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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DARRYL FUJIHARA et al., Plaintiffs and Appellants, v. GIANNA BRELIANT et al., Defendants and Respondents.	B284107 (Los Angeles County Super. Ct. No. EC064652)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura A. Matz, Judge. Reversed and remanded.

Gravitas Law Group and David Joseph Scharf for Plaintiffs and Appellants.

Larson O'Brien, Stephen G. Larson, Steven E. Bledsoe, R.C. Harlan and Bruce M. Bench for Defendant and Respondent Gianna Breliant.

Murchison & Cumming and Edmund G. Farrell for Defendants and Respondents Russell S. Balisok and Russell Balisok & Associates, Inc.

Plaintiffs and appellants Darryl Fujihara and Seacliff Recovery Center (Seacliff) (collectively appellants) appeal from the trial court's order awarding attorney fees to respondents Russell S. Balisok, Russell Balisok & Associates (collectively Balisok), and Gianna Breliant (collectively respondents) following the grant in part of respondents' special motion to strike (Code Civ. Proc., § 425.16, the so-called "anti-SLAPP statute").[1] We reverse and remand for the trial court to reconsider the award in light of the factors to be considered when a defendant's anti-SLAPP motion is partially successful.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2016, appellants filed a first amended complaint (FAC) against respondents and assorted Does, alleging malicious prosecution, conspiracy and abuse of process. According to the FAC, Breliant hired Warren Boyd in January 2010 to try to help her daughter, Amy, who was a heroin addict. Boyd was a somewhat controversial intervention specialist who had helped Hollywood celebrities stop using drugs. Amy died in September 2010 of a heroin overdose.

The FAC alleged that Breliant paid Boyd over $200,000 and authorized him to make charges on her credit card for his fees and expenses. In May 2010, Boyd told Fujihara, the director and owner of Seacliff, that a client's mother authorized him to run charges on her credit card, but Boyd did not have an account with a credit card

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[1] Unspecified statutory references will be to the Code of Civil Procedure.

processor. Fujihara knew and trusted Boyd and therefore allowed Boyd to run a charge of $27,000 through Seacliff's credit card processing account. Breliant did not question the charge until two years later.

In 2012 Breliant, represented by Balisok, sued appellants, Boyd, and various other defendants, alleging wrongful death, breach of contract, fraud, dependent adult abuse and unfair business practices. In a prior appeal, we affirmed the trial court's order sustaining without leave to amend the demurrer in favor of Fujihara and Seacliff. (*Breliant v. Fujihara* (Oct. 22, 2014, B249378) 2014 Cal. App. Unpub. LEXIS 7569 [nonpub. opn.].)

Appellants filed their complaint against respondents in November 2015 and their FAC in July 2016. As to malicious prosecution, appellants alleged that when Breliant sued appellants, she and Balisok knew that the allegations were false. They knew Amy had never had any contact with Seacliff or Fujihara, and Breliant falsely claimed that she had contacted appellants to inquire about the $27,000 charge when it was made. Breliant also falsely claimed that she had not authorized Boyd to make charges on her credit card. In the second cause of action, appellant alleged that respondents engaged in a civil conspiracy to commit malicious prosecution, relying on the allegations set forth in the malicious prosecution cause of action. The third cause of action alleged that respondents abused the judicial process, again relying on the allegations set forth in the malicious prosecution cause of action. Breliant and Balisok filed separate demurrers and anti-SLAPP motions.

In December 2016, the trial court granted in part and denied in part Breliant's motion to strike, striking the second and third causes of

action but not the first. The court denied the motion as to the first cause of action (malicious prosecution), stating that appellants had submitted evidence sufficient to support the claim that Breliant "brought the underlying action against [appellants] with knowledge that the allegations of fraud . . . were false." The court granted the motion as to the second cause of action (conspiracy), stating that the cause of action was insufficiently pled "due to the absence of an order under . . . section 1714.10(a)."[2] The court also granted the motion as to the third cause of action (abuse of process), on the ground that "the complaint fails to allege any conduct other than the filing and pursuit of the allegations of the complaint and no actual judicial processes are alleged to have been abused. The evidence also fails to establish any misuse of any judicial process as against [appellants]." The court found that Breliant was "entitled to mandatory fees under . . . section 425.16(c)(1) for prevailing on two causes of action." The court found Breliant's demurrer moot as to the second and third causes of action and overruled the demurrer as to the first cause of action.

The court also granted in part and denied in part Balisok's motion to strike. As to the first cause of action (malicious prosecution), the

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[2] Section 1714.10 of the Civil Code provides: "No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action." (§ 1714.10, subd. (a).)

court found that appellants "submitted evidence demonstrating that Breliant gave Boyd express permission to use the $27,000 credit card charge as partial payment for resuming his services to Amy, that Breliant knew that Amy was never admitted to Seacliff . . . . [Appellants] also submit evidence that moving defendants, acting as attorneys for Breliant, withheld evidence from [appellants] which would have established the factual falsity of the claims and expressly conceded to opposing counsel that he was not concerned with the factual basis for the claims." The court found this sufficient to support a claim that Balisok brought the underlying action with knowledge that the allegations were false. As to the second and third causes of action (conspiracy and abuse of process), the court relied on the same reasoning it used with respect to Breliant to strike both causes of action.[3] The court awarded Balisok fees under section 425.16. The court found Balisok's demurrer moot as to the second and third causes of action and overruled the demurrer as to the first cause of action.

Balisok sought $22,475 in attorney fees. Breliant sought $33,534.33 in attorney fees, plus costs of $140, or a total of $33,674.33. The trial court granted respondents the full amounts sought. Appellants' counsel argued that respondents were not entitled to the full amount because going forward, the scope of discovery and factual allegations remained the same following the partial grant of the anti-

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[3] That is, the absence of an order as required by Civil Code section 1714.10 to assert a cause of action for civil conspiracy against an attorney with a client, and the lack of evidence to establish misuse of judicial process.

SLAPP motion. The court reasoned that respondents prevailed on two out of three causes of action.

DISCUSSION

Appellants challenge the award of attorney fees and the amount of the award. "The determination whether a party prevailed on an anti-SLAPP motion lies within the broad discretion of a trial court. [Citation.] We review this determination on an abuse of discretion standard." (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340 (*Mann*).)

"[U]nder Code of Civil Procedure section 425.16, subdivision (c), any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees. The fee-shifting provision was apparently intended to discourage . . . strategic lawsuits against public participation by imposing the litigation costs on the party seeking to 'chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.]" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) However, "a partially prevailing party is not necessarily entitled to all incurred fees even where the work on the successful and unsuccessful claims was overlapping. [Citations.] Instead, the court must consider the significance of the overall relief obtained by the prevailing party in relation to the hours reasonably expended on the litigation and whether the expenditure of counsel's time was reasonable in relation to the success achieved. [Citation.]" (*Mann*, *supra*, 139 Cal.App.4th at p. 344.)

"[B]ecause [respondents] only partially prevailed on their special motion to strike under section 425.16, there are numerous factors to be considered in determining their right to fees and costs. Those factors were discussed at length in *Mann*[, *supra*,] 139 Cal.App.4th [at pp.] 344–345:

"'An award of attorney fees to a partially prevailing defendant under section 425.16, subdivision (c) . . . involves competing public policies: (1) the public policy to discourage meritless SLAPP claims by compelling a SLAPP plaintiff to bear a defendant's litigation costs incurred to eliminate the claim from the lawsuit; and (2) the public policy to provide a plaintiff who has facially valid claims to exercise his or her constitutional petition rights by filing a complaint and litigating those claims in court. [Citations.] In balancing these policies, we conclude a defendant should not be entitled to obtain *as a matter of right* his or her entire attorney fees incurred on successful and unsuccessful claims merely because the attorney work on those claims was overlapping. Instead, the court should first determine the lodestar amount for the hours expended on the successful claims, and, if the work on the successful and unsuccessful causes of action was overlapping, the court should then consider the defendant's relative success on the motion in achieving his or her objective, and reduce the amount if appropriate.

"'This analysis includes factors such as the extent to which the defendant's litigation posture was advanced by the motion, whether the same factual allegations remain to be litigated, whether discovery and motion practice have been narrowed, and the extent to which future

litigation expenses and strategy were impacted by the motion. The fees awarded to a defendant who was only partially successful on an anti-SLAPP motion should be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way. The court should also consider any other applicable relevant factors, such as the experience and abilities of the attorney and the novelty and difficulty of the issues, to adjust the lodestar amount as appropriate. [Citation.]'" (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1305 (*Malin*).)

We conclude the trial court abused its discretion in awarding fees without considering the factors set forth in *Mann*. In *Mann*, the trial court had denied the defendants' motion to strike four of 13 causes of action. In a prior appeal, the appellate court reversed as to the denial of one cause of action but affirmed the denial on the other three causes of action. On remand, the trial court found the defendants were prevailing parties under section 425.16, subdivision (c) and awarded their attorney fees. The appellate court agreed the defendants were prevailing parties but concluded the trial court "erred in failing to reduce the fees to reflect that defendants were only partially successful on the motion." (*Mann*, *supra*, 139 Cal.App.4th at p. 334.)

Mann explained that "the [trial] court should have considered the significance of the overall relief obtained by defendants in relation to the hours reasonably expended on the litigation and whether the expenditure of counsel's time was reasonable in relation to the success achieved." (*Mann*, *supra*, 139 Cal.App.4th at p. 345.) The court then addressed the proper amount of attorney fees rather than remanding to

the trial court. (*Id.* at p. 346.) "Militating against compensation, defendants had only limited success, and [the plaintiff] was compelled to defend the anti-SLAPP motion notwithstanding that two of the challenged causes of action were not even governed by the anti-SLAPP statute and there were facts showing a probability of prevailing on the . . . cause of action subject to the statute. . . . [¶] On the other hand, the practical impact of the motion was far more significant than the mere dismissal of [one] cause of action." (*Ibid.*) The court reasoned that the success of the anti-SLAPP motion as to a single cause of action "effectively restricted the factual allegations, reduced viable theories of recovery, limited discovery, lessened the work involved, and permitted both sides to more realistically evaluate liability, damages and future legal expenses." (*Ibid.*) The court thus awarded the defendants 50 percent of the claimed fees, an amount that "reflects the fact that defendants prevailed on important issues that materially changed the litigation, but does not reward them for legal efforts that were meritless." (*Ibid.*)

In *Moran v. Endres* (2006) 135 Cal.App.4th 952 (*Moran*), the trial court sustained the defendants' special motion to strike as to a civil conspiracy cause of action, but denied it as to the causes of action for defamation, placing in a false light, intrusion upon seclusion, assault, battery, intentional infliction of emotional distress, and "making private facts public." (*Id.* at p. 954.) The appellate court affirmed the trial court's denial of the defendants' request for attorney fees. (*Ibid.*) The court stated that the defendants' victory was illusory, pointing out that

"[t]he factual allegations defendants faced were not changed when the cause of action for conspiracy was stricken, because that cause of action included no specific factual allegations, but instead incorporated the factual allegations made in the other causes of action. Further, as a legal matter, the cause of action for conspiracy added little or nothing to plaintiffs' case. 'Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. . . . [¶] Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort.' [Citation.] . . . Thus, both before and after the special motion to strike, these plaintiffs had to prove commission of the torts they alleged, and defendants had to defend that case." (*Id.* at pp. 954-955.) After the partial success of the defendants' anti-SLAPP motion, "[t]he possible recovery against defendants did not change. The factual allegations which defendants had to defend did not change. The work involved in trying the case did not change." (*Id.* at p. 955.) The trial court thus properly denied the defendants' request for attorney fees. (*Ibid.*)

This case is more similar to *Moran* than *Mann*. In contrast to *Mann*, where the dismissal of only one of four causes of action "materially changed the litigation," in the instant case, the practical impact of the dismissal of the conspiracy and abuse of process causes of action was not significant. (*Mann*, *supra*, 139 Cal.App.4th at p. 346.) Appellants' civil conspiracy and abuse of process claims were based on the allegations of the malicious prosecution cause of action. Thus, as in

Moran, after the dismissal of the civil conspiracy and abuse of process claims, the malicious prosecution claim remained; the factual allegations and scope of discovery did not change. (See *Moran*, *supra*, 135 Cal.App.4th at p. 955.) As stated in *Mann*, "there is no reason to encourage a defendant to bring an anti-SLAPP motion where the factual and legal grounds for the claims against the defendant remain the same after the resolution of the anti-SLAPP motion. [Citation.]" (*Mann*, *supra*, 139 Cal.App.4th at p. 340; compare *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020 (*ComputerXpress*) [defendants entitled to attorney fees based on their partially successful anti-SLAPP motion, explaining that "the causes of action we have concluded are not subject to being stricken are based on different conduct than the remaining causes of action"].)

Balisok argues that the factual allegations supporting appellants' abuse of process claim are "different in kind from the factual allegations in support of their malicious prosecution claim," but does not explain how they differ. The conspiracy and abuse of process causes of action in the FAC clearly relied on the allegations of the malicious prosecution cause of action. Thus, both respondents' SLAPP motions focused on the malicious prosecution claim, and only cursorily addressed the other two claims.

The allegations supporting appellants' malicious prosecution claim included the following: Respondents' "prosecution of SEACLIFF for the murder of Breliant's daughter was not motivated by any belief that the allegations against SEACLIFF were actually true." Respondents signed the complaint against Seacliff "verifying false factual allegations that

[respondents] had no probable cause to believe and actually knew were not true." When respondents filed their complaint, they knew Amy had never had any contact with appellants and knew that the evidence refuted their own claims. Breliant falsely stated in a response to a special interrogatory that she never had an agreement with Boyd and falsely alleged in the complaint that she contacted appellants to inquire about the $27,000 charge.

The claim that respondents engaged in a conspiracy to commit malicious prosecution merely alleged that respondents formed an agreement to maliciously prosecute appellants for Amy's murder by filing a complaint that included knowingly false allegations of fact against appellants. Similarly, appellants' abuse of process claim alleged that respondents "knowingly, intentionally, willfully and substantially misused the judicial process in a vexatious and sham effort to harass [appellants] and displace responsibility for . . . Breliant's daughter's death by overdose by pursuing complaints without probable cause based on false allegations of fact."

Thus, following the dismissal of the conspiracy and abuse of process causes of action, "the essential thrust of [appellants'] complaint remains viable." (*Mann*, *supra*, 139 Cal.App.4th at p. 344.) In describing the competing policies of awarding attorney fees for a partially successful anti-SLAPP motion, *Mann* explained that "[i]f, after a court rules on an anti-SLAPP motion, a partially successful plaintiff is required to bear the entire cost of the anti-SLAPP litigation even though the defendant achieved only a relatively minor benefit and the essential thrust of the plaintiff's complaint remains viable, this could

impose a potential financial barrier to the plaintiff continuing with the lawsuit, burdening the plaintiff's right to exercise his or her right to petition for the redress of grievances." (*Ibid.*)

Breliant argues that her motion to strike was successful because it disposed of 66.6 percent of the causes of action against her, citing statistics in other cases awarding a defendant fees for a partially successful anti-SLAPP motion. The argument misses the mark. It is not merely a matter of how many causes of action are dismissed and how many remain. Rather, as *Mann* instructs, "an approach that concentrates on the practical impact of a partially successful motion on the overall litigation advances the objectives of the anti-SLAPP statute and minimizes abuses." (*Mann*, *supra*, 139 Cal.App.4th at p. 347.)

None of the cases on which respondents rely simply count how many causes of action are dismissed and how many remain after a partially successful anti-SLAPP motion in order to award the full amount of fees claimed. To the contrary, "'[t]he fees awarded to a defendant who was only partially successful on an anti-SLAPP motion should be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way.'" (*Malin*, *supra*, 217 Cal.App.4th at p. 1305; see also *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 218 ["A court awarding fees to the prevailing defendant on a partially successful special motion to strike must exercise its discretion in determining the amount of fees and costs to award in light of the defendant's relative success in achieving its litigation objectives."].) This is why the defendants in *Mann* were

considered prevailing parties for purposes of section 425.16, subdivision (c), despite having succeeded in striking only one of four challenged causes of action.

Nor is the attorney fee award here supported by the cases cited by respondents to assert the general principle that a defendant who achieves partial success on an anti-SLAPP motion is entitled to attorney fees. (See *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 783 [affirming attorney fee award to party whose anti-SLAPP motion obtained a "'significant victory'" by "'prevent[ing] the City from compelling [him] to undertake significant construction and work'"]; *ComputerXpress*, *supra*, 93 Cal.App.4th at p. 1020 ["the causes of action we have concluded are not subject to being stricken are based on different conduct than the remaining causes of action," and thus defendants were "entitled to recover attorney fees and costs incurred in moving to strike the claims on which they prevailed, but not fees and costs incurred in moving to strike the remaining claims" based on their partial success on their anti-SLAPP motion]; *Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, 605 [defendants who prevailed on all causes of action "entitled to awards of fees and costs reasonably allocable to achieving that result," and a partially prevailing defendant "may be entitled to an award of fees and costs reasonably allocable to achieving that victory"].) There is no dispute about this general principle. The issue is whether the trial court considered the practical effect on the litigation of the dismissal of the conspiracy and abuse of process causes of action and awarded fees that were "'commensurate with the extent to which the motion changed the

nature and character of the lawsuit in a practical way.'" (*Malin*, *supra*, 217 Cal.App.4th at p. 1305.)

The trial court's conclusion that respondents were the prevailing party because they succeeded on dismissing two of three causes of action fails to take into consideration factors such as "the extent to which the defendant's litigation posture was advanced by the motion, whether the same factual allegations remain to be litigated, whether discovery and motion practice have been narrowed, and the extent to which future litigation expenses and strategy were impacted by the motion." (*Mann*, *supra*, 139 Cal.App.4th at p. 345.) Moreover, the award of the full amount claimed "fail[s] to reduce the attorney fees award for fees attributable to the causes of action that remained in the litigation." (*Ibid.*)

Appellants point out that the invoice entries supporting respondents' attorney fee requests included work done on the demurrer. "However, only those attorney fees and costs related to the special motion to strike, not the entire action, may be recovered under section 425.16, subdivision (c). [Citations.]" (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 92; see *Mann*, *supra*, 139 Cal.App.4th at p. 346 [even where the partially successful anti-SLAPP motion "restricted the factual allegations, reduced viable theories of recovery, limited discovery, lessened the work involved, and permitted both sides to more realistically evaluate liability, damages and future legal expenses," the court awarded only 50 percent of the claimed fees].) Thus, on remand, the court must consider "the significance of the overall relief obtained by defendants in relation to the hours reasonably expended on the

litigation and whether the expenditure of counsel's time was reasonable in relation to the success achieved." (*Mann*, *supra*, 139 Cal.App.4th at p. 345.) The defendants bear the burden of establishing the proper amount, by, for example, producing "records sufficient to provide "'a proper basis for determining how much time was spent on particular claims.'"" (*ComputerXpress*, *supra*, 93 Cal.App.4th at p. 1020.)

DISPOSITION

The order is reversed and the matter remanded for the trial court to reconsider the attorney fee award in accordance with the principles set forth in *Mann*. Appellants are entitled to costs on appeal.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.