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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JEFFREY C. NELSON, et al.,

Cross-Complainants and
Appellants,

v.

MULLEN & HENZELL, L.L.P.,

Cross-Defendant and
Respondent.

2d Civ. No. B271929
(Super. Ct. No. 15CV00038)
(Santa Barbara County)

This appeal arises from a dispute between a law firm, Mullen & Henzell, L.L.P. (the Firm), and one of its former partners, Jeffrey C. Nelson. The litigation began when the Firm sued Nelson for breach of a promissory note. Nelson and his development company, Oak Creek Company (Oak Creek) (collectively “appellants”), cross-complained against the Firm, alleging, among other things, intentional interference with prospective business advantage (interference claim).

The Firm successfully demurred to the cross-complaint and first amended cross-complaint (FACC). The Firm did not move to strike the interference claim under Code of Civil Procedure section 425.16¹ (California’s so-called anti-SLAPP statute) until the claim was repeated for the third time in the second amended cross-complaint (SACC). Relying upon *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 315 (*Yu*), the trial court determined the anti-SLAPP motion was timely because it was filed within 60 days of the SACC, even though it “could and should have been brought in response to an earlier cross-complaint.” Appellants appeal the order granting the anti-SLAPP motion. Among other things, they contend the motion was untimely.

While this appeal was pending, our high court issued *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637 (*Newport Harbor*), which disapproved *Yu*. (*Newport Harbor*, at p. 646.) The court held that “subject to the trial court’s discretion under section 425.16, subdivision (f), to permit late filing, a defendant must move to strike a cause of action within 60 days of service of the earliest complaint that contains that cause of action.” (*Id.* at p. 640.) The Firm’s anti-SLAPP motion was not filed within this time frame.

After considering the parties’ supplemental briefing, we conclude the order granting the anti-SLAPP motion must be reversed and the matter remanded to the trial court to decide whether to exercise its discretion under section 425.16, subdivision (f) to allow a late filing of the motion. We therefore reverse the order with instructions.

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

PROCEDURAL BACKGROUND

Nelson was a partner of the Firm between 1981 and 2008. When Nelson left the Firm, he sought to take with him matters for two clients. The Firm's partnership agreement contained a method for calculating the amount owed to the Firm when a departing partner takes Firm clients. The Firm accordingly sought compensation from Nelson under the partnership agreement. After extended negotiations, Nelson executed two promissory notes in the Firm's favor.

Following a dispute, the Firm filed a complaint against Nelson alleging breach of one of the promissory notes. Appellants subsequently filed a cross-complaint against the Firm which asserted four causes of action, including the interference claim. The cause of action alleged that the Firm breached its fiduciary obligations to appellants by "interfer[ing] with or tak[ing] actions in opposition to development projects Oak Creek is engaged in, or [using] confidential information obtained by the Firm during the time Oak Creek was a client of the Firm and Nelson was a partner of the Firm."

The Firm demurred to the cross-complaint, arguing that the interference claim was barred by the one-year statute of limitations for attorney misconduct. The trial court agreed and sustained the demurrer with leave to amend.

Appellants filed an FACC alleging five causes of action, including the interference claim. This time they alleged that the Firm owed an implied covenant of good faith and fair dealing to Nelson to "not interfere with or take actions in opposition to development projects Oak Creek is engaged in, or to use confidential information obtained by the Firm as a result of the Agreement entered into between the parties." Once again, the Firm demurred, arguing that the claim was barred by the

two-year statute of limitations for an action upon a contract, obligation or liability not founded upon an instrument of writing. (§ 339, subd. (1).) The trial court sustained the demurrer with leave to amend.

The SACC contains four causes of action, including a third version of the interference claim. This claim alleges that “the Firm breached its fiduciary obligation owed to Nelson as a result of the joint venture relationship, by, among other things, using confidential information obtained from Nelson regarding the status of the various projects that were subject to the joint venture agreement and by using confidential information obtained from Nelson to object to the Park Hill project, and to interfere with Nelson’s development and contract rights regarding the development of the Park Hill project with the intent to disrupt the project and prevent development of the same.”

The Firm demurred to the interference claim and also filed a special motion to strike the claim under section 425.16. The trial court granted the anti-SLAPP motion, which rendered the demurrer moot. While the court agreed with appellants that the anti-SLAPP “motion could and should have been brought in response to an earlier cross-complaint” and that it “was an afterthought or a contrivance (or both) to disadvantage cross-complainants,” the court determined the motion was timely because it was filed within 60 days of service of the SACC. (See *Yu, supra*, 103 Cal.App.4th at p. 315.) The court noted it would decide “to what extent, if any, the late timing of this motion may affect the award of attorney fees.”

In granting the anti-SLAPP motion, the trial court found that the Firm had met its burden of establishing the gravamen of the interference claim arises from protected activity

within the meaning of section 425.16. It also found that appellants had not met their burden of showing a probability of prevailing on their interference claim.

DISCUSSION

Under section 425.16, subdivision (f), an anti-SLAPP motion “may be filed within 60 days of service of the complaint [or cross-complaint] or, in the court’s discretion, at any later time upon terms it deems proper.” Until recently, it seemed settled that the 60-day time period begins to re-run upon the service of an amended complaint or cross-complaint. (*Yu, supra*, 103 Cal.App.4th at p. 315; see *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 835.) After this appeal was filed, however, Division Three of the Court of Appeal for the Fourth Appellate District held that “[the] amended complaint reopens the time to file an anti-SLAPP motion without court permission only if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion.” (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1218-1219, review granted March 22, 2017, S239777.) The court “disagree[d] with *Yu* to the extent it holds that a defendant has an absolute right to file an anti-SLAPP motion to an amended complaint, even when the motion could have been brought [in] an earlier complaint.” (*Id.* at p. 1218.)

The Supreme Court “granted review to decide whether a special motion to strike an amended complaint may seek dismissal of causes of action that had been included in the earlier complaints.” (*Newport Harbor, supra*, 4 Cal.5th at p. 639.) Ultimately, the court affirmed the Court of Appeal, noting that “[a]n anti-SLAPP motion is not a vehicle for a defendant to

obtain a dismissal of claims in the middle of litigation; it is a procedural device to prevent costly, unmeritorious litigation at the initiation of the lawsuit.’ [Citation.]” (*Id.* at p. 645.) The court concluded that “section 425.16, subdivision (f), should be interpreted to permit an anti-SLAPP motion against an amended complaint if it could not have been brought earlier, but to prohibit belated motions that could have been brought earlier (subject to the trial court’s discretion to permit a late motion). This interpretation maximizes the possibility the anti-SLAPP statute will fulfill its purpose while reducing the potential for abuse.” (*Ibid.*)

Here, the trial court determined the Firm’s anti-SLAPP motion “could and should have been brought in response to an earlier cross-complaint.” In supplemental briefing, the Firm asserts “the most appropriate resolution of this matter in light of the *Newport Harbor* decision is to remand the matter back to the trial court and permit the trial court to exercise its discretion to consider the anti-SLAPP motion.” Appellants respond that “the trial court already addressed the issue of discretion in its ruling on the [m]otion when it was originally presented.” They point to the court’s statement that “bringing the motion at this late time was an afterthought or contrivance (or both) to disadvantage cross-complainants.”

It is apparent from the record that the trial court believed it was bound by *Yu* and had no discretion to decide whether or not to hear the anti-SLAPP motion. Although the court’s comments suggest that it may have declined to hear the motion, they are not conclusive. The court was unaware of its discretion to permit a late filed motion, and we will not presume that it would choose not to exercise that discretion if given the chance. We therefore agree with the Firm that the order

granting the anti-SLAPP motion must be reversed and the matter remanded to allow the trial court to consider whether to exercise its discretion to hear the motion on the merits.²

DISPOSITION

The order granting the anti-SLAPP motion as to the interference claim is reversed and the matter is remanded to the trial court to decide whether to exercise its discretion under section 425.16, subdivision (f) to allow a late filing of the motion. In the interests of justice, the parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

² In light of our ruling, we do not decide whether the trial court properly granted the anti-SLAPP motion on its merits. Nor do we consider appellants' premature request for an award of attorney fees and costs under the anti-SLAPP statute.

Donna D. Geck, Judge
Superior Court County of Santa Barbara

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