Filed 6/12/18 Thomas v. Makovoz CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GIHAN THOMAS, Plaintiff and Respondent, v. ILANA MAKOVOZ, Defendant and Appellant.	B281322 (Los Angeles County Super. Ct. No. LS028311)

APPEAL from an order of the Superior Court of Los Angeles County. Shirley K. Watkins, Judge. Affirmed.

The Cowan Law Firm and Jeffrey W. Cowan for Defendant and Appellant.

Law Offices of Daniel Hustwit and Daniel T. Hustwit for Plaintiff and Respondent.

Gihan Thomas filed a request for a civil harassment restraining order against Ilana Makovoz alleging that Makovoz had stalked her and presented false evidence in official proceedings. Makovoz filed a special motion to strike under the anti-SLAPP statute. The court granted the motion, but denied Makovoz's request for attorney fees. The court held that Makovoz could not recover fees for representing herself or for her colleague's work on the case. On appeal, Makovoz argues the court was required to award her all of the fees she incurred litigating the anti-SLAPP motion. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Civil Harassment Action*

Thomas and Makovoz are both attorneys. They live across the street from each other. After an altercation involving their respective dogs, five civil harassment actions were filed involving Thomas, her husband, Makovoz, and Makovoz's husband. This case is one of those five actions.[1]

On July 29, 2016, Thomas filed a petition for an injunction prohibiting Makovoz from harassing her pursuant to Civil Code of Procedure section 527.6.[2] She alleged that Makovoz had stalked her and presented false evidence in a court action and before the Animal Control Agency. The trial court granted a temporary restraining order.

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[1] We previously denied a petition for writ of mandate in superior court case numbers LS027879, LS027916, LS028249, and LS028311.

[2] All further statutory references are to the Code of Civil Procedure.

2. *The Anti-SLAPP Motion*

On September 28, 2016, before the trial of the harassment action, Makovoz, representing herself in pro per, filed an anti-SLAPP motion pursuant to section 425.16. She also filed a "fee declaration" asking for $20,655 in fees. She stated that her hourly rate was $450, she had spent 45.9 hours researching and drafting the motion, and "as a result of all this work . . . was unable to work on other cases." She also said she "expect[ed] more fees to be incurred" because she had retained her "colleague, Jeffrey Cowan, of the Cowan Law Firm to represent [her] on this TRO [temporary restraining order]. . . ."[3]

Among other things, Thomas opposed the fee application, arguing that Makovoz was not entitled to recover fees for her own work. Thomas further argued that section 425.16 only authorized an award of fees for work performed on the anti-SLAPP motion, and, therefore, no fees should be awarded for work Cowan may have performed on the temporary restraining order. Thomas also argued that, in any event, Makovoz could not recover fees for work Cowan performed on her behalf as she was "of counsel" to his firm.

Makovoz filed a reply listing herself as an attorney for The Cowan Law Firm on the cover page. However, in the memorandum she argued she "has never been an employee" of the Cowan Law Firm. She argued that in hiring Cowan, she had "retain[ed] outside counsel," was thus entitled to fees for his work. Makovoz also contended that she was not just in pro per because she was acting as an attorney for her husband. This last

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[3] We hereafter refer to Jeffrey Cowan as "Cowan" and the Cowan Law Firm by its full title.

allegation would later raise the suspicions of the trial court, as Makovoz's husband was not party to this action.

In contrast to Makovoz's own declaration stating that she had retained Cowan to work on the "TRO" and had drafted the anti-SLAPP motion herself, a declaration by Cowan stated that Makovoz had retained him to represent her on the anti-SLAPP motion and he had "already incurred significant time in helping draft (or edit) the moving papers." He also said he employed Makovoz as an independent contractor, and she was listed on his website as "counsel."

On November 7, 2016, the trial court granted the special motion to strike. However, the court denied the request for attorney fees on the ground Makovoz had not submitted "admissible evidence in support of [the] request for fees including the amount of fees incurred and the reasonableness of those fees."

3. *The Motion for Reconsideration*

Makovoz filed a motion for reconsideration arguing the trial court erred in not giving her an opportunity to present evidence of the fees incurred after it granted the anti-SLAPP motion. She stated that Cowan had billed her $16,470.15 in fees with $405.15 in expenses, and she had "billed" $26,460 in fees. Makovoz argued that even though her husband was not a party to this action, both her and her husband were "effectively restrained by" the court's temporary restraining order. According to Makovoz, she had "represented" her husband's "interests," while Cowan had "represented the acts directly alleged to have been committed by" her.

In support of the motion for reconsideration, Cowan filed a declaration stating his hourly rate was $450, and he had "primarily helped with strategy, edited briefs, and . . . argu[ed]

the anti-SLAPP motion." He asked for an additional $4,185 in connection with the motion for reconsideration. He attached to his declaration a "legal bill" showing $16,065 in fees and $405.15 in costs associated with work he performed on the anti-SLAPP motion.

At the same time that Makovoz filed her motion for reconsideration, she filed a one-page form memorandum of costs seeking $42,930.15 in attorney fees.

The trial court granted the motion for reconsideration to the extent it agreed to "reconsider the ruling denying the attorney fees." "Upon reconsideration, the court denie[d] the request for attorney fees." The court reasoned as follows:

> "First, the court is troubled by the declarations of Ms. Makovoz. In the declaration attached to the Special Motion to Strike, she advocated that *she* should be entitled to reimbursement of 49.5 hours of *her own time*—equaling $20,655 in fees—for representing *herself* because of the lost income she sustained because she was working on *her own case*. . . .
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> "In her declaration attached to the Motion for Reconsideration, Ms. Makovoz claims that she was representing herself *and* her husband [] and that she should be reimbursed for her fees in representing her husband. . . . There is nothing in Ms. Makovoz's original declaration which mentions that her time/fees were incurred in representing her husband, which would not be relevant anyway as he was not a party to this [] action and Special Motion to Strike. This case is clearly only against Ms. Makovoz.

> "In *Trope v. Katz* (1995) 11 Cal.4th 274, the California Supreme Court made clear that an attorney representing herself cannot claim attorney fees as compensation for the time and effort expended and the professional business opportunities lost as a result. Since she cannot claim reimbursement of fees in her self-representation and she cannot claim fees in the representation of her husband as he is not a party to this action, Ms. Makovoz's request for fees in the sum of $26,460 is denied."

The court then denied Makovoz's request for $19,125 in fees for Cowan's work on the ground that "Makovoz cannot recover fees when she was 'represented' by the firm of which she is counsel."

Makovoz appealed.[4]

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[4] Makovoz initially appealed from the court's November 7, 2016 denial of attorney fees in conjunction with the court's grant of the anti-SLAPP motion. Makovoz then appealed from the trial court's January 17, 2017 order granting reconsideration and denying attorney fees. We dismissed the first appeal on the ground that the trial court, by granting the motion for reconsideration, had "vacated its November 7, 2016 order" and "entered a new and different order denying Makovoz's request for attorney fees." Thomas now argues that Makovoz could only appeal from the first order, and the second order was actually a *denial* of reconsideration and non-appealable. We believe our prior order disposes of this argument: we have already held that the first order was vacated, and the court's January 17, 2017 was a "new and different order" that "*granted*" reconsideration. The appeal was filed within 60 days of that order.

DISCUSSION

1. *A Prevailing Defendant on an Anti-SLAPP Motion is Generally Entitled to Fees*

"In any action subject to [the special motion to strike], a prevailing defendant . . . shall be entitled to recover his or her attorney's fees and costs." (§ 425.16, subd. (c)(1).) However, "[t]o the extent a trial court is concerned that a particular award is excessive, it has broad discretion to adjust the fee downward or deny an unreasonable fee altogether." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.) " 'A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.' [Citation.]" (*Id.* at p. 1137.)

We review an anti-SLAPP attorney fee award under the deferential abuse of discretion standard. (*Ketchum v. Moses, supra,* 24 Cal.4th at p. 1130.) The trial court's fee determination " ' "will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' " (*Id.* at p. 1132.) "The trial court's resolution of any factual disputes arising from the evidence is conclusive." (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 561–562.) We may not reweigh on appeal a trial court's assessment of an attorney's declaration (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622–623), and it is for the trial court "to assess credibility and resolve any conflicts in the evidence. Its findings . . . are entitled to great weight." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.)

2. *The Court Was Not Required to Enter the Memorandum of Costs*

Makovoz does not directly challenge the trial court's order denying the $26,460 in fees she "incurred" representing herself.

However, she does indirectly argue that the trial court erred in not awarding the total amount of fees—$42,930.15, for both her and Cowan's work—as listed on the form memorandum of costs she filed with her motion for reconsideration.

Makovoz argues that once Thomas failed to object to those costs, the court "los[t] jurisdiction" to strike the costs, and the clerk "was required to "execute its mandatory ministerial duty, pursuant to [California Rules of Court] Rule 3.1700, to enter the cost memorandum on the Judgment." Rule 3.1700(b)(4) of the California Rules of Court provides that "after the time has passed for a motion to strike or tax costs or for determination of that motion, the clerk *must* immediately enter the costs of the judgment." (Emphasis added.)

In other words, Makovoz is arguing that, after the court denied her request for attorney fees, she could circumvent that ruling by submitting the same request in an unopposed memorandum of costs. According to Makovoz, the clerk was required to enter these costs after twenty days elapsed and Thomas failed to file a motion to strike or tax costs. Said otherwise, Makovoz argues the clerk should have entered costs while the motion for reconsideration was pending. We disagree.

When a trial court has denied a litigant's request for attorney fees, the litigant has several remedies, one of which is found in section 1008, which sets forth the procedure by which a court may reconsider its ruling. A litigant may not force a ruling in her favor by subsequently seeking the same fees via costs memorandum. More fundamentally, a noticed motion is required whenever the court is required to determine what constitutes a "reasonable" fee (Cal. Rules of Court, rule 3.1702), and, here, section 425.16, subdivision (c) provides for such a determination.

(Cf. *American Humane Ass'n v. Los Angeles Times Communications* (2001) 92 Cal.App.4th 1095, 1103 [dicta regarding how anti-SLAPP attorney fees may be sought as part of a costs memorandum].)

3. *The Court Did Not Err in Denying Makovoz's Request for Fees*

Makovoz argues she was entitled to an award of fees for Cowan's work on the anti-SLAPP motion because under *Gilbert v. Master Washer & Stamping Co.* (2001) 87 Cal.App.4th 212 (*Gilbert*) an attorney litigant "represented" by a member of her firm may recover fees. We agree that *Gilbert* provides that an attorney litigant may recover fees for her colleague's work on her case. However, we affirm the trial court's denial of fees on a related ground. The trial court found Makovoz's declarations not credible and questioned the extent to which Cowan had worked on this case. Substantial evidence supports the court's implied finding that the request for fees was excessive, and we conclude the court did not abuse its discretion in denying fees.

Makovoz presented contradictory evidence about her relationship with Cowan and to what extent he had performed legal services on the anti-SLAPP matter. The court was "troubled" by inconsistencies in Makovoz's declarations. Although Makovoz argued that she had never been employed by the Cowan Law Firm, the court found that she was an attorney at the firm: she listed the firm below her name on her own cover page, and the firm's website listed Makovoz as "counsel." The court also found that Makovoz had been inconsistent as to whether she was requesting fees for work she performed on her own behalf: she first asked for $20,655 in fees for work on "*her*

own case" and later claimed that she had, in fact, been representing her husband while Cowan was representing her.

There were also inconsistencies as to whether Makovoz or Cowan performed the services for which Makovoz sought compensation. In support of her anti-SLAPP motion, Makovoz filed a declaration asking only for her own fees for preparing that motion, but that she "expected" to incur further fees for "attending the hearing and filing responsive documents" (for work she had retained Cowan to perform). However, after Thomas objected to Makovoz's request for fees based on her in pro per representation, Makovoz submitted Cowan's declaration stating that, in contrast to Makovoz's representation that *she* had drafted the anti-SLAPP motion and had not yet incurred fees for Cowan's anticipated work at the hearing and on the reply, *he* had "already incurred significant time in helping draft (or edit) the moving papers."

As explained above, a trial court may deny a request for attorney fees altogether when a litigant has requested an unreasonably inflated fee. " '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. . . .' [Citation.]" (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 635.)

Here, given the trial court's finding that Makovoz's declarations were not credible and the inconsistent evidence as to the extent of the work Cowan had actually performed on this case, the trial court reasonably could have concluded either that

Makovoz had requested an excessive fee or that there was an inadequate showing that Cowan performed significant work for which Makovoz should recover fees. Under the circumstances, it was not an abuse of discretion for the court to deny Makovoz's request for fees altogether.[5]

DISPOSITION

The order is affirmed.[6] Respondent is awarded costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J. ROGAN, J.*

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[5] We grant Makovoz's unopposed request for judicial notice of the trial court's February 23, 2018 order denying attorney fees in a different case. The fact that the court may have articulated this point differently in a related matter does not undercut our analysis of the court's words here.

[6] The parties' respective motions for sanctions are denied. We also deny Makovoz's motion to augment the record with the motion to dismiss filed in the first appeal of this case as well as the May 12, 2016 order dismissing that appeal. We grant Makovoz's request to take judicial notice of the reporter's transcripts for the October 25, 2016 and January 6, 2017 hearings.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.