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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

WILLIAM POWERS, JR. et al., Plaintiffs and Appellants, v. DENISE EMERSON et al., Defendants and Respondents.	2d Civ. No. B280286 (Super. Ct. No. 16CVP-0115) (San Luis Obispo County)

Plaintiffs William Powers, Jr., William Powers III and Lindsey Keyes appeal the trial court's order denying their motions to strike $1,451.57 in costs requested by defendants Gary F. Nelson, individually and dba Webber-Nelson Realtors, and Ty Christensen (collectively "the Nelsons"), and $897.52 in costs requested by defendants Donald C. Jensen and Judith L. Jensen (collectively "the Jensens"). Plaintiffs contend the costs were not necessary or reasonable because the Nelsons and the Jensens failed to adequately meet and confer with plaintiffs before paying filing fees to appear in the case. Plaintiffs assert that had these defendants met and conferred with plaintiffs prior to filing their

demurrers, in accordance with Code of Civil Procedure section 430.41, subdivision (a)(1),[1] plaintiffs would have dismissed the action against them without the necessity of appearance costs. The court rejected this assertion. We affirm.

FACTS AND PROCEDURAL BACKGROUND

This litigation arises out of a neighbor dispute between plaintiffs and defendants Denise Emerson and Phil Emerson (collectively "the Emersons").[2] Plaintiff William Powers, Jr. (Dr. Powers) purchased the subject real property from the Jensens in September 2014. The Nelsons acted as the real estate agent and broker with respect to that purchase. Plaintiffs William Powers III and Lindsey Keyes reside at the subject real property and farm the land.

Plaintiffs allege that after Dr. Powers purchased the subject real property, the Emersons started harassing plaintiffs. Plaintiffs claim that the Nelsons and the Jensens are liable, at least in part, for the harassment.

On May 19, 2016, plaintiffs, appearing in propria persona, filed a first amended complaint (FAC) alleging claims against the Nelsons for intentional damage to and reduction of value of real property, failure to disclose a known condition materially affecting value of real property, failure to train and supervise agents working under broker's license, intentional infliction of emotional distress and gross negligence. The FAC alleged claims against the Jensens for intentional damage to and reduction of value of real property, failure to disclose known material defect

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

[2] The Emersons are not involved in this appeal.

substantially affecting value of real property, intentional infliction of emotional distress and gross negligence.

On June 10, 2016, Anne M. Watson, the Nelsons' attorney, sent plaintiffs a detailed letter outlining the deficiencies in the FAC. On June 22, 2016, Dr. Powers sent Watson an e-mail with his comments addressing the issues raised in her letter. The following day, Dr. Powers and Watson met and conferred telephonically. Watson "found that after discussing the issues, [they] could not agree." As a result, Watson filed a demurrer on the Nelsons' behalf.

The Jensens filed an amended demurrer on July 5, 2016. Before filing that demurrer, their attorney, Matthew K. Davis, attempted to meet and confer with plaintiffs by leaving three voicemail messages at the telephone number listed on the FAC. Plaintiffs failed to respond to those messages.

Plaintiffs opposed both demurrers. On September 13, 2017, the trial court sustained the Nelsons' demurrer with leave to amend. Before the Jensens' demurrer could be heard, plaintiffs dismissed the FAC without prejudice as to the Nelsons and the Jensens.

The Nelsons filed a memorandum seeking $1,451.57 in costs, representing first appearance and motion filing fees. The Jensens requested $897.52 in costs, also representing first appearance and motion filing fees. Plaintiffs moved to strike both cost requests.

The trial court issued a tentative ruling denying the motions to strike. First, it determined that the cost memoranda were valid and timely filed. Second, it found that the Nelsons and the Jensens were prevailing parties even though plaintiffs voluntarily dismissed the claims without prejudice. (§ 1032, subd. (a)(4); see *Cano v. Glover* (2006) 143 Cal.App.4th 326, 331

["Defendant is entitled to costs regardless of whether the dismissal is with or without prejudice"].)

Third, the trial court rejected plaintiffs' argument that the Nelsons and the Jensens were not prevailing parties because plaintiffs intend to file a new complaint against them. (See *Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 94 ["Even though there may remain the possibility (or existence) of a second lawsuit, both justice and judicial economy require that the award of costs be swiftly and simply concluded following the dismissal"].)

Finally, the trial court found that the costs incurred were not unnecessary or unreasonable on the basis that the Nelsons and the Jensens had failed to meet and confer before paying filing fees to appear in the case. The court observed that "both demurrers include declarations regarding efforts to meet and confer." It noted that "[t]he meet and confer efforts did not resolve the case," and that "[p]laintiffs' dismissal was filed after the hearing date for the Nelson demurrer and four days before the hearing on the Jensen demurrer."

Following a hearing, the trial court adopted its tentative ruling and denied plaintiffs' motions to strike the costs requested by the Nelsons and the Jensens. Plaintiffs appeal.[3]

DISCUSSION

Standard of Review

We review a trial court's order granting or denying a motion to strike or tax costs for abuse of discretion. (*Seever v.*

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[3] It appears the order denying plaintiffs' motion to strike costs is appealable because it was made following the clerk's entry of dismissal without prejudice, which dismissal carried with it the right to recover costs by the Nelsons and the Jensens. (See *Jimenez v. City of Oxnard* (1982) 134 Cal.App.3d 856, 858 fn. 3; *Cano v. Glover*, *supra*, 143 Cal.App.4th at p. 331.)

Copley Press, Inc. (2006) 141 Cal.App.4th 1550, 1556-1557.) We will reverse such an order only when the trial court's action is arbitrary, capricious or patently absurd, resulting in a manifest miscarriage of justice. (*Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 421; *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1249-1250.) "Interpreting a statute is . . . a matter of law, which we review de novo. [Citation.]" (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52.)

The Trial Court Properly Denied the Motions to Strike Costs

As plaintiffs point out, "[a]llowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (§ 1033.5, subd. (c)(2).) Here, the attorney who signed each memorandum of costs verified that "[t]o the best of my knowledge and belief this memorandum of costs is correct and *these costs were necessarily incurred in this case*." (Italics added.) Plaintiffs contend the costs were not necessarily incurred because the Nelsons and the Jensens failed to comply with the meet-and-confer requirements of section 430.41, subdivision (a)(1).[4] Plaintiffs claim that

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[4] Section 430.41 provides, in relevant part: "(a) Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. If an amended complaint, cross-complaint, or answer is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a demurrer to the amended pleading. [¶] (1) As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies. The party who filed

because these defendants did not comply with this subdivision, "their having to pay fees to demur was their own fault, not a necessary expense of litigation." We are not persuaded.

First, the record does not support plaintiffs' assertion that the Nelsons failed to comply with section 430.41, subdivision (a)(1). As plaintiffs concede, the Nelsons' attorney sent a letter to plaintiffs setting forth the bases for the anticipated demurrer. Dr. Powers responded to the letter. The attorney also met and conferred telephonically with Dr. Powers on June 23, 2016. The letter explained that the ninth, twelfth, thirteenth, fifteenth and sixteenth causes of action were uncertain and failed to state facts sufficient to constitute a cause of action against the Nelsons. Those same grounds were raised in the demurrer.

The Jensens specifically withdrew their initial demurrer to allow for a meet-and-confer session. Their attorney attempted on three occasions to schedule the meet-and-confer session with plaintiffs. Each time, the attorney "left a voicemail identifying [him]self, the case number, the purpose of [the] call, and [his] return phone number." Plaintiffs failed to respond to these messages. Given their failure to cooperate, plaintiffs cannot complain that the Jensens failed to comply with section 430.41, subdivision (a)(1).

Second, section 430.41 does not contain any penalties for the failure the follow the meet-and-confer process set forth in section 430.41, subdivision (a)(1). For example, section 430.41, subdivision (a)(4) provides that "[a]ny determination by the court that the meet and confer process was insufficient shall not be

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the complaint, cross-complaint, or answer shall provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency."

grounds to overrule or sustain a demurrer." Section 430.41, subdivision (f) states that "[n]othing in this section affects appellate review or the rights of a party pursuant to [s]ection 430.80." The Legislature's decision to forego such penalties suggests it did not intend for a defendant's failure to adhere to section 430.41, subdivision (a)(1) to result in the loss of the right to claim costs following a post-demurrer dismissal of the case.

Finally, plaintiffs' assertion that they would have dismissed the Nelsons and the Jensens from the case without the need for the demurrers is speculative at best. Dr. Powers had substantial pre-demurrer discussions with the Nelsons' attorney, yet refused to dismiss them from the case. Plaintiffs ignored the Jensens' requests for a meet-and-confer and did not agree to dismiss them until after the trial court had sustained the Nelsons' demurrer. There is nothing to suggest that plaintiffs would have voluntarily dismissed these defendants without the added pressure of the demurrers.

DISPOSITION

The order denying plaintiffs' motions to strike costs is affirmed. No costs on appeal are awarded.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Donald G. Umhofer, Judge
Superior Court County of San Luis Obispo

William Powers, Jr., William Powers III and Lindsey Keyes, in pro. per., for Plaintiffs and Appellants.

No appearance for Defendants and Respondents.