deemed to confer personal jurisdiction. (*Ibid.*)

On the other hand, a nonparty can move to quash a subpoena. (§ 1987.1.) So moving, appellant did not avail himself of any advantage that would be closed to a nonparty choosing to object to a subpoena. This was not relief that could only be granted upon the assumption that the court has jurisdiction over the person. (See *Nam Tai Electronics, Inc. v. Titzer* (2001) 93 Cal.App.4th 1301, 1307-1309, disapproved on another point in *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 278, fn. 8 [ruling that appearance at status conference and filing related questionnaire does not constitute general appearance].) Nor, as suggested by respondents, did service of their opposition on appellant's counsel constitute service of the complaint on him. Section 1015, which they cite for this bizarre proposition, provides that *when a party has appeared* in the action and has an attorney, an ordinary procedural paper or notice must be served on the attorney, not the party. (See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 12, pp. 411-412.)

Fourth, constructive or actual knowledge of the litigation does not constitute legal service. "[N]otice does not substitute for proper service. Until statutory requirements are satisfied, the court lacks jurisdiction over a defendant." (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808.)

III. DISPOSITION

The order denying appellant's motion for attorney fees is reversed and remanded with direction to rule on the motion in accordance with the views expressed in this opinion.

Reardon, J.

We concur:

Kay, P.J.

Sepulveda, J.