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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PERI NESS et al.,

Plaintiffs and Respondents,

v.

TERRY RONDBERG et al.,

Defendants and Appellants.

D053855

(Super. Ct. No. 37-2008-00052535-
CU-DF-NC)

APPEAL from an order of the Superior Court of San Diego County, Robert P.

Dahlquist, Judge. Affirmed.

I.

INTRODUCTION

Plaintiffs Peri Ness and Synergy Yoga (Plaintiffs) filed this action against defendants Terry Rondberg and Michelle DePalma (Defendants), alleging, among other things, causes of action for libel and slander. Defendants appeal from the denial of their

special motion to strike Plaintiffs' complaint pursuant to the anti-SLAPP statute (Code Civ. Proc., § 425.16).¹

The trial court denied Defendants' anti-SLAPP motion on the ground that the motion was untimely under Code of Civil Procedure section 425.16, since Defendants filed only a notice of motion and motion, and failed to include a memorandum in support of the motion, as required by California Rules of Court, Rules 3.1112 and 3.1113. The court also provided the following two alternative grounds for denying the motion:

(1) Defendants' conduct did not fall within any of the categories of protected activity set forth in section 425.16, subdivision (e); and (2) Plaintiffs demonstrated a probability of prevailing on the merits (§ 425.16, subd. (b)(1)).

On appeal, Defendants spend the majority of their brief challenging the bases of the trial court's alternative grounds for denying their anti-SLAPP motion, and they nt less than a page of argument regarding the timeliness issue. We conclude that Defendants have failed to establish that the trial court abused its discretion in denying their anti-SLAPP motion on the ground that the motion was untimely. We therefore affirm the trial court's order.

¹ "SLAPP" stands for Strategic Lawsuit Against Public Participation. Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*²

Plaintiffs alleged that Ness founded Synergy Yoga — a business that offered yoga classes to the public — in Encinitas in 1992. Terry Rondberg was a former student at Synergy Yoga, and DePalma was a former yoga teacher there. Rondberg and DePalma became romantically involved while DePalma was teaching at Synergy Yoga. Rondberg is a chiropractor, but admitted in his answer to the operative complaint that he is not licensed to practice in California.

According to Ness, in April 2007, Rondberg hurt Ness's back while he was attempting to give her a chiropractic adjustment. In January 2008, Rondberg wrote Ness a letter of apology in which he offered to pay her money to "make it up to [her]." In response to Rondberg's letter, Ness told Rondberg that she would settle with him for \$150,000.

Approximately a week after Ness requested \$150,000 from Rondberg, DePalma quit her job as a teacher at Synergy Yoga. Shortly thereafter, the website "www.truthaboutsynergyyoga.com" came into existence. The website included a personal narrative that appeared to describe Rondberg's version of his experiences with Ness and Synergy Yoga. In this context, Rondberg made a variety of allegations against

² Because we affirm the trial court's denial of Defendants' motion on procedural grounds, we provide only a brief summary of the factual allegations that underlie this case.

Ness, including that Synergy Yoga was a cult, and that Ness was a cult leader.³ In addition, Rondberg sent e-mails to Ness's yoga customers in which he made similar claims after he managed to obtain Ness's e-mail list. Further, Rondberg was seen near the location of Synergy Yoga, passing out cards that stated "Shocking News about a Cult in Encinitas, CA – www.truthaboutsynergyyoga.com." Similar cards were found in various locations throughout Encinitas.

During this time, attendance at Synergy Yoga decreased by 75 percent. Ness closed Synergy Yoga in March 2008.

B. *Procedural background*

On March 19, 2008, Plaintiffs filed a complaint alleging causes of action for libel, slander, harassment and negligence. On April 17, 2008, Plaintiffs served Defendants with a first amended complaint (FAC) alleging causes of action for libel, slander,

³ Despite the fact that the website narrative concludes with the words, "Much Love and Light to You on Your Journey [¶] ~Namaste~ [¶] Dr. Terry A Rondberg" (formatting in original), on appeal, Defendants assert that they did not own or operate the website in question, citing to their own declarations in support of this assertion. However, the trial court sustained Plaintiffs' objections to these declarations as being untimely under section 1010, and did not consider either declaration in ruling on the anti-SLAPP motion. Defendants do not challenge on appeal the trial court's rejection of these declarations. Further, even if Defendants do not themselves own or operate the website in question, that would not necessarily demonstrate that Defendants did not write and/or have published the personal narrative on the website.

intentional infliction of emotional distress, misappropriation of trade secrets and negligence.⁴

Defendants answered on June 18, 2008. Five days later, on June 23, Defendants filed a document entitled, "Notice of Motion and Special Motion to Strike Plaintiffs' Complaint as a SLAPP" pursuant to section 425.16. Defendants did not include with this notice a memorandum in support of the anti-SLAPP motion. The notice provided that the anti-SLAPP motion was to be heard on October 3, 2008—over three months after the notice was filed.

On July 17, 2008, approximately 90 days after Plaintiffs filed and served the FAC, Defendants filed a document entitled, "Amended Notice of Motion and Special Motion to Strike Plaintiffs' Complaint as a SLAPP (CCP § 425.16)." The amended notice and motion included a memorandum in support of the motion, as well as declarations of both Defendants.

On July 28, Plaintiffs filed an opposition to the anti-SLAPP motion, arguing, among other things, that the motion was untimely. Plaintiffs also filed a separate document entitled, "Plaintiffs' Objection to Late Filed Memorandum of Points and Authorities and Declarations of Terry Rondberg and Michelle DePalma."

After full briefing, on August 22, 2008, the trial court sustained Plaintiffs' timeliness objection to Defendants' memorandum and declarations filed in support of

⁴ The FAC provided in the appellant's appendix does not include a proof of service. We are therefore unable to tell from the record provided on appeal how the FAC was served. However, Plaintiffs state in their brief that the FAC was served by mail on April 17, 2008.

their anti-SLAPP motion. The court denied Defendants' anti-SLAPP motion on the ground that the motion was untimely under section 425.16 and California Rules of Court, Rules 3.1112 and 3.1113. The trial court provided alternative grounds for denying Defendant's anti-SLAPP motion, concluding both that Defendants' conduct did not fall within the protected activities set forth in section 425.16, subdivision (e), and that even if Defendants' conduct fell within one of the protected activities enumerated in section 425.16, subdivision (e), Plaintiffs had demonstrated a probability of prevailing on the merits.

Defendants filed a timely notice of appeal on October 2, 2008.

On July 6, 2009, Plaintiffs filed a motion for sanctions against Defendants in this court, arguing that Defendants' appeal of the denial of their anti-SLAPP motion was subjectively and objectively frivolous and that Defendants filed the appeal solely to delay the litigation. The following day, this court issued an order stating that Plaintiffs' motion for sanctions would be considered with the appeal, and gave Defendants 10 days to file an opposition to the motion for sanctions.

III.

DISCUSSION

Section 425.16, subdivision (f), provides in pertinent part: "The [anti-SLAPP] 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." The 60-day period commences with service of the most recent complaint or, where appropriate, service of the amended

complaint (e.g., *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 835 (*Lam*)). Here, the trial court determined that Defendants did not properly file the anti-SLAPP motion within the 60-day time period set forth in section 425.16, subdivision (f), because Defendants filed only a notice of motion within the time period set forth in section 425.16, subdivision (f),⁵ and did not include a memorandum in support of the motion.

We review a trial court's denial of an anti-SLAPP motion on the ground that the motion was untimely, for an abuse of discretion. (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 285.) Under this standard, we will overturn the trial court's ruling only if "the grounds given by the court for finding the anti-SLAPP motion untimely are inconsistent with the substantive law of section 425.16, or . . . the application to the facts of this case is outside the range of discretion conferred upon the trial court under that statute, read in light of its purposes and policy." (*Ibid.*) Defendants neither mention the applicable standard of review, nor argue that the trial court abused its discretion in denying their anti-SLAPP motion. Defendants' briefing on this issue is thus utterly unpersuasive. We conclude that there is simply no basis for reversing the trial court's

⁵ Defendants assert, without citation to either the record or to relevant legal authority, that their June 23 notice of the anti-SLAPP motion was timely despite the fact that the FAC was served on April 17, because the 60-day time period is extended by five days if the complaint is served by mail. Although the record does not disclose the method of service of the FAC, Plaintiffs essentially concede that the FAC was mailed on April 17. According to *Lam, supra*, 91 Cal.App.4th at page 835, when the complaint is served by mail, a party filing an anti-SLAPP motion has "an extra five days to file his anti-SLAPP suit motion." Therefore, we presume for purposes of this appeal that the document titled "Notice of Motion and Special Motion to Strike Plaintiffs' Complaint as a SLAPP," which was filed June 23, was filed within the time requirement set forth in section 425.16.

decision to deny Defendants' anti-SLAPP motion on the ground that Defendants failed to file a timely motion.

There is no inconsistency with the substantive law of section 425.16 in the court's determination that Defendants' anti-SLAPP motion was untimely. Defendants filed a *notice* of the anti-SLAPP motion within the 60 day time period. On this basis, alone, Defendants conclude that they filed their anti-SLAPP motion within the 60-day requirement set forth in section 425.16, subdivision (f). Specifically, Defendants maintain that the "original Notice complies with the requirements of CCP 1005 and California Rules of []Court, Rule 3.1112(a)" because it "provides the date, time and place of the Motion and the grounds [on which] it is to be made, including the authority relied upon."

However, the document that Defendants filed did not include everything that is required for a proper motion under the California Rules of Court. Specifically, the document failed to comply with California Rules of Court, rules 3.1112 and 3.1113, as the trial court noted. California Rules of Court, rule 3.1112, subdivision (a) states that "[u]nless otherwise provided by the rules in this division, the papers filed in support of a motion *must consist of at least* the following: [¶] (1) a notice of hearing on the motion; [¶] (2) The motion itself; and [P] (3) A memorandum in support of the motion or demurrer." California Rules of Court, rule 3.1113 reiterates the necessity that a memorandum in support of a motion accompany the notice of motion. That rule provides in relevant part: "(a) A party filing a motion . . . must serve and file a supporting memorandum. The court may construe the absence of a memorandum as an admission

that the motion or special demurrer is not meritorious and cause for its denial [¶]

(b) The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (Cal. Rules of Court, rule 3.1113, subds. (a), (b).) The document Defendants filed on June 23 did not include a memorandum containing the relevant facts, authority or argument in support of the anti-SLAPP motion. Thus, as the trial court concluded, Defendants failed to file a motion that complied with the California Rules of Court within the 60-day time limit.

Defendants suggest that they cured the defect in the timeliness of their anti-SLAPP motion by supplementing it with their amended motion. They contend that "nothing in the code . . . prevents supplementation of the original motion." However, Defendants did not simply "supplement" their original motion. Rather, they attempted to avoid the time requirement for filing an anti-SLAPP motion by filing a "placeholder" (i.e., an unsupported notice of motion) within that time period, and then waiting until the time period had elapsed to file a procedurally adequate motion. This tactic deprived Plaintiffs of the opportunity to respond to the motion on its merits within the time frame contemplated by section 425.16. Under these circumstances, the trial court appropriately determined that Defendants' motion was untimely.

Defendants have not made any argument that the trial court's decision to deny their untimely anti-SLAPP motion constituted an abuse of discretion, and we see no basis for such an argument. Throughout this process, Defendants have never offered any reason for their failure to meet the time requirements for an anti-SLAPP motion. Under these

circumstances, the trial court was well within its discretion in concluding that Defendants did not file a sufficient anti-SLAPP motion within the time limits set forth in the governing statute, and in denying their Anti-SLAPP Motion on this ground.⁶

IV.

DISPOSITION

The order of the trial court is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

⁶ Although we reject Defendants' contentions on appeal, we nevertheless decline to award Plaintiffs sanctions. A reviewing court "may add to the costs on appeal such damages as may be just" when that court determines that an appeal "was frivolous or taken solely for delay." (§ 907.) "An appeal is frivolous 'only when it is prosecuted for — improper motive — to harass the respondent or delay the effect of an adverse judgment — or when it indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]' [Citation.]" (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1422.) "We impose a penalty for a frivolous appeal for two basic reasons: to discourage further frivolous appeals, and to compensate for the loss that results from the delay. [Citation.]" (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 33.) Although Defendants' briefing on appeal may leave something to be desired, we cannot say under the circumstances presented here that the appeal itself was wholly frivolous, or that it was taken solely for the purpose of delay.