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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

BRUCE D. KUYPER et al., Plaintiffs and Appellants, v. DANIEL SAPARZADEH et al., Defendants and Respondents.	B275531 (Los Angeles County Super. Ct. No. BS154289)

APPEAL from an order of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Affirmed.

Bruce D. Kuyper, in pro. per., and for Plaintiffs and Appellants.

Afifi Law Group and Faryan Andrew Afifi for Defendants and Respondents.

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Plaintiffs Bruce Kuyper et al. appeal an order granting attorney fees to defendants Daniel Saparzadeh et al. after the trial court found plaintiffs filed a frivolous motion to strike defendants' cross-complaint pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] We find the order appealable, find no abuse of discretion, and affirm.

BACKGROUND

In the operative complaint, plaintiffs alleged a variety of causes of action attempting to prevent defendants from developing a parcel of property to replace a single-family residence with five townhomes near homes they owned. Defendants filed a cross-complaint alleging in paragraph 12 that "Cross-Defendant KUYPER opposed the City of Los Angeles issuance of the applicable permits and approvals, and unsuccessfully appealed the City's August 6, 2014 approval." In paragraph 13, they alleged, "[D]espite the fact that all requisite City permits and approvals have been properly pursued and obtained by [defendants], [plaintiffs] have opposed, and continue to assert that [defendants'] proposed development on the Subject Property, as well as their

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[1] SLAPP stands for strategic lawsuit against public participation.

All undesignated statutory citations are to the Code of Civil Procedure unless otherwise noted.

subdividing the property into 5 lots violates the CCRs or other deed restrictions, and assert that the City permits issued to [defendants] are invalid." They asserted a single claim for declaratory relief, seeking a "judicial determination that the proposed subdivision and development project on the Subject Property does not violate CCRs or any deed restrictions, and complies with applicable City and State rules, ordinances and regulations governing the same."

Plaintiffs filed a combined demurrer and motion to strike the cross-complaint pursuant to the anti-SLAPP statute. For the motion to strike, they argued in a single paragraph that defendants' cross-complaint was "based on" protected activity alleged in paragraph 13 and asserted in a single sentence with no legal or factual support that defendants could not establish a probability of prevailing.

The court overruled the demurrer and denied the motion to strike. It agreed with defendants' "argument to the effect that the motion is frivolous" because plaintiffs "cite no authority for their conclusion that the cross-complaint is some sort of attempt to chill [plaintiffs'] 'exercise of their protected rights to oppose [defendants'] project and assert their privilege in litigation that [defendants] are violating 3 separate recorded documents that impose restrictions that [defendants'] project violates.' "

Approximately five months later, defendants moved for $23,060.75 in attorney fees for opposing the anti-SLAPP motion, claiming the motion was frivolous and brought solely for the purpose of delay. Plaintiffs opposed, arguing in part the motion was not frivolous because two attorneys gave the unsolicited suggestion that plaintiffs should consider filing an

anti-SLAPP motion, given defendants' cross-complaint was "retaliatory for Plaintiffs' and other property owners' opposition to Defendants' project."

The court partially granted the motion for fees, finding plaintiffs' anti-SLAPP motion frivolous because it was "under-researched." It awarded defendants $9,400 in fees for the anti-SLAPP motion and $3,000 in fees for the fees motion. Plaintiffs appealed from that order.

DISCUSSION

1. Legal Standard

"The anti-SLAPP statute requires the trial court to award reasonable attorneys' fees to a prevailing plaintiff pursuant to section 128.5 when the court determines that a defendant's anti-SLAPP motion was 'frivolous or . . . solely intended to cause unnecessary delay.' (§ 425.16, subd. (c)(1) ['shall' award].) Frivolous in this context means that any reasonable attorney would agree the motion was totally devoid of merit. [Citation.] An order awarding attorneys' fees pursuant to section 128.5, as incorporated in section 425.16, subdivision (c), is reviewed under the abuse of discretion test. [Citation.] A ruling amounts to an abuse of discretion when it exceeds the bounds of reason, and the burden is on the party complaining to establish that discretion was abused." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450 (*Gerbosi*).)[2]

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[2] Plaintiffs argue our review is de novo because the issue is the statutory construction of the term "frivolous." They are incorrect. The only issue is whether the trial court acted

2. Appealability

An order denying an anti-SLAPP motion is immediately appealable. (Code Civ. Proc., § 904.1, subd. (a)(13).) But plaintiffs did not appeal the court's order denying their anti-SLAPP motion, and the longest possible time to do so has expired. (Cal. Rules of Court, rule 8.104(a)(1)(C) [180 days from date of entry of judgment].) Nor do they challenge the denial of that motion in this appeal. Instead, they challenge the court's later order granting attorney fees, which they argue was an appealable order for monetary sanctions over $5,000. (Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(12).) We agree the order was appealable as an order for sanctions.

As set forth above, if the trial court finds "that a special motion to strike is frivolous or is solely intended to cause unnecessary delay" pursuant to section 425.16, subdivision (c)(1), it shall award costs and reasonable fees pursuant to section 128.5. Section 128.5 is a sanctions provision governing the imposition of attorney fees incurred by a party "as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (§ 128.5, subd. (a).) By incorporating the standard from section 128.5, section 425.16, subdivision (c)(1) is a sanction provision as well. Thus, an order imposing attorney fees over $5,000 for a frivolous anti-SLAPP motion is immediately appealable pursuant to section 904.1, subdivision (a)(12). (See *Doe v. Luster* (2006) 145 Cal.App.4th 139, 146 ["Because an award of attorney fees to a plaintiff prevailing on the motion is to be made 'pursuant to

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within its discretion in finding their motion met the statutory definition of frivolous, which we review for abuse.

section 128.5,' and only if the motion 'is frivolous or is solely intended to cause unnecessary delay,' if the amount awarded exceeds $5,000, it is appealable pursuant to section 904.1, subdivision (a)(12) (immediate appeal may be taken from order directing payment of monetary sanctions by a party or an attorney for a party if amount exceeds $5,000)."].)

3. Merits

Plaintiffs assert three challenges to the court's fee award: (1) their anti-SLAPP motion was not frivolous because the allegations in paragraphs 12 and 13 of defendants' cross-complaint stated protected activity and e-mails from two outside attorneys recommended that they consider filing an anti-SLAPP motion; (2) the court's order failed to meet the specificity requirement in section 128.5, subdivision (c); and (3) the court improperly awarded fees for defendants' counsel's work opposing the demurrer. We find none of these points persuasive.

First, the trial court acted within its discretion in concluding the motion was frivolous because "any reasonable attorney would agree the motion was totally devoid of merit." (*Gerbosi, supra,* 193 Cal.App.4th at p. 450.) Certainly, paragraphs 12 and 13 of the cross-complaint alleged plaintiffs engaged in some protected petitioning activity, and defendants may have even filed their cross-complaint in response to those acts. But to trigger anti-SLAPP protection, defendants' declaratory relief cross-claim must be one " '*arising from* protected activity.' " (*Id.* at p. 443, italics added.)[3] This means

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[3] The anti-SLAPP statute applies to acts that "were taken in furtherance of the defendant's right of petition or free speech

the acts "*underpinning* the plaintiff's cause of action involved an exercise of the right of petition or free speech. [Citation.] It does *not* mean that the plaintiff filed his or her lawsuit 'in response to' the defendant's acts. [Citation.] A defendant does not establish that a cause of action 'arises from' an act in furtherance of the right of petition or free speech merely by showing that the plaintiff filed his or her lawsuit in retaliation for the defendant's petitioning or speech activities. The defendant must establish that the plaintiff's cause of action is actually *based on* conduct in exercise of those rights." (*Ibid.*, 1st & 2d italics added; see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 ["[A] claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic."]; *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1393 (*Garamendi*) ["The phrase 'arising from' in section 425.16 should not be interpreted as meaning ' "in response to." ' "].)

Plaintiffs did nothing in their motion to address these legal standards other than set forth a single paragraph quoting the allegations in paragraph 13 and claiming defendants' declaratory relief cross-claim was "based upon" those actions. That is patently inaccurate. Defendants' cross-claim had nothing whatsoever to do with plaintiffs' exercise of their petitioning rights to challenge defendants' project. It simply sought a declaration that their proposed project did not violate any deed or other restrictions and complied with applicable

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under the federal or state Constitution." (*Gerbosi, supra,* 193 Cal.App.4th at p. 443.)

laws. That defendants might have filed the cross-complaint in response to plaintiffs' contesting the project is inconsequential, as the case law makes clear.

Nor did the unsolicited e-mails plaintiffs received from outside attorneys rebut the frivolousness of the motion. The e-mails were far from recommendations that an anti-SLAPP motion would be meritorious, or even colorable. One stated: "Not intending to provide you legal advice (I don't think you need the help, frankly), but does SLAPP procedure apply here? It seems to me that these are retaliatory lawsuits intended to squelch public participation and punish the community at large for supporting you." The other stated: "The only possible basis for an anti-SLAPP motion is paragraph 12 of the cross-complaint where they reference your objections to the development. I'm not sure that will be legally sufficient but I would still look at the issue since I believe that the developers are clearly TRYING TO STIFLE PUBLIC OPPOSITION TO THEIR DEVELOPMENT." At best, these e-mails may have prompted plaintiffs to research the issue, but even cursory legal research should have led them to conclude an anti-SLAPP motion would be unsupportable. Although plaintiffs claimed they did research the issue and concluded the motion was warranted, the trial court acted well within its discretion in finding the research inadequate and plaintiffs' decision unreasonable.

Second, the trial court's written order was cursory but adequate under section 128.5. That provision states an order imposing sanctions "shall be in writing and shall recite in detail the conduct or circumstances justifying the order." (§ 128.5, subd. (c).) The court's one-word explanation that the

motion was "under-researched" can hardly be considered "in detail," but in the context of this case, it was sufficient. By stating the motion was "under-researched," the order was " ' "more informative than a mere recitation of the words of the statute." ' " (*Garamendi, supra,* 132 Cal.App.4th at p. 1388.) Moreover, the order can reasonably be interpreted to refer back to the order denying the anti-SLAPP motion, in which the court expressly "agree[d] with [defendants'] argument to the effect that the motion [was] frivolous" because plaintiffs "cite[d] no authority for their conclusion that the cross-complaint is some sort of attempt to chill" plaintiffs' rights to oppose defendants' project. And we may look to defendants' motion since the court agreed with their arguments, in which defendants argued in detail that plaintiffs' motion was insufficient because their declaratory judgment claim was not based on any protected activity. (See *Garamendi, supra,* at p. 1389 [considering trial court's incorporation of opposition in denial of anti-SLAPP motion].) While we would have preferred a more detailed explanation, the order satisfied the statute when viewed in the context of the record.

Third, plaintiffs have failed to show the fee award included time defendants' counsel spent on opposing the demurrer. We have reviewed defendants' counsel's declarations and find no indication they sought compensation for any time spent on the demurrer. To the contrary, the managing attorney for the case stated none of the time included in the fees request was incurred in opposing the

demurrer. Also, the court specified the fees awarded were "incurred in opposing the anti-SLAPP motion."[4]

DISPOSITION

The order is affirmed. Defendants are entitled to their costs, including attorney fees, on appeal. (*Garamendi, supra,* 132 Cal.App.4th at p. 1395.) The proper amount of fees and costs shall be determined by the trial court.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

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[4] For the first time in their reply brief, plaintiffs argue defendants failed to comply with section 128.7, subdivision (c)(1), which required them to serve their motion for attorney fees at least 21 days before filing to give plaintiffs time withdraw their frivolous anti-SLAPP motion. (See § 128.5, subd. (f) [incorporating § 128.7, subd. (c)].) Plaintiffs forfeited this argument by not raising it in their opening brief. (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 200, fn. 10.)