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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STEVEN ROTH et al., Plaintiffs and Respondents, v. ROSENTHAL & ASSOCIATES, Defendant and Appellant.	B277498 (Los Angeles County Super. Ct. No. LC102503)

APPEAL from an order of the Superior Court of Los Angeles County, Rick Brown, Judge. Affirmed.

Law Offices of Rosenthal & Associates and Lisa F. Rosenthal for Defendant and Appellant.

Steven Roth, in pro. per., and Paula Roth, in pro. per., for Plaintiffs and Respondents.

INTRODUCTION

Defendant Lisa Rosenthal, doing business as the Law Offices of Lisa Rosenthal and Associates (the law firm), appeals from the order of the trial court sanctioning the law firm pursuant to Code of Civil Procedure section 128.7[1] for filing a frivolous motion. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The litigation*

Plaintiffs Steven Roth and Paula Roth brought this lawsuit against Christopher Knight for, inter alia, fraud and breach of contract, following the dismissal of Knight's unlawful detainer action against plaintiffs. Plaintiffs later added a sixth cause of action for malicious prosecution against Knight and Rosenthal, who had represented Knight in the unlawful detainer action.

Knight and Rosenthal specially moved to strike the sixth cause of action in the amended complaint as a strategic lawsuit against public participation (§ 425.16) (the first anti-SLAPP motion). The trial court granted that motion.

Thereafter, on November 20, 2015, plaintiffs filed a Doe amendment naming the law firm as a defendant. On November 23, 2015, upon receiving the Doe amendment, Rosenthal informed plaintiffs' attorney by email that the law firm was a "DBA of myself" and in light of the trial court's ruling granting Knight and Rosenthal's anti-SLAPP motion, the Doe amendment "is in bad faith. I suggest . . . you dismiss this non-existent entity immediately. If I a[m] forced to file another

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

SLAPP motion I will be seeking sanctions against you and your firm for filing a clearly frivolous pleading." Plaintiffs' attorney responded by asking Rosenthal to provide him with the fictitious business name statement for the law firm so that he could "confirm it is simply a dba and not a separate entity. *If it is simply a dba, we can file a dismissal*." (Italics added.) Rosenthal emailed an extract from a registry showing a fictitious business number without the registrant's name. Upon examination, plaintiffs discovered that the information Rosenthal provided belonged to a Jay S. Rosenthal, no relation, and his real estate company, which was located at a completely different address from the law firm's.

The record contains no evidence that plaintiffs ever served the law firm with the amended complaint. Rather, plaintiffs dismissed the Doe amendment naming the law firm on December 14, 2015, twenty-one days after Rosenthal first told them that the law firm was her fictitious business name.

Meanwhile however, on December 8, 2015, fourteen days after plaintiffs told Rosenthal they would dismiss the law firm, Attorney Robert Levy filed an anti-SLAPP motion (§ 425.16) on the law firm's behalf seeking to strike the unserved amended complaint based on "[t]he filing of the DOE amendment . . . to add [the law firm] to the 6th cause of action . . . ." (The second anti-SLAPP motion.) This motion closely mirrored the first anti-SLAPP motion that Rosenthal and Knight had earlier filed. Neither Rosenthal nor Levy claimed that the law firm was served with summons or the amended complaint.

On January 14, 2016, thirty-one days after it was dismissed from the action, the law firm filed a request for $23,703.75 in

attorney fees and costs pursuant section 425.16, subdivision (c)(1).

2. *Plaintiffs' sanctions motion*

Plaintiffs brought the instant motion under section 128.7 for $10,560 in sanctions against Rosenthal, the law firm, Levy, and the Law Offices of Robert M. Levy on the ground that the law firm's attorney-fee motion was unnecessary and improperly motivated because its sole purpose was to harass plaintiffs, to cause them unnecessary delay, and to increase the cost of litigation.

At oral argument, Levy asserted that plaintiffs had served the amended complaint on the law firm on November 19, 2015. Plaintiffs vigorously denied this, noting that they only served the amended complaint on Knight. Plaintiffs pointed to their attorney's declaration stating – under penalty of perjury – that the amended complaint was never served on the law firm. Levy conceded that the document Rosenthal claimed to have received was not attached to his opposition papers. He could not explain why, but assumed that it could be found in the trial court's file. Levy finally clarified that the amended complaint itself was never served on the law firm.

The trial court denied the law firm's motion for attorney fees under section 425.16. The court found that the law firm had never been served with the amended complaint and so the second anti-SLAPP motion was premature and "totally frivolous." Thus, the court determined, the law firm was not a prevailing party on the second anti-SLAPP motion so as to justify an award of

attorney fees and costs under section 425.16, subdivision (c)(1).[2] The court also found the law firm's claim for $23,703.75 in attorney fees for 19.75 hours of work "to be unbelievable and reflects on the credibility of" Levy.

The trial court granted plaintiffs' motion and sanctioned the law firm and Levy $6,000 for violating section 128.7, subdivision (b) on the ground that the law firm's attorney-fee motion was "unnecessary . . . . Should never have been filed. Supported by no law."[3] Alternatively, the court ruled that it would grant plaintiffs' sanction request pursuant to section 425.16, subdivision (c) because the second anti-SLAPP motion was frivolous.[4] The law firm filed its timely appeal.

CONTENTION

The law firm contends that the trial court erred in imposing section 128.7 sanctions on it because its attorney-fee motion was not frivolous.

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[2] This is so notwithstanding that it appears the trial court had earlier granted the second anti-SLAPP motion.

[3] The sanction order does not make clear whether the trial court sanctioned the law firm and Levy jointly and severally. However, the question was not raised on appeal and so it is forfeited. "An appellant's failure to raise an argument in the opening brief waives the issue on appeal. [Citations.]" (*Telish v. State Personnel Bd.* (2015) 234 Cal.App.4th 1479, 1487, fn. 4.)

[4] Section 425.16, subdivision (c)(1) reads in relevant part: "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

DISCUSSION

1. *Section 128.7*

Under section 128.7, by submitting a pleading or written notice of motion to the court, an attorney certifies "that to the best of [that] person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" (§ 128.7, subd. (b)), the submission is "not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" (*id.*, subd. (b)(1)) and the claims therein "are warranted by existing law" (*id.*, subd. (b)(2)).[5]

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[5] Section 128.7 reads in relevant part: "(b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [¶] (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. [¶] (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. [¶] (4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

There are generally three types of submitted papers that merit sanctions: "factually frivolous (not well grounded in fact); legally frivolous (not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law); and papers interposed for an improper purpose." (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167 (*Guillemin*).) "[S]ection 128.7 requires only that the conduct be 'objectively unreasonable;' " the moving party need not show " 'subjective bad faith.' [Citation.]" (*Ibid*.)

The trial court's award of sanctions under section 128.7 is reviewed for abuse of discretion. (*Guillemin*, *supra*, 104 Cal.App.4th at p. 167.)

2. *Plaintiffs notified Rosenthal that they would dismiss the Doe amendment and never served summons or the amended complaint on the law firm and so the second anti-SLAPP and associated attorney-fee motions were unwarranted.*

The anti-SLAPP statute, section 425.16, provides that "[t]he special motion *may* be filed within 60 days of the *service of the complaint* or, in the court's discretion, at any later time upon terms it deems proper." (*Id*., subd. (f), italics added.) "The 60-day period commences with the *service* of the most recent complaint or amended *complaint* in the action. [Citations.]" (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 283, italics added, citing *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 835.) The law firm does not attempt to challenge the sufficiency of the evidence to support the court's finding that it was never served with the summons and complaint. Indeed, the law firm acknowledged that fact by specially moving to strike "[t]he filing of the DOE amendment," not the amended complaint itself. Instead, on appeal the law firm presents two arguments why it did not have

to be served with the amended complaint to respond with its anti-SLAPP motion. The arguments are specious.

The law firm first argues, by using the permissive word "may" rather than the mandatory "shall," that section 425.16, subdivision (f) allows the filing of an anti-SLAPP motion before the moving party is brought into the lawsuit. However, the special motion to strike is aimed at claims *in the complaint or amended complaint*. (*Lam v. Ngo*, *supra*, 91 Cal.App.4th at p. 835; see also *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 643 [" 'the "special" anti-SLAPP suit motion is directed at a particular document, namely "the complaint" ' "].) It would be absurd to read the anti-SLAPP statute as authorizing the striking of claims in a complaint *before* the complaint is served on the moving defendant.

The law firm next argues that it could simply "subject [itself] to the jurisdiction of the court," by making a general appearance and voluntarily submitting to the court's jurisdiction after receiving the Doe amendment, and then file its anti-SLAPP motion. But, this argument conflates personal jurisdiction with the timing for filing a special motion to strike, which time period is not jurisdictional. (*Lam v. Ngo*, *supra*, 91 Cal.App.4th at p. 841, citing § 425.16, subd. (f).) More important, this argument contravenes the plain words of the section 425.16, subdivision (f) which identifies "*service of the complaint*" as the relevant date for commencing the 60-day period for filing a special motion to strike. (Italics added.) If the complaint is never served on a defendant, no claim against that defendant exists to be stricken under section 425.16. A special appearance or submission to jurisdiction in advance of service of process do not justify the filing of an anti-SLAPP motion.

The law firm contends that it should not be sanctioned for "Zealously Representing a Client." It argues that it had the right to respond to the Doe amendment "as expeditiously as possible so as not to delay the proceedings" and that the act of filing the second anti-SLAPP motion was not egregious, regardless of whether the complaint was ever served. The law firm reasons that having received the Doe amendment, it was "*safe to assume* that [plaintiffs] fully intended to bring this party into the case as an additional Defendant and service was imminent." (Italics added.) Citing the timing of events, the law firm insists that its special motion to strike caused plaintiffs to dismiss it from the action.

But, plaintiffs *notified* Rosenthal, a *full two weeks before the law firm filed its anti-SLAPP motion*, that they would dismiss the law firm upon proof of the DBA. The law firm's dismissal was already in process when it specially moved to strike. The record indicates that any delay in dismissing the Doe amendment was caused by Rosenthal's failure to provide the correct fictitious name statement and instead unaccountably sending a completely unrelated entity's registration. Therefore, as Rosenthal was aware, service of the amended complaint was clearly not "imminent" and the anti-SLAPP motion did not bring the dismissal about.

In any event, nothing would have prevented the law firm from expeditiously but properly moving to strike. If it had been served with the amended complaint, it could have moved at the very beginning of the statutory 60-day period. (§ 425.16, subd. (f).) Under the circumstances here however, filing an anti-SLAPP motion before "service of the complaint" in contravention

of section 425.16, subdivision (f) was not expeditious or zealous; it was unjustified and completely unnecessary.

In sum, the law firm filed its anti-SLAPP motion before it was ever made a party to the lawsuit and after plaintiffs notified Rosenthal that they would dismiss the Doe amendment. Having never been served with the amended complaint, the law firm's special motion to strike it was unwarranted. The anti-SLAPP motion along with the attorney-fee motion – which mirrored the first anti-SLAPP motion filed on Knight and Rosenthal's behalf – could only have been filed for the unreasonable and improper purpose of extracting money from plaintiffs in violation of section 128.7. Therefore, the order imposing sanctions was a proper exercise of trial court's discretion.[6]

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[6] Plaintiffs argue on appeal that they incurred $10,560 in attorney fees and costs in bringing their section 128.7 motion but that the trial court awarded them only $6,000. They observe that they incurred an additional $3,675 to respond to this appeal and ask us to award them both the costs on appeal along with the difference between what they incurred below and the $6,000 award. Plaintiffs have waived their request for the difference between the $6,000 awarded and the $10,560 amount requested. (*Cahill v. San Diego Gas & Electric Co*. (2011) 194 Cal.App.4th 939, 956 [when an appellant fails to support a point with reasoned argument and citations to authority, we treat the argument as forfeited].)

DISPOSITION

The order appealed from is affirmed. Respondent to recover costs on appeal.

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DHANIDINA, J.*

WE CONCUR:

EDMON, P. J.

LAVIN, J.

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