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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

EAGLE BROADBAND, INC., Plaintiff and Appellant, v. ROY THOMAS MOULD, Defendant and Respondent.	H030719 (Santa Clara County Super. Ct. No. CV050179)

In this appeal, the plaintiff challenges the award of attorney's fees and costs to the defendant, who prevailed in his special motion to strike the plaintiff's complaint. Finding no abuse of discretion, we shall affirm the award.

BACKGROUND

The parties to this appeal are plaintiff Eagle Broadband, Inc. (plaintiff), and defendant Roy Thomas Mould (Mould). This is the second appeal involving these parties.[1] The first arose from an order entered in March 2006 on a special motion to strike plaintiff's complaint as a "SLAPP" – a strategic lawsuit against public participation. (Code Civ. Proc., § 425.16.) That motion was brought jointly by

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defendants Mould and Williams. The trial court granted the motion as to Mould but denied it as to Williams. In the first appeal, as relevant here, we affirmed the trial court's order granting the special motion to strike in favor of Mould. (H030169, non-pub. opn., filed Dec. 14, 2007.)

In this appeal, we consider plaintiff's contentions that the trial court erred in subsequently awarding Mould more than $66,000 in attorney's fees and costs.

LEGAL PRINCIPLES

The governing statute provides for an award of attorney's fees and costs to the prevailing defendant on a special motion to strike. (Code Civ. Proc., § 425.16, subd. (c).)[2] As the California Supreme Court has recognized, "any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131 (*Ketchum*).)

While recovery is mandatory, the amount is left to the trial court's discretion. (See, e.g., *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1388.) Trial judges are entrusted with this discretionary determination, because they are in the best position to assess the value of the professional services rendered in their courts. (*Ketchum, supra*, 24 Cal.4th at p. 1132; see *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623 ["trial court has its own expertise" on the question of fees].)

[2] The pertinent provision reads as follows: "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 prevailing on the motion, pursuant to Section 128.5." (Code Civ. Proc., § 425.16, subd. (c).)

As a general rule, the trial court must exercise its discretion " 'based on the lodestar adjustment method.' " (*Ketchum, supra,* 24 Cal.4th at p. 1134.) Typically, that method "should be applied to fee awards under Code of Civil Procedure section 425.16," although "a blanket 'lodestar only' approach" is not required. (*Id*. at p. 1136.)

Employing that method, "a court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney … involved in the presentation of the case.' " (*Ketchum, supra,* 24 Cal.4th at pp. 1131-1132.) The lodestar figure "may be adjusted by the court based on factors, including … (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." (*Id*. at p. 1132.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action." (*Ibid*.)

The trial court's determination of the appropriate fee is reviewed for an abuse of discretion. (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1249.) It "will not be disturbed unless the appellate court is convinced that it is clearly wrong." (*Ketchum, supra,* 24 Cal.4th at p. 1132, internal quotation marks omitted.)

ANALYSIS

Plaintiff attacks the trial court's order on several grounds. We consider and reject each in turn.

1. A statement of decision was not required.

Plaintiff first contends that the court committed reversible error by failing to "issue … a statement of decision or finding on the lodestar components …." According to plaintiff, "given the contested nature of the fees sought by Mould, both parties expressly and implicitly requested that the court issue such a statement." Based on that factual assertion, plaintiff urges its entitlement to a statement of decision.

Plaintiff's argument borders on the frivolous.

As plaintiff acknowledges, the California Supreme Court explicitly rejected a similar contention in the *Ketchum* case. (*Ketchum, supra*, 24 Cal.4th at p. 1140.) In that case, the plaintiff asserted "that the superior court erred by failing to provide a 'reasoned explanation' for denying his objections to specific items in the billing records." (*Ibid.*) The high court disagreed, saying: "The superior court was not required to issue a statement of decision with regard to the fee award. [Citation.] Moreover, although [plaintiff] opposed the motion for attorney fees, he did not request a statement of decision with specific findings." (*Ibid.*)

Applying that governing precedent here, we emphatically reject plaintiff's argument. First, contrary to the sly suggestion embraced in plaintiff's factual assertion, plaintiff did not *explicitly* request findings; only Mould did so. Second, there is no evidence supporting plaintiff's claim that it *implicitly* requested such findings, a claim that lacks legal merit in any event, given the Supreme Court's pronouncement in *Ketchum*. (*Ketchum, supra*, 24 Cal.4th at p. 1140.) The authority cited by plaintiff is equally unavailing. (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 342, fn. 6 ["trial court is not required to issue a statement of decision with regard to a fee award, unless a party timely requests one"].)

2. The trial court gave proper consideration to the motion.

In a related vein, plaintiff argues that "it is highly unlikely that the trial court conducted a detailed analysis" under the lodestar method. In support of that argument, plaintiff cites both the absence of a statement of findings and "the fact that the court had four separate motions before it at the August [8] hearing and signed the August 9 Order on all four motions the next day."

The record belies plaintiff's assertion. At the hearing, the trial judge stated: "I have read your papers, including some that came in as late as yesterday afternoon." Moreover, even on a silent record, we indulge all presumptions in favor of the trial court's decision. (*Ketchum, supra,* 24 Cal.4th at p. 1140.)

3. The court did not fail to make any required reductions.

Citing various specific grounds, plaintiff contends that the trial erred by failing to discount the attorney fees and costs. As we now explain, neither plaintiff's overall argument nor any of its specific grounds is persuasive.

Background

In his moving papers on the fee motion, Mould requested $65,470.00 in attorney fees plus $705.39 in costs, for a total of $66,175.39. His request was supported by the declaration of one of his attorneys, Mark Goldowitz of the California Anti-SLAPP Project (CASP), and by the declarations of four other attorneys with expertise in attorney fee issues, James Towery, Michael Reedy, Brad Seligman, and Richard Pearl. Various exhibits were attached to Goldowitz's declaration, including detailed billing records for this case dating from October 6, 2005 to June 30, 2006.

In his reply papers, Mould submitted an "updated fee claim" for $87,200.00 in attorney fees and $805.84 in costs, for a total of $88,005.84. Updated billing

records through August 8, 2006, accompanied the claim, along with supplemental attorney declarations. Among the cited bases for the increase were the preparation of a reply on the fee motion and responses to related motions brought by the plaintiff. Mould thus identified attorney time of approximately "16.7 hours to respond to plaintiff's ex parte application and motion for a stay; 18.5 hours to reply to plaintiff's opposition to the fee motion; 3 hours to respond to plaintiff's motion to seal documents; and an estimated 3 hours related to appearing at the hearing on this motion (including travel)."

The trial court awarded Mould $65,645.84 in fees, and $805.84 in costs, for a total of $66,451.68. Since Mould requested more than $88,000 in fees and costs, the award represents a reduction of more than $20,000. Given these facts, it is indisputable that the trial court discounted the requested fees in some fashion. That circumstance severely undermines plaintiff's remaining contentions. Nevertheless, we briefly address each.

Claims concerning work performed for defendant Williams

According to plaintiff, the trial court "abused its discretion by failing to discount the requested amount for work [that defense counsel] CASP performed on behalf of Williams, a non-prevailing party. This failure to apportion the fees and costs between Williams and Mould constitutes reversible error." Plaintiff makes the same apportionment argument concerning costs. In its opposition papers below, plaintiff highlighted the offending entries for the court.

In support of this argument, plaintiff relies on three cases: *Fennessy v. DeLeuw-Cather Corp.* (1990) 218 Cal.App.3d 1192, 1196 (*Fennessy*) ["where a prevailing party incurs costs jointly with one or more parties who remain in the litigation, *during the pendency of the litigation* that party may recover only costs actually incurred by a party or in its behalf in prosecuting or defending the case"];

Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265, 1297 (*Heppler*) [in lengthy trial involving a number of defendants with disparate issues, "trial court erred by not apportioning the attorney fees award" where appellant's "part of the case could have been tried in considerably less time"]; and this court's recent decision in *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 985 (*Wakefield*) [where spouses have a unity of interest in the litigation, but only one spouse prevails, "the trial court retains discretion to award, deny, or allocate costs" under the second prong of § 1032].) As these cases instruct, the trial court must exercise its discretion in allocating costs when jointly represented parties obtain mixed outcomes. (See *Fennessy*, at p. 1197 [trial court must "ascertain[]" whether successful defendant actually incurred claimed costs]; *Heppler,* at p. 1297 [trial court has "discretion to allocate awards of attorney fees"]; *Wakefield,* at p. 985 ["trial court retains discretion to … allocate costs"].)

As we now explain, based on the evidentiary record, plaintiff's apportionment argument does not withstand scrutiny.

Here, the record contains affirmative evidence that the fee request was for services that benefited Mould, either exclusively or jointly with Williams. That evidence includes the declaration of attorney Goldowitz, whose office also represented Williams. As Goldowitz declared under penalty of perjury: "This fee motion claims only that time which was reasonably related to *Mould's* special motion to strike or this fee motion." To the extent that it did so, the trial court was justified in relying on this affirmative declaration in assessing the need for apportionment. (*Melnyk v. Robledo*, *supra*, 64 Cal.App.3d at p. 625 [rejecting the appellant's contention "the trial court's order was not based on evidence"].) Conversely, there is no evidence that the court failed to apportion any fees where it was required to do so. Absent such evidence, we uphold the trial court's decision. (*Ketchum*, *supra*, 24 Cal.4th at p. 1140.)

Claims concerning fees for challenged litigation activities

Plaintiff next contends: "The August 9 Order also constitutes an abuse of the trial court's discretion because it awarded Mould attorney fees that were not incurred in connection with his anti-SLAPP motion." Noting that it identified "over 4.4 hours of impermissible time entries" unrelated to the motion, plaintiff complains that the court failed to discount the fee award accordingly.

Again, we reject plaintiff's contention.

As before, plaintiff offers no evidence that the court in fact compensated Mould's attorneys for these items. That being so, we presume that its decision is correct. (*Ketchum, supra,* 24 Cal.4th at p. 1140.) Additionally, some of plaintiff's specific objections are questionable, in light of the case authority and countervailing evidence provided by Mould.

Claims that some work was unnecessary, redundant, or excessive

In its final argument, plaintiff asserts that the award "constitutes an abuse of discretion as many of the tasks performed by Mould's lawyers were unnecessary and redundant." As plaintiff points out, courts commonly "reduce the amount of requested fees and costs where they appear excessive." Significantly, however, the cases cited by plaintiff involve an exercise of discretion by the *trial court*. (See, e.g., *Maughan v. Google Technology, Inc.*, *supra,* 143 Cal.App.4th 1242.) And in any event, "it is only when the request appears 'unreasonably inflated' that the trial court is permitted to reduce the award." (*Id.* at p. 1264, quoting *Ketchum*, *supra*, 24 Cal.4th at p. 1137.) That is not the case here.

As it did below, plaintiff takes issue with various specific items appearing on the fee statement, including (1) preemptive work on the reply brief, (2) charges "for items normally not billed to the client," and (3) the amount of time spent preparing this "basic" anti-SLAPP motion. As to this last item, plaintiff argues

that the recovery sought for "preparing a consolidated boilerplate motion to strike and somewhat substantive reply papers is unconscionable."

Mould persuasively refutes all three points, citing contrary evidence as to each. As to the first point, Mould observes, compensation for work on his reply "is no less recoverable because, using foresight, defendant's counsel were able to begin preparing the reply memorandum earlier." That observation finds evidentiary support in the supplemental declaration of his attorney Goldowitz. Concerning the second category, Mould points to evidence in the supplemental declaration of attorney Reedy, which effectively endorses the practice of charging for the challenged items (conferring with associate counsel, revising subordinates' work, travel). Finally, as to the third category, Mould presented evidence below concerning the difficulty presented by this special motion to strike. As attorney Reedy declared: "Anti-SLAPP motions are not easily litigated. They require thorough research (because the case law is ever-changing and expanding) and detailed knowledge of the entire case." (See *Ketchum, supra,* 24 Cal.4th at p. 1139 [anti-SLAPP and related motions "may be complex and time consuming"].) More specifically concerning this case, attorney Goldowitz declared, "the probability issues related to Mould were much more factually complex and required more work than those related to [Williams] …."

In support of its claim that Mould's fees are generally excessive, plaintiff asserts that its own attorney fees for prosecuting its claims against four defendants are lower than the fees sought by Mould, a single moving defendant represented by an expert in the field. (See *Maughan v. Google Technology, Inc., supra,* 143 Cal.App.4th at p. 1250, fn. 7 ["the time expended by the losing party" may be considered in determining fee award].) As Mould points out, however, even assuming that the comparison is factually apt, "it is not unreasonable for the prevailing party to spend more time or incur more fees than the losing party,

especially in a section 425.16 case where the defendant files two anti-SLAPP memoranda and the plaintiff only one." Moreover, Mould observes, "it is not true (as Eagle implies) that the number of defendants proportionally increases the amount of time spent by plaintiff's counsel."

Assuming that the trial court accepted Mould's arguments and rejected plaintiff's, it did not err in doing so. The defense evidence here is persuasive. (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 782 [respondent's "voluminous materials" amply supported the fee award].) Conversely, plaintiff "failed to show that the number of compensable hours allowed was unreasonably excessive." (*Id.* at p. 783.) And given the fact that the amount awarded was far below the amount sought, we reject plaintiff's "contention that the superior court merely 'rubber stamped' the request without an independent assessment." (*Ketchum, supra,* 24 Cal.4th at p. 1140.) To the contrary, it appears that the court analyzed defense counsel's detailed billing records and reduced Mould's fee request to the extent that it deemed warranted. The resulting order is entirely proper.

DISPOSITION

Insofar as it awards fees and costs against plaintiff and in favor of defendant Mould, the trial court's order of August 9, 2006, is affirmed.

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McAdams, J.

WE CONCUR:

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Mihara, Acting P.J.

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Duffy, J.

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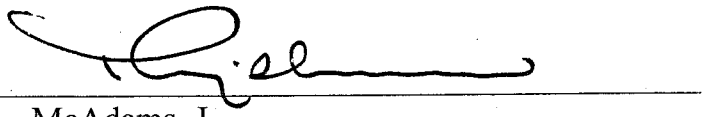

McAdams, J.

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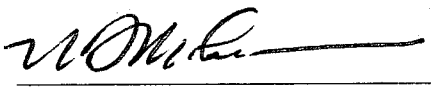

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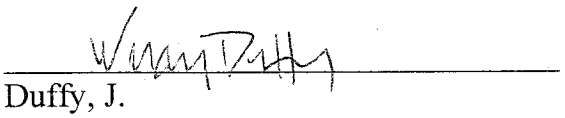

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