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Court of Appeal, First District, Division 3, California.

Walter K. PYLE, Plaintiff and Appellant,
v.
Daniel A. HOROWITZ, et al.,
Defendants and Respondents.
Walter K. Pyle, Plaintiff and Respondent,
v.
Daniel A. Horowitz, Defendant and Appellant.

Nos. A114353, A117105.
|
(San Francisco County Super. Ct. No. 445534).
|
Sept. 30, 2008.

Attorneys and Law Firms

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Opinion

McGUINESS, P.J.

***1** In this malicious prosecution action, plaintiff Walter K. Pyle challenges the trial court's dismissal of his lawsuit after the granting of special motions by defendants **Daniel A. Horowitz** and Robin A. Dubner to strike the complaint as a "strategic lawsuit against public participation" pursuant to Code of Civil Procedure [1] section 425.16 (commonly known as the anti-SLAPP statute) (case No. A114353). Defendant **Daniel A. Horowitz** challenges the trial court's denial of his motion, pursuant to section 473, to vacate an order denying his request for attorney fees as untimely (case No. A117105). [2] We affirm both decisions.

1 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

2 We consolidated the appeals for purposes of oral argument and decision.

FACTUAL AND PROCEDURAL BACKGROUND

A. First Lawsuit-Dubner's Federal Civil Rights Action (42 U.S.C. § 1983)

In 1996, Robin A. Dubner hired Walter K. Pyle to represent her in a federal civil rights action (42 U.S.C § 1983) against the City and County of San Francisco (City). Dubner sought damages and attorney fees based upon her allegations of wrongful arrest and incarceration for 14 hours before her release from custody without charges being filed against her. At the time Dubner hired Pyle, the parties had not agreed on a fee for his representation. During settlement negotiations with the City in 2002, Dubner sought recovery for her damages and attorney fees. Pyle provided an itemized bill for attorney fees to the City. Dubner and Pyle agreed to negotiate with the City for a lump sum settlement including both Dubner's damages and Pyle's attorney fees. Dubner and Pyle would later apportion the settlement sum between themselves.

Dubner accepted the City's offer to settle for $205,000 for her damages and attorney fees. The settlement was contingent on the approval of the City Police Commission and Board of Supervisors. While those approvals were pending, Dubner and Pyle unsuccessfully attempted to resolve the distribution of the settlement sum. Dubner also retained defendant **Daniel A. Horowitz**, who filed an association of counsel in the federal action.

In November 2002, all necessary approvals were completed. The initial $205,000 settlement check was made payable to Dubner and Pyle. However, at the request of Dubner and Horowitz, the City reissued the check making it payable to Dubner alone. Upon receipt of the reissued settlement check in her name alone, Dubner dismissed the federal action.

B. Second Lawsuit-Pyle's Fee Collection Action

In May 2003, Pyle sued Dubner in San Francisco Superior Court to collect $193,678.41, representing the reasonable value of his attorney fees and the costs advanced in the federal action. The complaint included causes of actions for conversion, breach of oral contract, breach of implied contract, and breach of covenant of good faith and fair dealing. Pyle sought punitive damages based upon Dubner's conversion of the entire settlement check, as well as compensatory damages.

Dubner, represented by Horowitz, filed a cross-complaint, alleging causes of action against Pyle for breach of fiduciary duty, fraud, and constructive fraud, and seeking both compensatory and punitive damages. Dubner asserted that various actions taken by Pyle established he had improperly viewed the settlement as his property, causing a delay of both the settlement and her receipt of the settlement sum. As to the parties' fee arrangement, Dubner alleged that Pyle did not fully disclose in writing the terms of his purported contract with her, he did not ensure the contract was clearly and definitely stated and understood, he did not properly advise her to seek the advice of independent counsel at the time he acquired an interest adverse to Dubner's interest, and the invoice for attorney fees that Pyle used as the basis of his lawsuit against Dubner was fraudulent, illegal and untrue in that the various entries for time spent, work done, and costs incurred were excessive and false, and the entries did not represent the actual time Pyle spent on the case. Dubner alleged Pyle failed to inform her that the settlement was her property, but instead alleged the settlement belonged to him, and he insisted that his fees had to be paid before Dubner could receive any money thereby attempting to extort money from her. In her fraud causes of action, Dubner alleged that Pyle knowingly misstated the law to her, he secretly conspired with the City's counsel to withhold the settlement, he secretly communicated with the federal court about his fee dispute with Dubner, and concealed from Dubner his secret communications with the federal court and opposing counsel. Pyle's conduct allegedly constituted violations of the following rules of the California Rules of Professional Conduct: rule 3-110 [duty to perform legal services competently]; 3-300 [attorney must avoid interests adverse to client], 3-310 [attorney must avoid representation of adverse interests]; rules 3-500 [failure to keep client reasonably informed about significant developments in lawsuit]; rule 4-200 [attorney must not enter into an agreement for, charge, or collect an illegal or unconscionable fee].

***2** A jury trial was held in October 2004. At the conclusion of the evidence, the court directed a verdict in favor of Pyle on Dubner's cross-complaint on the ground that she had failed to proffer expert testimony to support her allegations. The court also directed a verdict on Pyle's conversion claim. The jury awarded Pyle $165,000 on the claim for breach of an oral contract, $10,000 on the conversion claim, and $20,000 in punitive damages. The jury did not award any damages on Pyle's claim for breach of an implied contract. On October 8, 2004, the court entered judgment against Dubner in the principal sum of $195,000, plus interest of $32,083.33, for a total of $227,083.33. Dubner did not appeal and she and Pyle later settled the fee collection action.

C. Third Lawsuit-Pyle's Malicious Prosecution Action

On March 6, 2005, Pyle commenced the lawsuit that is before us on this appeal. In his complaint, Pyle alleged one cause of action for malicious prosecution against Dubner and Horowitz. Pyle asserted that Dubner and Horowitz knew or should have known that the cross-complaint in the fee collection action had no basis in law, they did not make a reasonable argument for changing existing law, and notwithstanding their knowledge, they continued to pursue the cross-complaint going so far as to present the claim at trial until the trial court directed a verdict in favor of Pyle. It was also alleged that Pyle had incurred substantial expenses in defending the cross-complaint, and that defendants' acts were willful, wanton, malicious and oppressive, and done in conscious disregard of Pyle's rights, thereby justifying an award of exemplary and punitive damages.

The trial court dismissed Pyle's lawsuit after granting defendants' special motions to strike pursuant to section 425.16 on the ground that Pyle had failed to demonstrate that he was likely to prevail on his malicious prosecution claim. The court also denied Horowitz's request for section 473 relief to vacate an order denying his request for attorney fees as untimely.

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DISCUSSION

I. Grant of Defendants' Special Motions to Strike Pursuant to Section 425.16

Section 425.16, subdivision (b), reads: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

The rules governing section 425.16 motions are well settled. The court conducts a two-part inquiry. First, the court decides whether the defendant has made a threshold showing that the plaintiff's cause of action arises from protected activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) " 'If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) "To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. [Citation.] Whether he has done so is a question of law, which we determine de novo. [Citations.]" (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.)

***3** Pyle does not contest that defendants Horowitz and Dubner met their burden under the first prong of the anti-SLAPP motion inquiry-that plaintiff's malicious prosecution cause of action based upon the filing of the cross-complaint in the underlying fee collection action arises from protected activity pursuant to section 425.16. (*Jarrow Formulas v. LaMarche, supra,* 31 Cal.4th at p. 741.) The issue for our determination is whether Pyle met his burden under the second prong of the anti-SLAPP motion's inquiry of demonstrating a probability of prevailing on the malicious prosecution cause of action.

To establish malicious prosecution, Pyle must prove that the cross-complaint in the fee collection case (1) terminated in his favor, (2) was initiated or maintained without probable cause, and (3) was initiated or maintained with malice. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965-966, 973.) We conclude Pyle has failed to meet his burden of demonstrating, by a sufficient prima facie showing of facts, a probability of successfully establishing the favorable termination element.

In directing a verdict dismissing Dubner's cross-complaint in the fee collection case, the court explained its ruling as follows: "At the outset, [the] Court wants to observe and recite on the record that the case pending before this Court for determination by the jury is not a determination as to the reasonableness of the attorney's bill taking into account the complexity of the case and issues that the Court would weigh in factoring whether there was or was not a situation in which the attorney[ ] fees would be subject to a lodestar and how much would be recovered. This Court is faced with a case in which there is a sum certain that was the amount of a settlement of a civil rights litigation by Ms. Dubner against the City and County of San Francisco with an understanding that thereafter there would be an agreement or a determination as to the manner in which that sum would be divided between Ms. Dubner and Mr. Pyle. [¶] Having said that, and the Court having to rule on whether this is a matter in which a directed verdict at the conclusion of all the evidence should be granted as argued by [Mr. Pyle], the subject matter of the breach of fiduciary duties and the subject matter of the attorney's bill for services rendered is a subject matter that was ... requested to be submitted to the jury for their determination. If this had been a bench trial, it is not uncommon for the Court to make that determination for the reasons set forth previously in the introductory remarks, but the subject matter of attorney's billings and breach of fiduciary duties is beyond the scope of knowledge of a lay person and requires the assistance of experts to provide the information for the jury with which to render a decision." The court disagreed with Pyle's argument to the extent he argued there is never a situation in which the trial court would relieve a party of proffering expert testimony to assist the jury in making a determination. Nevertheless, the court determined that expert testimony was necessary on the issues of breach of fiduciary duty and attorney fees as alleged in the cross complaint. Because the allegations in support of the breach of fiduciary duties cause of action were essentially realleged in the fraud causes of action, the court determined that the directed verdict ruling also applied to the fraud causes of action.

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***4** Pyle contends that because section 630 establishes that a directed verdict operates as an adjudication on the merits, and defendants did not appeal the adverse directed verdict ruling, we should not consider the reasons for the court's ruling in determining whether there was a favorable termination for malicious prosecution purposes. We disagree.

Subdivision (c) of section 630 reads: "If the motion [for a directed verdict] is granted, unless the court in its order directing entry of verdict specifies otherwise, it shall operate as an adjudication upon the merits." However, in the context of a malicious prosecution claim, "It is apparent 'favorable' termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits-reflecting on neither innocence of nor responsibility for the alleged misconduct-the termination is not favorable in the sense it would support a subsequent action for malicious prosecution ." (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751, fn. omitted; see *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341-342 (*Casa Herrera*).) "The focus is not on the malicious prosecution plaintiff's opinion of his *innocence,* but on the opinion of the dismissing party. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881.) "The test is whether or not the termination tends to indicate the innocence of the defendant or simply involves technical, procedural or other reasons that are not inconsistent with the defendant's guilt. [Citations.]" (*Ibid.*)

Casa Herrera, supra, 32 Cal.4th 336, is informative on whether we may consider the reasons for the court's directed verdict. In *Casa Herrera,* the Supreme Court was asked to determine whether a termination was favorable for malicious prosecution purposes where a Court of Appeal terminated an underlying breach of contract and fraud action after finding that there was no substantial evidence to support the claims " 'because the parol evidence rule mandates the defendant's liability be determined by the provision embodied in the written contract rather than by any prior inconsistent oral promises....' " (*Id.* at p. 340-341.) Although "[o]stensibly," the Court of Appeal's decision "reflect [ed] on the merits and [defendant's] innocence of the wrongful conduct alleged in the underlying action," the Supreme Court nevertheless considered whether the termination based on the parol evidence rule reflected on the defendant's innocence and was therefore favorable for malicious prosecution purposes. (*Id.* at pp. 341-342; see *Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 744 ["a favorable termination does not occur simply because a party has prevailed regardless of the reason for success"].) So, too, in this case, we conclude that in determining whether there was a favorable termination in the malicious prosecution context, it is appropriate to consider the reason for the directed verdict dismissing Dubner's cross-complaint.

***5** The Supreme Court's decision in *Casa Herrera* is also informative in determining whether the termination in this case was substantive, as opposed to procedural or technical. In ruling that a termination based on the parol evidence rule was favorable for malicious prosecution purposes, the *Casa Herrera* court rejected an argument that the termination was "procedural or technical," and did not reflect on the merits of the allegations against the malicious prosecution plaintiff. (32 Cal.4th at pp. 342-343.) In explaining its decision, the court stated: "The parole evidence rule therefore establishes that the terms contained in an integrated written agreement may not be contradicted by prior or contemporaneous agreements. In doing so, the rule necessarily bars consideration of extrinsic evidence of prior or contemporaneous negotiations or agreements at variance with the written agreement. '[A]s a matter of substantive law such evidence cannot serve to create or alter the obligations under the instrument.' [Citation.] In other words, the evidentiary consequences of the rule follow from its substantive component-which establishes, as a matter of law, the enforceable and incontrovertible terms of an integrated written agreement." (32 Cal.4th at p. 344.)

The *Casa Herrera* court reaffirmed that whether a statue or rule is procedural or substantive is to be analyzed " 'according to the nature of the problem for which a characterization must be made.' " (32 Cal.4th at pp. 343-344; see *Grant v. McAuliffe* (1953) 41 Cal.2d 859, 865.) " 'As a general rule, laws [that] fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are "substantive laws" in character, while those [that] merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are "procedural laws." ' [Citation.]" (*Vienna v.*

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California Horse Racing Bd. (1982) 133 Cal.App.3d 387, 394.)

Unlike the situation in *Casa Herrera,* in this case, the court's dismissal of the cross-complaint in the fee collection case was not based upon the application of a principle of substantive law. The court did not hold that Pyle had not violated his fiduciary duties or had not committed fraud. The court was concerned only with the method of proving the allegations in the cross-complaint. Consequently, the termination of the cross-complaint does not constitute a favorable termination for malicious prosecution purposes because it does not imply a lack of wrongful conduct by Pyle as alleged in the cross-complaint.

Nor has Pyle set forth facts from which it could reasonably be inferred that defendants, as practicing attorneys, knew or should have known that expert testimony was required to prevail on the cross-complaint, that if expert testimony was available it would have been produced at trial, and that defendants' failure to proffer expert testimony reflects defendants' concession that the cross-complaint lacked merit. "While California law holds that expert testimony is admissible to establish the standard of care applicable to a lawyer in the performance of an engagement and whether he has performed to the standard [citation], it by no means clearly establishes the parameters of the necessity of expert testimony to the plaintiff's burden of proof. In some situations, at least, expert testimony is not required. [Citations.]" (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810; see *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 311; *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1087.) As explained in *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125: "An attorney's duty, the breach of which amounts to negligence, is not limited to his failure to use the *skill* required of lawyers. Rather, it is a wider obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances. [¶] The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct. They *cannot* be changed by expert testimony. If an expert testifies contrary to the Rules of Professional Conduct, the standards established by the rules govern and the expert testimony is disregarded. [Citation.]" (*Id.* at p. 1147; see *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1621; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 892-893.) When a standard of care is not a matter of common knowledge, the trial court may allow expert testimony to establish the standard of care. (*Day v. Rosenthal, supra,* 170 Cal.App.3d at p. 1147.) But the courts have recognized that "[i]n some circumstances, the failure of attorney performance may be so clear that a trier of fact may find professional negligence unaided by the testimony of experts." (*Wright v. Williams, supra,* 47 Cal.App.3d at p. 810, fn. omitted; see *Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, 1508; *Day v. Rosenthal, supra,* 170 Cal.App.3d at p. 1147.) Contrary to Pyle's contentions, the record does not show that defendants sustained any adverse pretrial rulings or otherwise had reason to believe the cross-complaint would be dismissed for lack of expert testimony until the court so ruled at the conclusion of the evidence in the fee collection action. (See *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App .4th 1043, 1057.)

***6** We also reject Pyle's contention that a favorable termination can reasonably be inferred from defendants' failure to appeal the adverse directed verdict ruling. Citing to *Ross v. Kish* (2006) 145 Cal.App.4th 188, 200, Pyle argues that, because it can be presumed that a party does not abandon a meritorious claim, the reasonable inference to be drawn from defendants' failure to pursue an appeal is that they knew the cross-complaint lacked merit. However, the failure to appeal the adverse ruling, without more, does not necessarily demonstrate that defendants knew the cross-complaint lacked merit. "It is common knowledge that costs of litigation, such as attorney's fees, costs of expert witnesses, and other expenses, have become staggering. The law favors the resolution of disputes. 'This policy would be ill-served by a rule which would virtually compel [parties] to continue [the] litigation in order to place [themselves] in the best posture for defense of a malicious prosecution action.' [Citation.]" (*Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, 344-345.)

Because Pyle has not demonstrated a probability of establishing the favorable termination element, we agree with the trial court that he is unlikely to prevail on the malicious prosecution cause of action. This conclusion makes it unnecessary for us to address whether Pyle demonstrated a probability of establishing the other elements of the malicious prosecution cause of action.

II. Denial of Horowitz's Section 473 Motion for Relief

A. Relevant Facts

After prevailing on his special motion to strike pursuant to section 425.16, Horowitz filed a request for attorney fees on July 25, 2006. Pyle opposed the request for attorney fees on various grounds, including that it was untimely pursuant to the California Rules of Court,[3] rules 3.1702 and 8.104[4] in that the filing deadline was June 5, the 61st day (the 60th day being a court holiday) after the April 5, 2006, service of the notice of entry of the order of dismissal. In reply, Horowitz argued the court had discretion to consider a late motion and Pyle had not shown any prejudice by the untimely filing. Horowitz also asserted the filing deadline for a request for attorney fees was July 10, 2006, the 61st day (the 60th day being a court holiday) following the May 10, 2006, service of notice of entry of the judgment recapitulating the provisions of the dismissal order. However, he did not offer any excuse for failing to file by July 10, nor did he apply for an extension of time to file upon a showing of good cause.[5] After a hearing on September 12, 2006, the trial court denied Horowitz's request for attorney fees as time-barred. On October 3, 2006, Horowitz was served with notice of entry of the order denying his request for attorney fees.

3 All further unspecified rule references are to the California Rules of Court. Effective January 1, 2007, the rules were renumbered. For consistency and convenience, we refer to the rules by their current numbers in this opinion.

4 Rule 3.1702 reads, in relevant part: "A notice of motion to claim attorney's fees for services up to and including the rendition of judgment in the trial court ... must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108." (*Id.,* rule 3.1702(b)(1).) Rule 8.104 reads, in relevant part: "Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment." (*Id.,* rule 8.104(a).) Rule 8.108 provides for the extension of time to appeal under certain circumstances that do not apply in this case.

5 Rule 3.1702(d) reads: "For good cause, the trial judge may extend the time for filing a motion for attorney's fees in the absence of a stipulation or for a longer period than allowed by stipulation."

About two weeks later, Horowitz filed a motion for relief pursuant to section 473, asking the court to vacate its order denying his request for attorney fees. He asserted that his failure to file his fees request in timely fashion was caused by excusable neglect. Horowitz again contended that the time for filing his request for attorney fees was the 60 day period between May 10, 2006, and July 10, 2006. He proffered reasons for his attorney's failure to file the request from June 26, 2006, through July 25, 2006, the filing date of the initial request. Pyle opposed the motion, asserting that the filing deadline was June 5, 2006, and Horowitz had not offered any excuse for failing to file by that date. In reply, Horowitz did not offer any excuse for his failure to file by June 5, reasserting that the deadline was July 10.

***7** At a hearing on November 21, 2006, the court announced its tentative decision was to deny the section 473 motion because the request for attorney fees had to be filed between April 5, 2006, and June 5, 2006, and no reason had been proffered for the failure to file by June 5. Horowitz conceded that the proffered excuse for failing to file by July 10, 2006, was probably inapplicable and did not affect his failure to file by June 5. Horowitz's counsel asked the court for an opportunity to brief the issue of whether there was a valid reason for failing to file by June 5 on the grounds of excusable neglect or mistake. Pyle opposed the request for additional briefing, arguing that defense counsel could have addressed the issue in his motion papers but did not do so. The court ruled that the filing deadline for the request for attorney fees was June 5; it also noted that there was no basis for the court to consider relief under section 473 because no reason for failing to file by June 5 had been proffered by Horowitz. The court also denied Horowitz's request to submit additional briefing because defense counsel was aware of the dispute regarding the filing deadline and should have proffered the reason for failing to file by June 5 in the motion papers seeking section 473 relief.

B. Analysis

Horowitz argues the trial court erred as a matter of law in determining that his request for attorney fees had to be filed between April 5, 2006, and June 5, 2006. We disagree.

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Because the order dismissing the complaint with prejudice was a judgment, the April 5, 2006, service of the notice of entry of the dismissal started Horowitz's time to file a request for attorney fees pursuant to rule 3.1702. The law is well settled that all dismissals ordered by a court in a written order signed by the court and filed in the action "shall constitute judgments and be effective for all purposes," and shall be entered by the clerks of the court as "judgments." (§ 581d;[6] see *Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118, 1120, fn. 1.) As recently noted by our colleagues in Division Four, "just because all orders granting or denying anti-SLAPP motions (many of which are necessarily interlocutory because they either allow the action to proceed or because they dispose of fewer than all causes of action) are now appealable under section 904.1, subdivision (a)(13), it does not follow that dismissal of an entire action following the granting of a special motion to strike is not a judgment pursuant to section 581d." (*Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 995.)

6 The statute has not been substantively changed since 1963.

Carpenter v. Jack in the Box Corp. (2007) 151 Cal.App.4th 454 (*Carpenter*) does not support Horowitz's arguments that the trial court should have considered his attorney fee application. In *Carpenter,* the trial court denied the defendant's anti-SLAPP motion. (*Carpenter, supra,* 151 Cal.App.4th at p. 459.) The plaintiff filed a request for attorney fees after the defendant had unsuccessfully appealed the denial and the matter was remitted to the trial court for further proceedings. (*Ibid.*) The trial court and the reviewing court held that the plaintiff's motion for attorney fees, which was filed after entry of the prejudgment appealable order denying the section 425.16 motion but before entry of judgment concluding the action, was not untimely under rule 3.1702. (*Carpenter, supra,* 151 Cal.App.4th at pp. 459-460, 468.) The *Carpenter* court interpreted "rule 3.1702 such that the time limits imposed by the rule do not commence to run in connection with a motion for fees under section 425.16 until entry of judgment." (*Carpenter, supra,* 151 Cal.App.4th at p. 466, fn. 9 .) In this case, the "entry of judgment" referred to by the *Carpenter* court (*ibid.*), is the entry of the order of dismissal, notice of entry of which was served on April 5, 2006, and the time limits commenced to run in connection with a motion for fees under section 425.16 on that date.

***8** Also, *Carpenter, supra,* 151 Cal.App.3d at p. 468, does not support Horowitz's contention that his request for attorney fees is premature because the litigation was not at an end as a result of Pyle's filing of an appeal from the order of dismissal and judgment.[7] The filing deadline for seeking attorney fees for services rendered before entry of a trial court judgment is not automatically stayed by an appeal. If a notice of appeal is filed, the parties may stipulate to extend the time for filing a request for attorney fees (rule 3.1702(b)(2)(B)), but the parties did not so stipulate in this case. Alternatively, if a party wants to delay filing a request for attorney fees, such relief must be sought from the trial judge upon a showing of "good cause." (Rule 3.1702(d).) At no time did Horowitz ask the trial court to extend his time to file his request for attorney fees upon a showing of good cause. In the absence of the parties' stipulation or a court order, the pending appeal did not extend Horowitz's right to seek attorney fees "for services up to and including the rendition of judgment in the trial court," (rule 3.1702(b)(1)), which are the fees at issue here.

7 The judgment in favor of Horowitz, which was submitted by his attorneys and signed by the trial court, although appealable, "appears to have served no purpose here" because it merely recapitulates the earlier filed order of dismissal. (*Melbostad v. Fisher, supra,* 165 Cal.App.4th at p. 997.)

We therefore conclude that the trial court appropriately found Horowitz's time to file his request for attorney fees began to run on April 5, 2006, and expired on June 5, 2006. Horowitz did not proffer any reason for failing to file his request during that time period. Consequently, the court acted within its discretion in denying the section 473 motion on the basis that no grounds for relief specified in the statute had been proffered for consideration. The court also acted within its discretion in refusing to permit supplemental briefing on issues that should have been but were not addressed in Horowitz's motion papers.

DISPOSITION

In case No. A114353, the orders granting the special motions of **Daniel** **A**. **Horowitz** and Robin A. Dubner to strike the complaint pursuant to section 425.16 and the

judgments entered in their favor are affirmed. Horowitz and Dubner are awarded costs on appeal in case No. A114353.

In case No. A117105, the order denying **Daniel A. Horowitz's** motion for relief pursuant to section 473 is affirmed. Walter K. Pyle is awarded costs on appeal in case No. A117105.

We concur: SIGGINS and JENKINS, JJ.

All Citations

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