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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

ADLY ENTERPRISES, LLC, Plaintiff and Respondent, v. ACTION A PARENT & TEEN SUPPORT PROGRAM, INC., et al., Defendants and Appellants.	B282578 (Los Angeles County Super. Ct. No. BC583719)

APPEAL from an Order of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed.

Bleau Fox, Martin R. Fox, Edward D. Baker and Megan A. Childress for Defendants and Appellants Action a Parent & Teen Support Program and Cary Quashen.

Law Offices of Joseph R. Brown and Joseph R. Brown for Plaintiff and Respondent Adly Enterprises, LLC.

Action A Parent & Teen Support Program, Inc. (Action) and its principal Cary Quashen (Quashen) appeal the trial court's order awarding Adly Enterprises, LLC (Adly) $77,047.60 in attorney fees in Adly's breach of lease action and denying, in part, Action's motion for sanctions. Action contends Adly was a suspended corporation for three separate intervals during the breach of lease litigation, and pursuant to Corporations Code section 2205, was not entitled to attorney fees during those time periods. Action also contends the trial court improperly reduced the sanctions it requested. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Adly is the owner of commercial real estate located on Soledad Canyon Road in Santa Clarita. Adly leased the premises to Action in April 2012 for a term of three years, two months, with Action's occupancy to commence May 1, 2012, at a base rent of $4,866. The lease contained a provision entitling the prevailing party to attorney fees. Quashen, the principal of Action, guaranteed the lease.

During its occupancy of the premises, in February 2014, Action experienced flooding and was forced to vacate the premises before the end of the lease term. Although the premises were repaired, Action refused to return.

Adly was unable to re-let the premises until April 1, 2015. Adly filed a complaint for breach of lease against Action on June 3, 2015, seeking damages of $146,366.71. In its answer to Adly's complaint, Action asserted the affirmative defense of "lack of [a] capacity to sue" based on the suspension of Adly's corporate powers.

On July 28, 2015, Action cross-claimed for breach of contract, breach of the covenant of good faith and fair dealing, fraud, negligent misrepresentation, negligence, and rescission. Action's fraud claim asserted that Adly represented the premises to be in good operating condition, including the plumbing and sewer line.

In December 2015, after a failed mediation, Adly moved for summary judgment. The court, on March 28, 2016, granted the motion except as to the claims for fraud, breach of contract, and rescission. Action's fraud claim was based upon its assertion that there was a sign in the women's restroom warning about flushing foreign objects in the toilet, and that the sign evidenced Adly's knowledge that the sewer lines were compromised. The trial court found Action's assertions about the sign created a triable issue of fact.

After denial of summary judgment, the parties commenced discovery on the limited issue of the condition of the sewer line. This discovery disclosed that Goodwill Industries, the prior tenant at the premises, had placed the sign in the restroom, and such signs were standard operating procedures at Goodwill job service centers. Goodwill produced plumbing receipts from 2008 for repairs for a problem caused by feminine hygiene products in the toilet. After the repairs, the problem ceased. At the same time, the plumbers found no problems with the sewer line.

The parties requested a mandatory settlement conference and in February 2017 agreed to settle the case. Pursuant to the settlement, Adly accepted $80,000, plus interest, payable over two years. The question of Adly's attorney fees under Civil Code section 1717 was left

to consideration by a later motion. In March 2017, Adly sought $84,825 in attorney fees and costs, composed of in part fees of $81,143 consisting of 326.75 hours of billable time. Adly admitted that most of the time spent was for the summary judgment motion and related papers, as well as depositions.

Action opposed Adly's motion for attorney fees, seeking to disallow $40,909 in fees that Adly's counsel expended during three separate periods of suspension during the litigation of the breach of lease action. Adly also sought to disallow duplicative attorney fees for attendance at depositions, and fees incurred in defending against the sanctions motion it brought concurrently with its opposition to Adly's motion for attorney fees.

Although Action conceded Adly was the prevailing party, Action asserted it was also entitled to attorney fees because the corporate suspensions of Adly precluded enforcement of the contract. Action sought sanctions under Code of Civil Procedure sections 128.5 and 2023.030 in the form of attorney fees and costs in the amount of $25,870.94 based on Adly's suspensions on three separate occasions during the course of the litigation. Action asserted that Adly knowingly engaged in litigation during the periods it was suspended.

Adly sought sanctions of its own in response to Action's motion for sanctions. Adly asserted that the first two suspensions were inadvertent, while the third was the result of an error by the Franchise Tax Board. Adly was suspended on the following dates, for a total of eight months:

The First Suspension–June 23, 2015 to October 8, 2015

Action discovered the first suspension on July 27, 2015, while preparing its answer; Adly's counsel Joseph Brown discovered the suspension on September 3, 2015. The suspension was imposed due to Adly's failure to file a "statement of information" with the Secretary of State. (See Corp. Code, § 2205.) Adly filed the required Statement of Information to revive itself the same day, and the revivor was effective October 8, 2015.

The Second Suspension–November 2, 2015 to January 27, 2016

On November 2, 2015, Adly was suspended by the Franchise Tax Board, but did not realize it was a different suspension from the June suspension. The suspension was based upon fines levied in connection with the first suspension. Action, however, discovered the second suspension on December 7, 2015, and made a motion to dismiss based upon the suspension.[1] Adly learned of the second suspension on January 25, 2016 when it checked the court docket and saw the motion to dismiss. Adly obtained a revivor the next day.

The Third Suspension–July 1, 2016 to September 12, 2016

The third suspension was the result of a mistake by the Franchise Tax Board; the Franchise Tax Board restored Adly's status. Adly did

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[1] In January 2016, Action filed a motion to dismiss the complaint due to Adly's corporate suspension. The trial court set an OSC re dismissal in September 2016, but the motion was taken off calendar after Adly revived itself.

not learn of the suspension until Action's counsel advised him at the Final Status Conference on September 9, 2016.

Adly asserted that it did not knowingly litigate the breach of lease action during the periods it was suspended; Action's motion was beyond the scope of the settlement agreement, which provided that Adly, not Action, was entitled to attorney fees as the prevailing party; Action waived its right through its silence to raise the suspension issue; and Adly was entitled to sanctions based on Action's claim for attorney fees.

The court found Adly was generally entitled to attorney fees because "procedural acts of the prosecution or defense of a lawsuit are validated retroactively by corporate revival," citing *Benton v. County of Napa* (1991) 226 Cal.App.3d 1485. The court found that Adly took steps to revive itself promptly after each suspension was discovered.

However, after finding Adly was entitled to $81,143 in attorney fees, the court made some deductions in the fee award. The court deducted $975 because the settlement agreement did not necessarily preclude Action from requesting attorney fees. The court also deducted $4,650 from Adly's request because the court found time spent preparing the summary judgment motion was excessive. Finally, the court deducted $3,000 as an offset based on its granting of Action's sanction motion. The trial court awarded Adly $77,047.60 in attorney fees after making the above deductions from its request.

The court granted Action's motion for sanctions, relying on *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553 (*Palm Valley*), finding Adly knew or should have known it was suspended based upon Action's answer that asserted its suspended

status as an affirmative defense. The court awarded Action $4,095.40 against Adly and its counsel for the fees and costs Action incurred in the action during the period of Adly's first suspension. The trial court did not award sanctions for the second or third suspension because Adly did not know of the second suspension, and the third suspension was a mistake by the Franchise Tax Board.

DISCUSSION

I. *Award of Attorney Fees to Adly*

Action argues that the trial court improperly relied upon *Benton v. County of Napa, supra,* 226 Cal.App.3d 1485 in awarding attorney fees to Adly during the periods of its suspension. Action asserts the trial court improperly reasoned that because Adly's subsequent compliance with the Corporations Code retroactively validated its litigation activities, it was entitled to attorney fees.

Under California law, a corporation ordinarily has the capacity to sue. (See Corp. Code, § 207 [corporation generally has "all of the powers of a natural person in carrying out its business activities"]; *Color–Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1603–1605.) But a corporation that has had its powers suspended "lacks the legal capacity to prosecute or defend a civil action during its suspension." (*Sade Shoe Co. v. Oschin & Snyder* (1990) 217 Cal.App.3d 1509, 1512.)

The corporate powers, rights and privileges of any domestic corporate taxpayer may be suspended for failure to pay certain taxes and penalties. (Rev. & Tax. Code, § 23301.) A corporation's powers,

rights, and privileges may also be suspended if a corporation fails to file annual statements of information pursuant to Corporations Code section 1502. (See Corp. Code, § 2205.) "[A] corporation suspended under the Corporations Code, like a corporation suspended under the Revenue and Taxation Code, is also disabled from participating in litigation activities." (*Palm Valley, supra,* 85 Cal.App.4th at p. 556.) The corporation may revive its powers by complying with the requirements of Corporations Code section 2205, subdivision (d). (*Id.* at pp. 561–562.)

A suspended corporation cannot prosecute or defend an action, seek a writ of mandate, appeal from an adverse judgment, or renew a judgment obtained before suspension. (*Center for Self–Improvement & Community Development v. Lennar Corp.* (2009) 173 Cal.App.4th 1543, 1552 (*Center for Self–Improvement*).) The purpose of Revenue and Taxation Code section 23301 is to "'prohibit the delinquent corporation from enjoying the ordinary privileges of a going concern,'" to pressure it into paying its taxes. (*Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 371.) That purpose, in turn, "'is satisfied by a rule which views a corporation's tax delinquencies, after correction, as mere irregularities.'" (*Center for Self-Improvement, supra,* 173 Cal.App.4th at p. 1552.) The same rule applies to corporations suspended for failure to file a statement of information. (*Palm Valley, supra,* 85 Cal.App.4th at p. 561.)

Reinstatement or revivor generally is "'without prejudice to any action, defense or right which has accrued by reason of the original

suspension or forfeiture.'" (*Center for Self-Improvement, supra*, 173 Cal.App.4th at p. 1553.) Thus, the revival of corporate powers retroactively validates any procedural steps taken on behalf of the corporation in the prosecution or defense of a lawsuit while the corporation was under suspension. (*Benton v. County of Napa, supra,* 226 Cal.App.3d at p. 1490.)

"Most litigation activity has been characterized as procedural for purposes of corporate revival. For example, a judgment obtained during suspension is validated by subsequent revivor. [Citations.] A motion to dismiss an appeal because of a party's suspension may be denied if the party obtains a certificate of revivor. [Citations.] . . . The corporate defense of an action undertaken during suspension may be validated by later revival of corporate powers. [Citations.]" (*Benton, supra*, 226 Cal.App.3d at pp. 1490–1491.) "In sum, the revival of corporate powers enables the previously suspended party to proceed with the prosecution or defense of the action and validates a judgment obtained during suspension. [Citations.]" (*Center for Self-Improvement, supra,* 173 Cal.App.4th at p. 1553.)

In arguing against retroactive revival of Adly's actions, Action relies on *City of San Diego v. San Diegans for Open Government* (2016) 3 Cal.App.5th 568 (*City of San Diego*), where the City of San Diego commenced a validation action to levy a special tax to finance the expansion of the City's convention center. (*Id.* at p. 572.) One of the defendants was a non-profit corporation, San Diegans for Open Government (SDOG), that was suspended for failure to pay its taxes.

(*Id.* at p. 573.) Nonetheless, SDOG filed an answer to the validation action. SDOG prevailed in the validation action and sought its attorney fees under Code of Civil Procedure section 1021.5. (*Id.* at p. 572.) The City asserted SDOG was not entitled to any fees because it was suspended at the time it filed its answer, was not revived until after the time for it to answer had passed, and its attorney knew of its suspended status. The City also filed a motion to strike SDOG's answer (based on a statute of limitations defense) and for its own attorney fees. (*Id.* at pp. 573, 575.) The trial court granted SDOG its fees and denied the motion to strike.[2] The trial court, however, exercised its discretion to deny SDOG any fees for the time periods during which it was suspended. (*Id.* at pp. 574–575.)

The *City of San Diego* court found that SDOG's conduct in appearing in the validation action while suspended, and in particular its attorney's action in filing a verified answer on its behalf while aware of the suspension, "was clearly wrong." (*City of San Diego, supra*, 3 Cal.App.5th at p. 578.) The court also took issue with the attorney's position of blaming the City for "failing to discover earlier that SDOG was a suspended corporation." (*Ibid.*) Finding that the statute of limitations was a substantive defense under the corporate revival doctrine, that any interested party must appear in a validation action by the statutory deadline, and that SDOG as a suspended corporation could not validly appear, the court denied its fees. "SDOG was only

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[2] The court reasoned that had the City raised its statute of limitations argument prior to trial, it would have prevailed but could not use the statute as a mechanism to strike the answer. (*Id.* at p. 574.)

eligible to recover its attorney fees under section 1021.5 if it appeared in the Validation Action by the prescribed deadline. It is undisputed that it could not legally do so in the instant action. . . . [W]e determine that attorney fees cannot be awarded to a party whose attorney violates the law to appear in the action and offers no justification whatsoever for his or her conduct. To require taxpayers to compensate a party or a law firm for unethical and unprofessional conduct, under the guise that the litigant is protecting the public interest, would turn [section 1021.5] on its head." (*Id.* at p. 580.)

The instant case is distinguishable from *City of San Diego* in two salient respects: First, Adly's counsel here did not know of the suspensions, and did not litigate during any period when he was aware of them. Second, there was no substantive defense to Adly's claims here, namely, the statute of limitations. As a result, all of the procedural actions Adly took were subject to retroactive revival upon Adly's filing of the necessary documents. Thus, the trial court properly relied on the rationale of *Benton v. County of Napa, supra,* 226 Cal.App.3d 1485 to award fees for those periods when Adly was in good standing.

II. *Motion for Sanctions*

A. *Knowledge of Corporation of Suspended Status*

Action argues the trial court applied the wrong standard in denying its motion for sanctions because the trial court failed to consider whether Adly itself, aside from its counsel, knew of its suspended corporate status. Action reasons that under Code of Civil

Procedure sections 128.5 and 2023.010, sanctions are awardable against a party, the party's attorney, or both; furthermore, a suspended corporation cannot authorize an attorney to act on its behalf. As a result, it follows that a corporation should be subject to sanctions if it authorizes an attorney to engage in litigation activities on its behalf where the corporation knew of its suspended status. We disagree.

In *Palm Valley, supra,* 85 Cal.App.4th 553, the defendant corporation was suspended for failure to file a statement of information. (Corp. Code, § 2205.) After filing an answer on behalf of the corporation, the corporation's attorney learned of its suspension, but did not report the suspension to the court or to the other parties. (*Id.* at pp. 556–557.) The plaintiffs moved for sanctions and to strike the corporation's answer. In opposition, the attorneys argued that because the corporation had not been suspended for nonpayment of taxes, the disabilities applicable to a suspended corporation under Revenue and Taxation Code section 23301 should not apply. The trial court rejected this argument, finding the firm had violated Code of Civil Procedure sections 128.5 (frivolous action taken in bad faith) and 2023 (discovery abuses), and imposed sanctions. (*Id.* at p. 557.)

Palm Valley observed that Corporations Code section 2205, subdivision (c) made clear that a suspended corporation could transact no business, and former Corporations Code section 2205, subdivision (d) provided a suspended corporation could be restored by filing the required statement. (*Palm Valley, supra*, 85 Cal.App.4th at p. 560.) *Palm Valley* concluded therefore that "[j]ust as the state may wish to persuade its corporate citizens to pay their taxes, it also may wish to

persuade them to comply with basic filing requirements, requirements that are fundamental to holding a corporation accountable for its actions." (*Id.* at p. 561.) *Palm Valley* found sanctions appropriate because the law firm concealed its knowledge of its suspension from both the court and opposing counsel. "Knowing concealment of material facts is not the hallmark of good faith." (*Id.* at p. 562.)

Contrary to Action's assertions, here the trial court's ruling was consistent with *Palm Valley*. In litigation, a corporation can only appear through counsel. (*Vann v. Shilleh* (1975) 54 Cal.App.3d 192, 199.) Thus, even if Adly itself knew of the suspension of its corporate status, it could not take any action in the litigation except through counsel. There is no evidence in the record Adly concealed the problem from its attorneys. On the other hand, the trial court accepted Adly's counsel's declaration that he did not know of the suspensions, and the moment counsel discovered them, he took action to rectify the situation.

B. *Reduction of Sanctions*

Action argues that its motion for sanctions sought its attorney fees incurred during Adly's first period of suspension, yet the trial court awarded sanctions only for the period after Adly's answer was served (July 29, 2015) to the end of Adly's suspension (October 7, 2015). Although Action's attorney fees during this period were $4,986.73, the court awarded $4,095.40.

In essence, Action contends the trial court made computational errors pertaining to its calculation of the amount attorney fees. As explained in *Dwyer v. Crocker National Bank* (1987) 194 Cal.App.3d 1418, 1438 "in the matter of an award of attorneys fees under CCP

§ 128.5, the court is not bound in its determination by such traditional factors as hours consumed, statements mailed, results attained, and the like." We review such award for abuse of discretion, and "[t]o be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice [Citations.]" (*Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337, 1345.)

Here, the trial court may have determined that some of Action's attorney fees were excessive, and reduced the amount by approximately $900. Absent a showing that this reduction was arbitrary and capricious, Action's claim on appeal fails. (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228 [sanction orders are "subject to reversal only for arbitrary, capricious or whimsical action"].)

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DISPOSITION

The judgment of the Superior Court is affirmed. Respondents are to recover their costs on appeal.

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WILLHITE, J.

We concur:

MANELLA, P. J.

MICON, J.*

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