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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ACE INDUSTRIAL SUPPLY,
INC.,

Plaintiff and Appellant,

v.

TOOL MASTERS,

Defendant and
Respondent.

B282989

(Los Angeles County
Super. Ct. No. BC629876)

APPEAL from an order of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Reversed.

Daar & Newman, Jeffery J. Daar and Michael R. Newman for Plaintiff and Appellant.

Law Offices of M. David Meagher, M. David Meagher; Law Offices of Katherine H. Donahue and Katherine Donahue for Defendant and Respondent.

Ace Industrial Supply, Inc. (Ace), appeals from an order granting Tool Masters’ special motion to strike the complaint (Code Civ. Proc., § 425.16; anti-SLAPP statute).¹ Ace contends the trial court had no jurisdiction to grant the special motion to strike after Ace voluntarily dismissed its complaint against Tool Masters; the complaint did not arise from protected activity under section 425.16; and Ace demonstrated a probability of prevailing on its claims. We conclude the trial court lacked jurisdiction to rule on the special motion to strike after the voluntary dismissal because there was no pending motion for attorney’s fees. We reverse and remand to the trial court with directions to vacate its order ruling the special motion to strike had merit and Tool Masters was entitled to an award of attorney’s fees.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Ace is a telemarketer that sells industrial tools and supplies.² On September 29, 2014 defendant Justin Lehmann

¹ All statutory references are to the Code of Civil Procedure. SLAPP is an acronym for “strategic lawsuit[] against public participation.” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060.)

² For purposes of this appeal we include the facts as set forth in the declarations filed in support of Ace’s ex parte application for a temporary restraining order and order to show cause regarding an injunction. Tool Masters did not dispute these facts in its opposition to the motion.

began working for Ace as a sales representative.³ He acknowledged receipt of an employee handbook, which included a provision requiring employees to maintain the confidentiality of Ace's proprietary and confidential information. On March 30, 2015 Lehmann signed a "Confidentiality, Non-Solicitation and Invention Assignment Agreement" (Confidentiality Agreement). Lehmann agreed that during his employment with Ace and for two years following termination of his employment he would not solicit Ace's clients or employees to leave Ace and would not use or disclose Ace's proprietary information.

On May 24, 2016 Lehmann voluntarily left his employment with Ace and went to work for defendant Tool Masters, a competitor. Lehmann sent text messages to several Ace employees encouraging them to leave their employment with Ace and work for Tool Masters. In addition, Lehmann posted the following message on his personal Facebook profile: "It isn't a secret yes I'm running the show at Toolmasters and I am coming for your salesmen. We offer much more money than you can offer them 50% profit sharing (those drill bits you sell for \$199-\$249 we buy for \$36 each so do the math) we have a 4% return rate on 2.3 million credit card business just this year to date and I will be giving cash signing bonus also to the right people. We ship our own tools and we are growing at an unbelievable rate. If you are tired of being a medium sized fish in a huge pond come be a large fish in a smaller pond. Toolmasters INC is here for a take over. Message for more info and details. This is the real deal. [Six] months from now we will be the 2nd biggest tool company in the [San Fernando Valley] if you know J Swipe you know my word

³ On November 8, 2016 the trial court entered a default against Lehmann.

and how serious I am.” A logo including the word “ToolMasters” appeared beneath this text. Subsequently, at least two sales representatives left their employment with Ace and went to work for Tool Masters.

B. *Ace’s Verified Complaint*

On August 9, 2016 Ace filed a verified complaint against Lehmann and Tool Masters. Ace alleged Lehmann and Tool Masters were soliciting Ace’s sales representatives to leave their employment with Ace and to take customer information and sales leads with them to Tool Masters. Ace also alleged Lehmann violated the Confidentiality Agreement by using Ace’s employee roster and customer lists. Ace asserted two causes of action against both Lehmann and Tool Masters for declaratory and injunctive relief and breach of contract for violation of the Confidentiality Agreement.

On August 9, 2016 Ace also filed an ex parte application for a temporary restraining order and an order to show cause regarding a preliminary injunction against Lehmann and Tool Masters. The trial court issued a temporary restraining order and scheduled a hearing on an order to show cause regarding the preliminary injunction. Tool Masters opposed the preliminary injunction, contending it was not responsible for Lehmann’s actions and was not a party to any contract with Ace. On September 16, 2016 the trial court issued a preliminary injunction against Lehmann and others acting in concert with him, but not specifically against Tool Masters.

C. *Tool Masters' Special Motion To Strike*

On September 2, 2016 Tool Masters filed a special motion to strike the complaint under section 425.16. Tool Masters contended Ace's causes of action arose from Lehmann's Facebook post, which was a written statement made in a public forum. Tool Masters argued the statement concerned employment opportunities, which was an issue of public interest, and therefore was protected activity under section 425.16, subdivision (e)(3) and (4). Tool Masters further asserted Ace could not establish a probability of prevailing on its claims. Tool Masters filed a declaration by its owner, John Travers, in support of its motion. Tool Masters did not seek attorney's fees anywhere in its motion.

On December 13, 2016 the trial court continued the hearing on the special motion to strike to April 4, 2017 and set a case management conference for the same date.

On March 20, 2017 Ace lodged a request for dismissal without prejudice of its complaint against Tool Masters. The trial court entered the dismissal on March 28, 2017.

D. *The Hearing on the Special Motion To Strike*

On April 4, 2017 the trial court conducted a case management conference and held a hearing on Tool Masters' special motion to strike. Tool Masters' counsel did not appear at the hearing. Ace's counsel appeared telephonically and argued that the trial court should have taken the motion off calendar because Tool Masters was no longer a party. The trial court found the voluntary dismissal of Tool Masters did not prevent the court from considering whether Tool Masters would have prevailed on the special motion to strike. The court explained,

“When a plaintiff voluntarily dismisses an action while a special motion to strike is pending, the defendant is entitled to his costs and attorney fees for bringing the motion if he would have prevailed in the motion. [*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218].”

The trial court then addressed the merits of Tool Masters’ motion. The court ruled Facebook was a public forum, and the employment solicitation was a matter of public interest because “creating jobs is a ‘hot’ political topic.”⁴ The trial court concluded Tool Masters made the required showing that the challenged claims fell within the scope of section 425.16. Next, the court considered whether Ace had established a probability of prevailing on the merits. The trial court stated, “[Ace] did not oppose the motion, did not submit any evidence, and dismissed the action as to Tool Masters. This is a concession that [Ace] cannot establish a reasonable probability of prevailing on the merits.” The court concluded, “[Tool Masters] is entitled to attorney fees incurred in bringing the motion, and may file a noticed motion for attorney fees.”

On the day of the hearing Tool Masters filed a motion for attorney’s fees and costs under section 425.16, subdivision (c)(1),⁵ as the prevailing defendant on its special motion to strike, with a January 31, 2018 hearing date. Tool Masters sought \$48,018.75 in attorney’s fees and costs.

⁴ The trial court took judicial notice “that creating jobs is a ‘hot’ political topic, and employment numbers are released by the government and reported on the news at least monthly.”

⁵ Section 425.16, subdivision (c)(1), provides that “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.”

Ace filed its notice of appeal from the April 4, 2017 order on June 2, 2017.

E. *Trial Court's Ruling on Tool Masters' Motion for Attorney's Fees*

While this appeal was pending, the trial court ruled on Tool Masters' motion for attorney's fees on April 16, 2018.⁶ The court rejected Tool Masters' request for attorney's fees of \$49,037.50 and costs of \$713 because "[i]t appears [Tool Masters] seeks fees incurred in its entire defense of the action." The trial court awarded Tool Masters \$7,600 in attorney's fees and \$462 in costs pursuant to section 425.16, subdivision (c) as the "prevailing defendant." The trial court declined to reconsider the April 4, 2017 order entered by a different judge, explaining: "The court has already made the determination that [Tool Masters] is entitled to its attorney fees, and is not inclined to reconsider that decision."

Ace did not appeal from the April 16, 2018 order awarding attorney's fees and costs.

DISCUSSION

A. *Ace's Appeal Is Not Moot*

In response to our invitation, Ace submitted a supplemental letter brief contending its appeal was not rendered

⁶ On our own motion, we augment the record to include the April 16, 2018 order awarding attorney's fees and costs to Tool Masters. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

moot by the subsequent April 16, 2018 order.⁷ We agree. In its April 4, 2017 order the trial court determined that Tool Masters would have prevailed on its special motion to strike, and therefore was “entitled to attorney fees incurred in bringing the motion.” We have jurisdiction to consider the appeal because the April 4, 2017 order determined Tool Masters was “entitled to attorney fees incurred in bringing the motion” under section 425.16, subdivision (c)(1), and the April 16, 2018 order merely set the amount of fees and costs. (*Cheveldave v. Tri Palms Unified Owners Assn.* (2018) 27 Cal.App.5th 1202, 1220 [appellate court had jurisdiction to consider appeal from attorney’s fee award to prevailing defendant on special motion to strike where trial court cited to law providing for mandatory award of attorney’s fees, although defendant did not appeal from later order awarding specific amount of fees]; *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998 [“[W]hen a judgment awards costs and fees to a prevailing party and provides for later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award.”].)

B. *Under Section 581 a Plaintiff May Dismiss an Action After a Special Motion To Strike Is Filed but Before the Trial Court Adjudicates the Motion*

Section 581 allows a plaintiff voluntarily to dismiss the complaint or any cause of action with or without prejudice as to any defendant at any time “before the actual commencement of trial.” (§ 581, subds. (b)(1), (c); *S. B. Beach Properties v. Berti*

⁷ Tool Masters also submitted a supplemental letter brief in which it argued Ace’s failure to appeal the April 16, 2018 order rendered this appeal moot.

(2006) 39 Cal.4th 374, 380; *Panakosta Partners, LP v. Hammer Lane Management, LLC* (2011) 199 Cal.App.4th 612, 632 [“Under . . . section 581, a plaintiff generally has unfettered right to dismiss a cause of action before commencement of trial.”].) “A section 581 dismissal ‘is available to [a] plaintiff as a matter of right and is accomplished by filing with the clerk a written request therefor. If in proper form, the dismissal is effective immediately.’ [Citation.] ‘The entry is a ministerial, not a judicial, act, and no appeal lies therefrom.’” (*S. B. Beach*, at p. 380; accord, *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 876 (*Yang*) [“A request for a dismissal is usually effective upon filing, and no other action by the clerk or the court is required.”].)

However, a plaintiff may not voluntarily dismiss an action “where the action has proceeded to a determinative adjudication, or to a decision that is tantamount to an adjudication.” (*Bank of America, N.A. v. Mitchell* (2012) 204 Cal.App.4th 1199, 1209; accord, *Yang, supra*, 178 Cal.App.4th at p. 877 [agreeing with cases suggesting that “parties are not permitted to voluntarily dismiss their actions after the court has made a dispositive ruling or given some indication of the legal merits of the case, or when the procedural posture is such that it is inevitable the plaintiff will lose”].)

Because Ace voluntarily dismissed the action before the trial court adjudicated the special motion to strike, the case was properly dismissed under section 581 before “the actual commencement of trial.” (See *Yang, supra*, 178 Cal.App.4th at p. 878 [voluntary dismissal of complaint without prejudice was effective where “the trial court had not made a tentative or definitive ruling on defendants’ anti-SLAPP motion and it was

not inevitable that the motion would be granted”]; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 912 (*Kyle*) [plaintiff retained right voluntarily to dismiss action before trial court ruled on special motion to strike].) It is undisputed the voluntary dismissal was filed on March 28, 2017, but the trial court did not rule on the special motion to strike until April 4, 2017.

Even though Ace did not oppose the special motion to strike,⁸ “it was not inevitable that the motion would be granted.” (*Yang, supra*, 178 Cal.App.4th at p. 878.) As the moving party, Tool Masters has the burden of demonstrating it engaged in protected activity. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062 [defendant must show relationship between plaintiff’s claim and protected activity]; *Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321 [““First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one ‘arising from’ protected activity.””].) Tool Masters had to make this required showing before the burden shifted to Ace “to demonstrate the merit of the claim by establishing a probability of success.” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384; accord, *Barry*, at p. 321 [if the defendant has made the threshold showing, the court ““then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim””].) Because Tool Masters could only prevail if it satisfied the first step of the analysis under section 425.16, “plaintiff’s failure to

⁸ The trial court found Ace “did not oppose the motion” and “did not submit any evidence.” On appeal, Ace contends it did not file an opposition to the special motion to strike because it voluntarily dismissed its complaint against Tool Masters before the opposition was due.

oppose the anti-SLAPP motion did not guarantee defendant[] would prevail and obtain an order to strike.” (*Yang*, at p. 879.)

C. *The Trial Court Lacked Jurisdiction To Rule on the Special Motion To Strike After the Action Against Tool Masters Was Dismissed*

Upon a plaintiff’s voluntary dismissal, “a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action.” (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784; accord, *Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1022.) “Accordingly, most orders entered after the dismissal are void and have no effect.” (*Pittman*, at p. 1022; accord, *Paniagua v. Orange County Fire Authority* (2007) 149 Cal.App.4th 83, 89 [“[I]t is a well-settled proposition of law that where the plaintiff has filed a voluntary dismissal of an action . . . , the court is without jurisdiction to act further [citations], and any subsequent orders of the court are simply void.”].) “Notwithstanding this general principle,” a voluntary dismissal does not divest a trial court of jurisdiction to “hear motions related to attorney fees and costs.” (*Pittman*, at p. 1022.)

“[A] trial court retains jurisdiction to award attorney fees pursuant to section 425.16, subdivision (c)(1) after a plaintiff voluntarily dismisses its complaint while a special motion to strike is pending.” (*Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1456 (*Tourgeman*); accord, *Pfeiffer Venice Properties v. Bernard*, *supra*, 101 Cal.App.4th at p. 218 (*Pfeiffer*) [“[B]ecause a defendant who has been sued in violation of his or her free speech rights is entitled to an award of attorney fees, the trial court must, upon defendant’s motion for a fee award, rule on

the merits of the SLAPP motion even if the matter has been dismissed prior to the hearing on that motion.”]; *Liu v. Moore* (1999) 69 Cal.App.4th 745, 751 (*Liu*) [“a defendant who is voluntarily dismissed, with or without prejudice, after filing a section 425.16 motion to strike, is nevertheless entitled to have the merits of such a motion heard as a predicate to a determination of the defendant’s motion for attorney’s fees and costs”]; *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 107 (*Coltrain*) [“where the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney’s fees under . . . section 425.16, subdivision (c)”].)⁹

Tool Masters relies on these cases to support its contention that the trial court had jurisdiction to consider the merits of its special motion to strike. However, *Tourgeman*, *Pfeiffer*, *Liu*, and *Coltrain* are distinguishable. In each of these cases, the trial court considered the merits of the special motion to strike in the context of a hearing on a motion for attorney’s fees under section 425.16, subdivision (c)(1). (See *Tourgeman*, *supra*, 222 Cal.App.4th at pp. 1454-1455, 1467 [in ruling on defendants’ attorney’s fees motion filed after voluntary dismissal, trial court

⁹ Other courts have agreed with the *Coltrain* court’s conclusion that the trial court retains jurisdiction after a voluntary dismissal to award attorney’s fees pursuant to section 425.16, subdivision (c)(1), but have criticized its conclusion that the trial court can rule on the attorney’s fees motion without first determining whether the defendant would have prevailed on the motion to strike. (See *Tourgeman*, *supra*, 222 Cal.App.4th at pp. 1456-1457; *Pfeiffer*, *supra*, 101 Cal.App.4th at p. 218; *Liu*, *supra*, 69 Cal.App.4th at p. 752.)

erroneously determined action did not come within public interest exception to anti-SLAPP statute]; *Pfeiffer, supra*, 101 Cal.App.4th at pp. 214-215 [trial court erred in concluding it lacked jurisdiction to rule on attorney's fees motion filed after dismissal of action]; *Liu, supra*, 69 Cal.App.4th at pp. 749, 751 [defendant was entitled to have merits of special motion to strike heard in ruling on her attorney's fees motion filed after voluntary dismissal]; *Coltrain, supra*, 66 Cal.App.4th at pp. 100, 107 [trial court did not err in granting defendants' motion for attorney's fees filed after voluntary dismissal].) Here, the trial court considered whether Tool Masters would prevail on its special motion to strike even though Tool Masters had been dismissed from the action, its counsel was not present at the April 4, 2017 hearing, and Tool Masters' motion for attorney's fees was not before the court at the time of the hearing. Rather, Tool Masters filed the motion the day of the hearing and set it for hearing on a future date—January 31, 2018.¹⁰

The holding in *Yang* is instructive. In *Yang*, the defendant filed a special motion to strike, which was unopposed. (*Yang, supra*, 178 Cal.App.4th at p. 874.) One day before the hearing,

¹⁰ *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1365, is also distinguishable. In *Wong*, the defendants appealed the trial court's denial of their special motion to strike. The plaintiff argued one of the defendants had no standing to appeal because plaintiff had voluntarily dismissed that defendant before the hearing on the motion. (*Id.* at p. 1364.) Because the defendants filed a joint special motion to strike and the dismissed defendant would be entitled to attorney's fees had defendants prevailed, the Court of Appeal concluded the dismissed defendant had standing to appeal the denial of the motion. (*Id.* at p. 1365.) The procedural posture in *Wong* is different from here, where Ace dismissed the only moving defendant prior to the hearing.

the plaintiff filed a request for dismissal without prejudice. (*Ibid.*) At the hearing, the trial court determined it had jurisdiction to hear the motion notwithstanding the plaintiff's request for dismissal, and took the matter under submission. (*Ibid.*) A week later the trial court issued an order granting the special motion to strike. (*Ibid.*) As here, the trial court ruled the defendants were entitled to attorney's fees under section 425.16, subdivision (c), even though no motion had yet been filed. (*Yang*, at p. 874.) Six days later defendants filed a motion for attorney's fees and costs. (*Ibid.*)

Our colleagues in Division Three concluded trial had not commenced under section 581 because "when plaintiff filed the dismissal, the trial court had not issued a ruling on the merits, and the procedural posture was such that it was not inevitable that plaintiff's complaint would be stricken." (*Yang, supra*, 178 Cal.App.4th at p. 881.) The *Yang* court next considered whether the voluntary dismissal divested the trial court of jurisdiction to consider the merits of the special motion to strike. The court observed, "[W]hen plaintiffs dismiss their cases before the trial court rules on the anti-SLAPP motion, the trial court continues to have jurisdiction over the case for purposes of deciding if the plaintiffs are responsible for attorney fees and costs, but not to rule on the anti-SLAPP motion." (*Id.* at p. 879, citing *Kyle, supra*, 71 Cal.App.4th at pp. 908, fn. 5, 917-919.)¹¹ The *Yang* court

¹¹ In *Kyle*, the trial court heard argument on defendant's special motion to strike and took the matter under submission. (*Kyle, supra*, 71 Cal.App.4th at p. 906.) Two days later, plaintiff filed a request for voluntary dismissal of the case with prejudice, which the clerk entered the following day. (*Ibid.*) Six days after dismissal of the action, the trial court issued an order granting the anti-SLAPP motion and stating defendant was to recover

concluded, “[T]he dismissal filed by plaintiff was effective upon filing, and the trial court lacked jurisdiction to rule on defendants’ anti-SLAPP motion.” (*Yang*, at p. 881.)

Like the plaintiff in *Yang*, Ace voluntarily dismissed its complaint against Tool Masters before the hearing on the motion to strike. Thus, the trial court only had jurisdiction to rule on Tool Masters’ motion for attorney’s fees. But similar to *Yang*, the trial court reached the merits of the motion and concluded Tool Masters was entitled to attorney’s fees, even though Ace had dismissed Tool Masters from the case, and Tool Masters had not filed a motion for attorney’s fees. (*Yang, supra*, 178 Cal.App.4th at p. 874.) Accordingly, in the absence of a pending motion for attorney’s fees set for hearing, the trial court lacked jurisdiction to address the merits of the special motion to strike.¹²

attorney’s fees and costs. (*Ibid.*) The Court of Appeal concluded the trial court erred in granting the motion to strike in light of the dismissal, but affirmed the trial court’s order awarding attorney’s fees and costs. (*Id.* at pp. 917-918.) The court concluded remand was not necessary on the attorney’s fees motion because the trial court had conducted a hearing and adjudicated the merits of the motion to strike, and on appeal the plaintiff did “not propose any conceivable circumstance that would justify denial of a fee and cost award to defendant.” (*Id.* at p. 919.) It is not clear from the opinion whether the anti-SLAPP motion requested attorney’s fees as part of the motion, which would explain why the Court of Appeal treated the motion as one for attorney’s fees. Here, Tool Masters’ motion for attorney’s fees was not filed until the day of the trial court’s ruling on the motion to strike.

¹² We do not consider the merits of Tool Masters’ special motion to strike because the trial court had no jurisdiction at the time of the hearing to adjudicate the merits of the motion.

DISPOSITION

We reverse and remand to the trial court with directions to vacate its April 4, 2017 order. Ace is entitled to its costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.

Although Ace urges us to reach the merits because the parties have briefed the merits on appeal, this is an issue for the trial court to consider in the first instance. We also do not reach the parties' other contentions because the jurisdictional inquiry is dispositive of the appeal.