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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RICHARD PACHECO et al.,

Plaintiffs and Respondents,

v.

GREG S. TUTTLE,

Defendant and Appellant.

B272171

(Los Angeles County
Super. Ct. Nos. KS019694,
KS019719, & KS019720)

APPEAL from orders of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Jimmy L. Gutierrez A Law Corp. and Jimmy L. Gutierrez;
Pollak, Vida & Barer, Daniel P. Barer and Anna L. Birenbaum
for Plaintiffs and Respondents.

Paul Cook for Defendant and Appellant.

Defendant and appellant Greg Tuttle (Tuttle) appeals orders denying his motions for attorney fees after he successfully opposed requests for civil harassment restraining orders that were sought by plaintiffs and respondents Richard Pacheco (Pacheco), Manuel Lozano (Lozano), and Monica Garcia (Garcia) (collectively, Plaintiffs).

Tuttle contends the trial court erred in refusing to award him attorney fees pursuant to either the anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425.16), or pursuant to the civil harassment statute (§ 527.6).¹

We find no error and affirm. The record reflects Tuttle did not request attorney fees pursuant to section 425.16; therefore, he cannot assert any error in that regard. Further, the trial court refused to award Tuttle any attorney fees under section 527.6 on the ground his request for \$94,934 was excessive; Tuttle has not shown the trial court abused its discretion in doing so.

FACTUAL AND PROCEDURAL BACKGROUND

On February 23, 2016, Pacheco, a member of the Baldwin Park City Council, filed a request for a civil harassment restraining order against Tuttle (§ 527.6), and obtained a temporary restraining order. Pacheco alleged a course of conduct by Tuttle, including: following Pacheco in his vehicle during a 2015 reelection campaign; making threatening statements during a city council meeting; and following Pacheco and his wife to a restaurant and hotel in Santa Barbara.

On March 4, 2016, Lozano, Baldwin Park's mayor, and Garcia, another member of the city council, filed separate requests for restraining orders against Tuttle, and alleged similar

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

conduct by him. Their requests for a temporary restraining order, which were heard by a different bench officer (Judge Blades), were denied on the ground that Lozano and Garcia had not sufficiently shown acts of violence, threats of violence, or a course of conduct that seriously alarmed, annoyed, or harassed them and caused them substantial emotional distress.

Pacheco's request for a civil harassment restraining order was reassigned to Judge Blades, so that all three matters were before him. The matters were scheduled to be heard on March 15, 2016.

On Wednesday, March 9, 2016, six calendar days before the hearing date, Tuttle filed special motions to strike (§ 425.16) the pleadings filed by Pacheco, Lozano, and Garcia. Tuttle served Plaintiffs with copies of the motions the following day. The anti-SLAPP motions were noticed to be heard concurrently with the hearings on the restraining orders. Tuttle contended the claims against him for injunctive relief arose out of his protected activity, and that Pacheco, Lozano, and Garcia could not prevail on their claims.

On March 15, 2016, the day of the hearing, Pacheco, Lozano, and Garcia each filed a preliminary opposition, arguing the special motions to strike could not be granted because Tuttle had failed to provide sufficient notice of his motions (§ 1005), and the court should either decline to hear the motions based upon improper notice or set them for a future date. Plaintiffs also argued that Tuttle's special motions to strike should be denied because their petitions for restraining orders did not arise from Tuttle's constitutionally protected activity.

On March 15, 2016, the three cases were reassigned to Judge Marrs, and the hearing proceeded that day as scheduled.

At the conclusion of the testimony and argument by counsel, the trial court ruled that Pacheco, Garcia, and Lozano had failed to meet their burden of proving harassment by clear and convincing evidence. (§ 527.6, subd. (i).) The trial court stated: “[Tuttle] has made it fairly clear throughout this entire period of time that he seeks to root out fraud, waste, and abuse. . . . [¶] All citizens have an interest in reducing and preventing public corruption. [¶] Walking close to an individual is not assault. [¶] It appears that at all times Mr. Tuttle was in a place that was open to the public or, in fact, a public road. [¶] Based on everything I’ve heard, the burden of clear and convincing evidence has not been met in this particular case. [¶] Temporary Restraining Orders in place at this point will be dissolved. . . . The cases are dismissed.” Tuttle’s anti-SLAPP motions were not addressed or argued at the March 15, 2016 hearing, and Tuttle did not obtain a ruling on his anti-SLAPP motions.

On April 18, 2016, Tuttle filed the attorney fee motions that are the subjects of this appeal, seeking \$94,934 based on a lodestar and multiplier. Tuttle requested attorney fees as the prevailing party on Plaintiffs’ petitions for civil harassment restraining orders, pursuant to section 527.6.² Alternatively, Tuttle requested attorney fees under the private attorney general statute. (§ 1021.5.) Tuttle did *not* request attorney fees pursuant to section 425.16.

On April 29, 2016, Plaintiffs filed opposition to Tuttle’s motions for attorney fees. They argued, *inter alia*, that section 527.6 does not compel an award of attorney fees, that Tuttle had

² Section 527.6 states at subdivision (s) that “[t]he prevailing party in an action brought pursuant to this section may be awarded court costs and attorney’s fees, if any.”

failed to show an entitlement to attorney fees under the private attorney general statute, and that the amount requested was unreasonable and excessive.

On May 5, 2016, the matters came on for hearing. The trial court initially ruled that it lacked jurisdiction to award attorney fees pursuant to section 527.6 because the three cases had been dismissed. The trial court went on to rule, however, that the amount Tuttle had requested was excessive, and therefore no attorney fees would be awarded.

On May 10, 2016, Tuttle filed a timely notice of appeal from the May 5, 2016 postjudgment orders denying his motions for attorney fees.

CONTENTIONS

Tuttle contends he is entitled to attorney fees because he prevailed under both the anti-SLAPP and the civil harassment statutes.

DISCUSSION

1. *No merit to Tuttle's contention the trial court erred in denying him attorney fees pursuant to section 425.16; in the court below, Tuttle did not seek attorney fees pursuant to section 425.16 and thereby forfeited the issue.*

Tuttle's basic argument is predicated on section 425.16, subdivision (c)(1), which states that "a prevailing defendant on a special motion to strike *shall* be entitled to recover his or her attorney's fees and costs." (Italics added.) Tuttle contends that such an award to a prevailing defendant is mandatory—even when the anti-SLAPP motion is mooted or the case is dismissed on other grounds. (See, e.g., *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 107 [where plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending,

trial court has discretion to determine whether defendant is the prevailing party for purposes of attorney fees under § 425.16]; *Liu v. Moore* (1999) 69 Cal.App.4th 745, 751 [a defendant who is voluntarily dismissed after filing a special motion to strike is entitled to have the merits of such motion heard as a predicate to a determination of the defendant's motion for attorney fees under § 425.16]; *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 215 [trial court has jurisdiction to award attorney fees to a prevailing defendant whose anti-SLAPP motion was not heard solely because the matter was dismissed before defendants obtained a ruling on the anti-SLAPP motion].)

Tuttle is correct insofar as the dismissal of an action before an anti-SLAPP motion is heard does not deprive the trial court of jurisdiction to rule on an anti-SLAPP motion as a predicate to a motion for attorney fees under section 425.16. However, that is as far as it goes.

As Plaintiffs contended in their opposing papers below, Tuttle's anti-SLAPP motions were not properly noticed. Tuttle filed and served his anti-SLAPP motions less than a week before the March 15, 2016 hearing on Plaintiffs' requests for restraining orders, with the anti-SLAPP motions to be heard concurrently with Plaintiffs' requests for injunctive relief. However, such short notice on an anti-SLAPP motion, which is a dispositive motion, is plainly insufficient. (See § 1005, subd. (b) [moving papers to be served and filed at least 16 court days before hearing].) Tuttle's anti-SLAPP motions were not properly before the court at the time of the March 15, 2016 hearing on Plaintiffs' requests for injunctive relief under section 527.6, and thus could not properly be granted.

Further, Tuttle did not request, and did not obtain, a ruling on his special motions to strike. The record of the oral proceedings reflects the anti-SLAPP motions were not argued or even addressed at the March 15, 2016 hearing, and the minute orders entered following that hearing demonstrate that the court only ruled on Plaintiffs' requests for restraining orders under section 527.6.

Moreover, Tuttle's subsequent motions for attorney fees did not request attorney fees pursuant to section 425.16. Rather, the moving papers reflect he moved for attorney fees only under sections 527.6 and 1021.5. Given that Tuttle did not request attorney fees pursuant to section 425.16, there is no merit to his contention that the trial court erred in failing to award him such fees.

In sum, Tuttle did not seek attorney fees below pursuant to section 425.16 and thereby forfeited the issue. (*In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 912 [issues raised for the first time on appeal which were not litigated in the trial court are forfeited]; *Gray1 CPB, LLC v. SCC Acquisitions, Inc.* (2015) 233 Cal.App.4th 882, 897 [same].)

2. *Trial court acted within its discretion in declining to award Tuttle attorney fees in any amount pursuant to section 527.6, notwithstanding his success in defeating the requests for injunctive relief.*

Tuttle's alternative contention is that the trial court erred in denying his request for attorney fees as the prevailing party under section 527.6. This argument similarly fails.

a. *General principles.*

Unless special circumstances would render such an award unjust, parties who qualify for a fee award should recover for all

hours reasonably spent. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 632–633 (*Serrano*).) However, a “fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.” (*Id.* at p. 635.) *Serrano* reasoned, “‘If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, *claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place.* To discourage such greed, a severer reaction is needful’” (*Ibid.*, italics added; accord, *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 990–991 [grossly inflated fee request is a sufficient reason, standing alone, to justify a total denial of attorney fees].)

b. *Tuttle has failed to show the trial court abused its discretion in denying attorney fees on the ground his request was excessive.*

The reporter’s transcript of the May 5, 2016 hearing reflects the trial court gave two grounds for denying Tuttle an award of attorney fees. The trial court initially indicated that it lacked jurisdiction to rule on the request for attorney fees because the three cases were dismissed after the denial of Plaintiffs’ requests for restraining orders. The trial court went on to rule, however, that Tuttle had overly litigated the matters and that his claimed attorney fees were excessive. The trial court stated, “I’ve reviewed the request for attorney’s fees submitted by the defense, former defense. [¶] And there’s tons and tons and tons of paperwork, far exceeding that which would be normally filed in a civil harassment case. [¶] . . . [F]or the record, I have a pile of papers filed by the parties that’s at least 6 inches high in a

civil harassment case. Which is far and away outside the legislative intent for passing that particular section. [¶] So the request for additional attorney's fees is denied.”³

Tuttle has focused his argument on attacking the trial court's ruling that it lacked jurisdiction to rule on his request for attorney fees under section 527.6. Tuttle has not argued that the trial court abused its discretion by refusing to award him attorney fees on the ground that his request for \$94,934 to defend a civil harassment case was unreasonably excessive. Therefore, the contention has been forfeited. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125 [issues not adequately briefed on appeal are deemed forfeited].)

³ We note the three minute orders relating to the May 5, 2016 hearing indicate the court informed the parties that it lacked authority to rule on any matters concerning this case because this case was previously dismissed on March 15, 2016, when the petitioners' requests for restraining orders were denied. However, the reporter's transcript of the May 5, 2016 hearing reflects that the trial court also denied Tuttle attorney fees on the additional ground that his request was excessive. We conclude the reporter's transcript is controlling, based on the rule that conflicts between the reporter's and clerk's transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter's transcript unless the particular circumstances dictate otherwise. (*McMillin Companies, LLC v. American Safety Indemnity Co.* (2015) 233 Cal.App.4th 518, 528, fn. 15; *In re P.A.* (2012) 211 Cal.App.4th 23, 30, fn. 4.)

Tuttle has failed to rebut the presumption that the reporter's transcript is controlling. He merely argues the minute orders can be harmonized with the reporter's transcript; he does so by disregarding the trial court's oral ruling that the claimed fees were excessive.

DISPOSITION

The May 5, 2016 orders denying Tuttle's motions for attorney fees are affirmed. Respondents shall recover their costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.