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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CHERYL KELMAR, Plaintiff and Appellant, v. KEVIN JAMES CORSTORPHINE et al., Defendants and Respondents.	2d Civil No. B239121 (Super. Ct. No. 1379714) (Santa Barbara County)

Plaintiff appeals an order declaring her to be a vexatious litigant. (Code Civ. Proc., § 391 et seq.)[1] We affirm.

FACTS

Kevin, Evan and Alisa Corstorphine (hereafter collectively "Corstorphine") brought a small claims action against Cheryl Kelmar. The action arose from an automobile accident in which Corstorphine and Kelmar were involved. Corstorphine obtained a default judgment against Kelmar in the amount of $3,585.26 plus $70 in costs.

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

Kelmar moved to vacate the judgment pursuant to section 116.730, allowing the trial court to vacate a small claims default judgment upon a showing of good cause. The trial court denied the motion.

Kelmar moved in equity to vacate the judgment on the grounds it was obtained through extrinsic fraud, mistake, accident, excusable neglect and duress. The trial court also denied that motion.

Kelmar then filed the instant action in propria persona in superior court. The complaint alleged causes of action against Corstorphine for fraud, negligence, conspiracy and emotional distress. The complaint alleged that Kevin Corstorphine caused the automobile accident that gave rise to the small claims default judgment against Kelmar.

Corstorphine moved to have Kelmar declared a vexatious litigant pursuant to section 391. The motion listed 10 actions Kelmar filed in propria persona within the immediately preceding 7-year period. The motion further alleged that none of the actions had been filed in small claims court and that none had been decided in her favor.

Nine of the cases were either dismissed by the court or dismissed by Kelmar without prejudice. The tenth case has been pending with no action on the file since June 2009.

Corstorphine also claimed Kelmar has no reasonable probability of prevailing in the instant action. Corstorphine argued Kelmar's complaint is in essence a malicious prosecution action. Kelmar cannot prevail in a malicious prosecution action because she did not prevail in the underlying small claims action, and, in any event, a malicious prosecution action cannot arise from a small claims court case. In addition, Kelmar's action constitutes a collateral attack on the small claims judgment.

In response, Kelmar claimed that she had obtained favorable outcomes in the cases upon which Corstorphine relied. Among the cases on which Corstorphine relies, the record shows as follows:

1. *Kelmar v. Washington Mutual Bank*, Santa Cruz Superior Court, Case No. CIS CV154801 was dismissed without prejudice. Kelmar provided documents from credit reporting agencies. The connection between the case and the documents, if any, is not apparent.

2. *Kelmar v. Countrywide*, United States District Court, Central District of California, Case No. 2009 CV02256 PSG-E, was dismissed by the court with prejudice.

3. *Kelmar v. Capital One Services, Inc.*, Santa Cruz Superior Court, Case No. CV154802 was filed July 19, 2006. It alleges, among other causes of action, violation of the Fair Debt Collection Practices Act (15 U.S.C. § 1788.17). Kelmar submitted only the front page of the complaint, a letter from Capitol One dated July 26, 2006, and a dismissal with prejudice dated February 29, 2008. The letter from Capitol One is dated seven days after Kelmar filed the complaint. The letter states that Capitol One is notifying credit reporting agencies to delete derogatory information on file for January and February 2006. No document connecting the letter to the complaint appears. Instead, the letter states: "Thank you for contacting our Executive Office today by phone."

4. *Kelmar v. Mortgage Electronic Registration System, Inc.*, United States District Court, Central District of California, Case No. 2009 CV01418, was dismissed for failure to prosecute.

5. *Kelmar v. One West Bank*, Santa Barbara Superior Court, Case No. 1340397, was dismissed without prejudice. Kelmar claims this case is related to *Kelmar v. IndyMac Bank*. She asserts both cases were filed in attempt to prevent the unlawful foreclosure of her home. She dismissed both cases without prejudice because there was no time to save her home.

6. In *Kelmar v. Santa Cruz Title Company*, Santa Cruz Superior Court, No. CV161528, the court dismissed the action against Santa Cruz Title on a motion to strike the complaint.

DISCUSSION

Section 391, subdivision (b)(1) defines a vexatious litigant as a person who: "In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiable permitted to remain pending at least two years without having been brought to trial or hearing."

In reviewing an order finding a person to be a vexatious litigant we presume the order to be correct and imply such findings as are necessary to support it. (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 780.)

An action that is dismissed by plaintiff, with or without prejudice, is nevertheless a burden on the target of the litigation and the judicial system. (*Tokerud v. Capitolbank Sacramento*, *supra*, 38 Cal.App.4th at p. 779.) Such a case is within the vexatious litigation statute. (*Ibid.*) A voluntary dismissal is prima facie proof the case was determined adversely to plaintiff. (*Id.* at p. 780, fn. 3.) Plaintiff may rebut the showing by contrary proof. (*Ibid.*)

Here there is substantial evidence from which the trial court could reasonably determine there were more than five cases, other than small claims cases, prosecuted or maintained by Kelmar in propria persona within the immediately preceding seven-year period that had been finally determined adversely to her. Kelmar does not dispute that she cannot prevail in the instant action. Thus we must uphold the trial court's order.

Kelmar appears to argue that *Tokerud* was wrongly decided. She believes she should not have the burden to show that a voluntarily dismissed case had been determined in her favor.

When a case has been voluntarily dismissed, the reasonable conclusion is that plaintiff did not prevail. Thus a voluntary dismissal is prima facie proof of an adverse determination. Most often there is nothing in the record of the case to show otherwise. If there is evidence to show the case had been determined

in plaintiff's favor, that evidence should be in plaintiff's possession. Thus it is reasonable to place the burden of going forward with the evidence on plaintiff. *Tokerud* was correctly decided.

Kelmar complains that the trial court denied her request for a continuance to obtain evidence to rebut Corstorphine's prima facie showing. The motion to declare Kelmar a vexatious litigant was filed on October 30, 2011. The hearing was originally set for December 7, 2011. The court granted Kelmar a continuance to January 11, 2012. The court denied Kelmar's request for a second 30-day continuance. Kelmar had over 60 days from the filing of the motion to produce the evidence. The trial court could reasonably conclude Kelmar's request for a second continuance was for the purpose of delay and obstruction. Kelmar has failed to show an abuse of discretion.

In any event, the trial court could also find Kelmar to be a vexatious litigant under section 391, subdivision (b)(2). That subdivision defines a vexatious litigant as a person who: "After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined."

Here instead of directly attacking the small claims judgment by appealing, Kelmar filed two meritless motions to set the judgment aside. When she lost those motions she mounted a collateral attack on the judgment by filing the instant superior court action. Because the final small claims judgment against Kelmar acts as a bar to further litigation over the same controversy, the superior court action cannot succeed. (See 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 334, pp. 938-939.)

Finally, Kelmar challenges the constitutionality of section 391. Suffice it to say, numerous cases have found the statute to be constitutional. (See, e.g., *Taliaferro v. Hoogs* (1965) 236 Cal.App.2d 521; *Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 993; *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 222.) There is simply no constitutional rights to harass others with meritless litigation.

The order is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Donna Geck, Judge

Superior Court County of Santa Barbara

Cheryl Kelmar, in pro. per., for Plaintiff and Appellant.

John C. Lauritsen for Defendants and Respondents.