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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TRACK No. 7260 ASSOCIATION,
INC.,

Plaintiff and Respondent,

v.

MICHAEL EVELOFF, and FIX THE
CITY, INC.,

Defendants and Appellants.

B279301, B279314

(Los Angeles County
Super. Ct. Nos. SC125328,
BC570854)

APPEALS from an order of the Superior Court of Los
Angeles County, John P. Doyle, Judge. Dismissed.

Wilson Keadjian Browndorf, Marc Y. Lazo for Defendants
and Appellants.

David C. Wheeler, Ronald J. Seeley for Plaintiff and
Respondent.

BACKGROUND

We glean the facts from the complaints in these consolidated appeals, taking them as true for present purposes.

Tract No. 7260 Association, a voluntary association of homeowners, contracted with Century City Mall (the Mall) on certain matters, and in 2012 entered into negotiations to modify the contract. The Mall sent a draft modification to Michael Eveloff, Tract 7260's president, pursuant to which the Mall agreed among other things to fund neighborhood improvements selected by the association. Rather than forward the modification to Tract 7260's board for its consideration, Eveloff altered the draft to provide that the Mall would fund Fix the City, a nonprofit organization he controlled.

Eveloff presented the modification to Tract 7260's board without apprising it of his alterations, obtained their approval of the new contract, and accepted payment of \$2.9 million from the Mall to Fix the City. Fix the City thereafter failed to fund any neighborhood improvement projects but instead funded Eveloff's personal projects, including a lawsuit against a political candidate.

Tract 7260 filed lawsuits against Eveloff and Fix the City for money had and received, rescission and breach of fiduciary duty.

Defendants moved to strike the complaints as a strategic lawsuit against public participation (SLAPP), arguing they were triggered by the lawsuit funded by Fix the City against the political candidate, which is protected activity.

On September 19, 2016, the trial court denied defendants' motions on the ground that the complaints arose from Eveloff's

misappropriation of funds belonging to Tract 7260, not from the use thereafter made of the funds.

Tract 7260 served notices of entry of the court's order on September 26, 2016 and September 27, 2016.

Defendants filed notices of appeal on December 1, 2016.

DISCUSSION

I. The Appeal is Untimely

Defendants challenge the order denying their anti-SLAPP motions on the ground that the targeted activity is defendants' speech and petitioning activity.

This challenge to the anti-SLAPP motion order is not cognizable on appeal.

"An order granting or denying a special motion to strike [under the anti-SLAPP statute] shall be appealable under Section 904.1." (Code Civ. Proc., § 425.16, subd. (i); see generally § 425.16 et seq.)¹ Under section 904.1, "An appeal . . . may be taken . . . [¶] . . . [¶] . . . [f]rom an order granting or denying a special motion to strike under Section 425.16." (§ 904.1, subd. (a)(13).)

"'If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.'" (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46.)

The order denying defendants' anti-SLAPP motions was filed on September 19, 2016, and notice of entry of the order was served by mail by Tract 7260 on September 26 and 27. Accordingly, the notice of appeal from that order had to be filed

¹ Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

within 60 days, or no later than November 27, 2016. (Cal. Rules of Court, rule 8.104(a)(1).) It was not filed until December 1.

Thus, we cannot reach the merits of defendants' appeal. "If a notice of appeal is filed late, the reviewing court must dismiss the appeal." (Cal. Rules of Court, rule 8.104(b); *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1246-1247 [appeal from order granting anti-SLAPP motion incognizable due to untimeliness].)

Marc Y. Lazo, defendants' attorney, filed a declaration in which he asserts the appeals were timely because he used a fax filing service to fax them to the clerk of the superior court on November 8, 2016. Unfortunately, the court's Web site showed the wrong number for civil appeals—(442) 247-3751—resulting in his filing going to the wrong department.

Attached as an exhibit to Lazo's declaration is the fax service's confirmation page, dated November 8, 2016, and sent by email to Sara Wilhoit and Carrie Ruiz, who are not identified. The confirmation page represents that two notices of appeal were faxed to (442) 247-3751 on that date. Lazo declares this to be a "true and correct copy of the facsimile machine's transmission record," which was "maintained by [his] office in the ordinary course of business," and of which he "had custody and control . . . since its creation."

Also attached is a copy of the court's Web page, dated June 20, 2018, indicating the phone number for fax filing is indeed (442) 247-3751.

Lazo asserts he did not learn of the error until November 30, 2016, when the court rejected his subsequent fax-filing of the designation of record on appeal, on the ground there was no appeal on file. He immediately re-faxed the notices of appeal to

the number designated by the court in its rejection notice, resulting in the December 1, 2016 filing date.

Lazo's evidence fails to establish timely facsimile filing. The confirmation page from the fax service is unauthenticated hearsay, and the court's Web page is dated June 20, 2018, more than a year and a half after any pertinent date. Lazo also fails to provide a declaration from the person who made the alleged facsimile transmission.

Moreover, it was Lazo's responsibility, if his filing was improperly rejected, to contact the clerk's office and obtain a revised filing date indicating timely filing, which he did not do.

Defendants' appeal being untimely, it must be dismissed.

II. OSC re Sanctions

On October 23, 2019, we issued an order to show cause why sanctions should not issue against Eveloff and Lazo for prosecuting a frivolous appeal, which we identified as one "prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." We invited and received briefs from both sides and scheduled the matter for hearing. Unfortunately, our OSC failed to make clear the matters we wanted discussed, namely defendants' efforts to prove their notices of appeal were timely filed. Instead the parties discussed the reasonableness of defendants' merits arguments on appeal. Given the above result, we do not reach those arguments.

DISPOSITION

The appeal is dismissed. Respondent is to recover costs on appeal.

The OSC is discharged.

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CHANEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.^{*}

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.