ROY AL FINANCE & LOAN COMPANY et al., Plaintiffs and Appellants, v. RASTEGAR & MATERN et al., Defendants and Appellants.

B156726

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

2005 Cal. App. Unpub. LEXIS 462

January 19, 2005, Filed

PRIOR HISTORY: APPEAL from an order of the Superior Court of Los Angeles County, No. BC231638. James R. Dunn, Judge.

DISPOSITION: Affirmed.

COUNSEL: Westrup, Klick & Associates and R. Duane Westrup for Plaintiffs and Appellants.

Law Offices of Martin L. Horwitz and Martin L. Horwitz for Defendants and Appellants Rastegar & Matern, Matthew J. Matern and Paul J. Weiner.

Rastegar & Matern and Paul J. Weiner for Defendant and Appellant Julia Vaynerov.

JUDGES: KLEIN, P. J.; KITCHING, J., ALDRICH, J. concurred

OPINION BY: KLEIN

OPINION

Plaintiffs and appellants Roy-Al Finance & Loan Company (Royal) and John Tonoyan (Tonoyan) (collectively, Royal) appeal an order granting in part an attorney fee motion brought by defendants and appellants Matthew J. Matern (Matern), Paul J. Weiner (Weiner), Julia Vaynerov (Vaynerov) and the law firm of Rastegar & Matern (R&M) (collectively, the attorney defendants), **[*2]** after the attorney defendants prevailed on a special motion to strike under the anti-SLAPP statute. (*Code Civ. Proc., § 425.16.*) [1]

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

The attorney defendants cross-appeal from the attorney fee order, contending the attorney fee award was inadequate.

The issue presented is whether, and to what extent, the attorney defendants are entitled to recover reasonable attorney fees related to their anti-SLAPP motion.

To the extent the attorney defendants retained outside counsel to represent them in connection with the anti-SLAPP motion, they were entitled to recover reasonable attorney fees pursuant to *section 425.16*. However, to the extent the attorney defendants represented themselves in the matter, recovery of attorney fees is barred. The order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND [2]

2 The facts are drawn in part from our previous opinion in this matter. (*Roy Al Finance & Loan Company v. Rastegar & Matern* (Dec. 30, 2003, B150292 [nonpub. opn.].)

[*3] 1. *The underlying lawsuit against Royal and Tonoyan.*

In 1996, the attorney defendants, on behalf of Bernice Prescott (Prescott), filed suit against Royal and others for fraud, rescission, declaratory and injunctive relief, seeking damages and rescission of a loan transaction agreement between Prescott and Royal. Tonoyan, a stockholder of the holding company for Royal, was subsequently added as a Doe defendant.

The matter proceeded to trial in July 1998, and ended in a grant of nonsuit in favor of Tonoyan and Royal.

2. *The instant action.*

a. *Royal and Tonoyan sue the attorney defendants for malicious prosecution.*

After prevailing in the underlying action, Royal and

Tonoyan filed a complaint for malicious prosecution against Prescott and her attorneys, the attorney defendants herein. [3] The complaint pled in relevant part: Royal and Tonoyan obtained a favorable termination of the underlying action, which concluded in a judgment of nonsuit in their favor. The attorney defendants lacked probable cause to include Royal and Tonoyan as defendants in the underlying action. The attorney defendants acted maliciously in bringing the action against Royal and Tonoyan **[*4]** for the improper purpose of obtaining a settlement which had no relationship to the merits of the claim.

> 3 An attorney is liable for malicious prosecution for " 'prosecuting a claim which a reasonable lawyer would not regard as tenable . . . .' " (*Norton v. Hines (1975) 49 Cal. App. 3d 917, 924, 123 Cal. Rptr. 237*, italics omitted.)

b. *The attorney defendants successfully move to strike the malicious prosecution complaint.*

On October 23, 2000, the attorney defendants filed a special motion to strike pursuant to *section 425.16*.

On February 21, 2001, the trial court granted the special motion to strike. The trial court ruled the cause of action for malicious prosecution was subject to scrutiny under *section 425.16*, and the denial of Royal's defense motion for summary judgment in the underlying action was sufficient to establish the attorney defendants had probable cause to sue, thus barring the malicious prosecution suit against them. [4]

> 4 In *Roy Al Finance & Loan Company v. Rastegar & Matern, supra,* No. B150292, this court affirmed the order granting the attorney defendants' special motion to strike.

[*5] c. *The attorney defendants' motion for attorney fees.*

On May 29, 2001, the attorney defendants filed a motion for an award of attorney fees pursuant to *section 425.16*, together with supporting declarations. [5] They asserted that in connection with their successful motion to strike, they reasonably and necessarily incurred attorney fees in the total amount of $ 64,182.50, comprised of $ 39,600 representing the reasonable value of Weiner's services, $ 10,937.50 representing the reasonable value of the services of Jennifer Van Duzer (Van Duzer), $ 11,045 representing the reasonable value of Matern's services and $ 2,600 representing the reasonable value of the services of Douglas W. Perlman (Perlman).

> 5 *Section 425.16, subdivision (c)*, provides for a mandatory award of attorney fees to a prevailing defendant, stating "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."

Royal and Tonoyan opposed the motion, arguing that pursuant to *Trope v. Katz (1995) 11 Cal.4th 274,* **[*6]** the attorney defendants were not entitled to attorney fees because they represented themselves in the action.

d. *Trial court's ruling.*

After hearing the matter and taking it under submission, the trial court ruled: "In view of the similar objectives of deterring frivolous lawsuits or discovery practices, the court finds that a pro per litigant, including an attorney acting in pro per, is not entitled to an award of attorneys fees under the anti-SLAPP statue for the reasons stated in the *Trope* and *Kravitz* opinions and the cases cited therein.

"This holding does not entirely resolve the issues in this case, however, as defendants contend that, even if they are in pro per as to their individual interests, they have also been retained by the law firm of Rastegar & Matern, a corporation, and by [Vayernov] on a contingency basis, and therefore, at least as to the work attributable to those representations, they are entitled to fees as 'retained counsel' and not as pro pers. In Mr. Weiner's case, he points out as well that he is only 'of counsel' and is also an independent contractor rather than a partner or associate in the firm. The court finds from the evidence proffered **[*7]** that Mr. Matern is a principal shareholder in the firm, and Mr. Weiner does virtually all of his work for this firm and thus is not an independent contractor. The court finds further that both were actively involved in litigating the underlying case, and as defendants in their individual capacities are being sued for the same alleged acts of malicious prosecution as alleged against the law firm. Their interests and that of the law firm are identical, and there is no basis in the record from which to conclude that the law firm has hired them and will thus incur fees that must be paid to them as retained counsel similar to the fact pattern seen in the in-house counsel cases such as *PLCM Group, Inc. v. Drexler (1999) 72 Cal.App.4th 693* [rev. granted and affd. by *PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084]*. The court further finds that defendant Julia Vaynerov was actively engaged in the underlying litigation as an associate of the firm and that as a member of the firm would be entitled to a defense. Moreover, even if that were not the case, there is no practical way to parse out fees related only to her defense as the issues are common to all **[*8]** the defendants. [P] . . .

"As this court noted at the hearing on this motion, if the moving parties actually retained any counsel to either assist them or to represent them in the SLAPP motion, then the court would award a fee based on that representation. Upon further review of the record, and the motion papers filed by the parties, the court finds

there is sufficient evidence in the record to conclude that attorneys Douglas W. Perlman and Jennifer Van Duzer (neither of whom worked on the underlying case nor are associates of the firm) can be construed as 'retained counsel' in this case and therefore the court confirms its original tentative ruling and awards attorneys fees in the amount of $ 13,537.50 (Perlman, 8 hours at $ 200/hour; Van Duzer, 62.5 hours at $ 175/hour), plus 'reasonable expenses' within the meaning of the *Kravitz* case. The court further finds no basis to apply a lodestar multiplier in this case."

Thereafter, the trial court awarded the attorney defendants "reasonable expenses" in the sum of $ 884.94, consisting of appearance fees of $ 756.00, motion and document filing fees of $ 92.00 and Fed Ex charges of $ 36.94.

Royal and Tonoyan filed a timely notice **[*9]** of appeal from the attorney fees order and the attorney defendants filed a timely notice of cross-appeal.

CONTENTIONS

Royal contends the trial court erred in awarding any attorney fees to the attorney defendants because attorneys who litigate in propria persona are not entitled to recover attorney fees, and the attorney defendants waived their entitlement to costs by failing to request them timely.

The attorney defendants contend: *Trope v. Katz, supra, 11 Cal.4th 274*, which involved *Civil Code section 1717* (*section 1717*), does not apply to a fee application under *section 425.16*; assuming arguendo a fee award is unavailable in a case of pure self representation, this is not such a case, in that Vaynerov and R&M were represented by Weiner and Matern; and even assuming R&M were obligated to indemnify Vaynerov for her defense as a former employee, such right to indemnification does not constitute a defense to an award of attorney fees under *section 425.16*.

DISCUSSION

1. *General principles.*

a. The pertinent statute.

Section 425.16 provides in relevant part at subdivision (c): "In any action subject to [a **[*10]** special motion to strike pursuant to] subdivision (b), a prevailing defendant on a special motion to strike *shall* be entitled to recover his or her attorney's fees and costs." (Italics added.)

b. *Trope held an attorney litigating in propria persona cannot recover attorney fees under section 1717.*

In *Trope*, our Supreme Court considered whether an attorney who chooses to litigate in propria persona rather than retain another attorney to represent him in an action to enforce a contract containing an attorney fee provision can nevertheless recover reasonable attorney's fees under *section 1717* as compensation for the time and effort expended and the professional business opportunities lost as a result. (*Trope v. Katz, supra, 11 Cal.4th at p. 277*.) *Trope* concluded "such an attorney litigant cannot recover such fees under *section 1717* . . . . Were we to construe the statute otherwise, we would in effect create two separate classes of pro se litigants - those who are attorneys and those who are not - and grant different rights and remedies to each. We find no support for such disparate treatment either in the language of *section 1717*, in the legislative **[*11]** policy underlying it, or in fairness and logic." (*Ibid*.) [6]

> 6 *Kravitz v. Superior Court (2001) 91 Cal.App.4th 1015*, which the trial court also cited in its ruling, held that pro se litigants, including pro se lawyers, who have prevailed on motions to compel responses to requests for production of documents, cannot recover attorney fees as a discovery sanction, but may recover reasonable expenses that were incurred, such as photocopying and computer-assisted legal research. (*Id., at pp. 1016- 1017*.)

c. *A defendant who appears in a SLAPP action in propria persona and later retains counsel who successfully brings a special motion to strike is entitled to recover attorney fees under section 425.16 to compensate the retained counsel.*

Dowling v. Zimmerman (2001) 85 Cal.App.4th 1400, was presented with "a matter of first impression, the issue of whether a SLAPP suit defendant, who appears in the action in propria persona and successfully moves for dismissal **[*12]** of the suit under *section 425.16* with the assistance of specially appearing retained counsel, is entitled to an award of reasonable attorney fees under the mandatory attorney fees provisions of subdivision (c) of that section." (*Id., at p. 1423*.)

Dowling held "in order to effectuate the purpose of the anti-SLAPP statute and the Legislature's intent to deter SLAPP suits, a defendant who appears in a SLAPP action in propria persona and later retains specially appearing counsel who successfully brings on behalf of the defendant a special motion to strike the complaint under *section 425.16*, is entitled to recover an award of reasonable attorney fees under the mandatory provisions of subdivision (c) of that section in order to compensate the retained counsel for the legal services provided in connection with both the special motion to strike, and the recovery of attorney fees and costs under that subdivision." (*Dowling, supra, 85 Cal.App.4th at p. 1425*.)

d. *Preliminary conclusion.*

The rule we draw from these cases is that an attorney defendant who successfully brings an anti-SLAPP motion in propria persona is not entitled to recover attorney **[*13]** fees for the time and effort expended in litigating the matter, but if an attorney defendant obtained legal representation and thereby incurred legal fees, those fees are recoverable under *section 425.16, subdivision (c)*.

We now turn to the particulars of the matter at hand.

2. *The trial court properly awarded the attorney defendants $ 13,537 in legal fees they incurred as a consequence of being represented by Van Duzer and Perlman.*

Although Royal contends the attorney defendants' self-representation precludes their recovery of any attorney fees, with respect to self-representation, the record is mixed. In addition to representing themselves, the attorney defendants also retained outside counsel.

As the trial court recognized, attorneys Perlman and Van Duzer were not involved in the underlying matter, were not defendants in the malicious prosecution suit, and were not associates of the attorney defendants. Rather, Perlman and Van Duzer were retained by the attorney defendants to assist in bringing the anti-SLAPP motion. Therefore, to the extent the attorney defendants incurred attorney fees as a consequence of being represented by Perlman and Van Duzer, those attorney fees **[*14]** are clearly recoverable and Royal's reliance on *Trope* is misplaced.

Accordingly, the trial court properly awarded the attorney defendants the attorney fees they reasonably incurred for the services of Perlman and Van Duzer.

3. *The trial court properly denied recovery of attorney fees for the services of Weiner and Matern.*

With respect to Weiner and Matern, the situation is entirely different. Both Weiner and Matern were named as defendants in the malicious prosecution action, and they spent many hours on the defense in connection with the anti-SLAPP motion, to the tune of $ 39,600 and $ 11,045, respectively.

Clearly, Weiner and Matern cannot recover for the time and effort they expended in representing themselves. The issue remains, however, whether the R&M firm and Vaynerov are entitled to recover for the work done by Weiner and Matern in representing them. The attorney defendants argue that R&M, as a corporation, could not appear for itself in the underlying action, and Vaynerov did not appear for herself - both appeared solely through counsel and should be able to recover therefor.

In this regard, *Trope* is instructive. There, the plaintiff was a law firm. The **[*15]** Trope firm, representing itself, successfully sued a former client for breach of contract to recover unpaid legal fees. Thereafter, the Trope firm moved for an award of attorney fees under the attorney fees provision of the contract. (*Trope, supra, 11 Cal.4th at pp. 278*.) Recovery of attorney fees by the Trope firm was denied on the ground an attorney who litigates in propria persona cannot recover reasonable attorney fees for the time and effort expended. (*Id., at p. 277*.)

By a parity of reasoning, the R&M firm cannot recover reasonable attorney fees for representing itself, through the persons of Matern and Weiner. As the trial court found, "Mr. Matern is a principal shareholder in the firm, and Mr. Weiner does virtually all of his work for this firm and thus is not an independent contractor." Therefore, to the extent the R&M firm was represented by Matern and Weiner, it was representing itself and cannot recover for such representation.

With respect to Vaynerov, the result is the same. [7] The record does not indicate that she *incurred* or *became liable* for any attorney fees. (*Trope, supra, 11 Cal.4th at p. 280*.) Moreover, **[*16]** as the trial court found, "there is no practical way to parse out fees related only to her defense as the issues are common to all the defendants."

> 7 Vaynerov ceased working at R&M in December 1999, six months before Royal filed its malicious prosecution action. The attorney defendants reached the following agreement concerning Vaynerov's defense: Counsel would represent Vaynerov on a contingent basis, contingent on the likelihood that reasonable attorney fees would be awarded to Vaynerov if she prevailed on the anti-SLAPP motion. In consideration of that agreement, counsel would not otherwise charge or hold Vaynerov personally liable for attorney fees in connection with the representation.

For these reasons, the trial court properly denied any recovery to any of the attorney defendants for the services of Matern and Weiner.

4. *Royal's challenge to award of $ 884.94 in costs is meritless.*

Finally, we address the trial court's award to the attorney defendants of "reasonable expenses" in the sum of $ **[*17]** 884.94.

a. *Proceedings.*

On March 22, 2001, the trial court granted the attorney defendants' special motion to strike. Notice thereof was served on March 30, 2001.

On May 29, 2001, the attorney defendants filed their motion for attorney fees pursuant to *section 425.16*, but did not request costs.

On October 25, 2001, the trial court awarded the moving parties reasonable attorney fees in the sum of $ 13,537.50 "plus reasonable expenses," gave them until November 5, 2001 to submit a list of claimed reasonable expenses, and gave Royal until November 13, 2001 to file an opposition.

On November 5, 2001, the attorney defendants filed a supplemental declaration seeking $ 2,184.04 as reasonable expenses. [8] Royal did not file any opposition thereto before the matter was submitted. On November 14, 2001, by minute order, the trial court awarded the attorney defendants $ 884.94 in costs. [9]

8 We construe the supplemental declaration as a memorandum of costs.

9 After the trial court issued its order, Royal filed a belated opposition, contending the request for costs was untimely.

[*18] b. *Royal waived the issue by failing to object below.*

Royal contends the time for requesting costs is governed by *California Rules of Court, rule 870*; [10] the attorney defendants did not comply with *rule 870* and thereby waived any right to claim costs, and therefore, the trial court erred in awarding costs.

10 All further rule references are to the California Rules of Court.

Rule 870(a), pertaining to prejudgment costs, states: "A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under *Code of Civil Procedure section 664.5* or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. The memorandum of costs shall be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct **[*19]** and were necessarily incurred in the case."

As indicated, Royal did not file a timely objection to the attorney defendants' memorandum of costs; Royal only filed an opposition after the trial court already had issued its ruling awarding costs. There is no jurisdictional defect in the trial court's award of costs to the attorney defendants because the time provisions relating to the filing of a memorandum of costs, while mandatory, are not jurisdictional. (*Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co. (1990) 223 Cal. App. 3d 924, 929, 272 Cal. Rptr. 899*.) Thus, by failing to make a proper objection below to the timeliness of the attorney defendants' memorandum of costs, Royal waived the issue and cannot be heard to complain for the first time on appeal.

DISPOSITION

The order is affirmed. The parties shall bear their respective costs on appeal.

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.