

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

S. B. BEACH PROPERTIES et al.,

Plaintiffs and Respondents,

v.

RICHARD A. BERTI et al,

Defendants and Appellants.

2d Civil No. B168950
(Super. Ct. No. 01110911)
(Santa Barbara County)

Defendants, believing they are the victims of a SLAPP suit (strategic lawsuit against public participation), file a special motion to strike the complaint and for attorney's fees and costs. (Code Civ. Proc., § 425.16.)¹ Plaintiffs voluntarily dismissed the suit before defendants filed the motion. The trial court determines the dismissal deprives it of jurisdiction to decide the motion. We reverse. The trial court has jurisdiction to decide questions of attorney's fees and costs.

FACTS

S. B. Beach Properties is a limited partnership. William Levy and Roy Millender, Jr., are the general partners (collectively S. B. Beach). Richard Berti, Marguerite Berti and Ilene Bruckner are limited partners (collectively Berti).

¹ All statutory references are to Code of Civil Procedure.

On January 2, 2003, S. B. Beach filed a complaint against Berti for breach of fiduciary duty, breach of contract and breach of the covenant of good faith and fair dealing. The complaint alleges, among other matters, that the partnership is attempting to obtain government approvals to develop partnership property on State Street in Santa Barbara; that Berti has solicited and encouraged others to oppose the partnership's development plans; and that Berti has unreasonably demanded and continues to demand audits of the partnership's records.

Berti answered, and on February 11, 2003, made an ex parte motion to increase the page limitation on a memorandum to strike the complaint as a SLAPP suit.

On February 20, 2003, S. B. Beach voluntarily dismissed its complaint without prejudice.

On February 21, 2003, Berti filed a notice of motion to strike under the anti-SLAPP statute with supporting points and authorities. The motion requested an award of attorney's fees and costs, among other relief. According to an affidavit submitted by Berti's attorney, the superior court clerk refused to set the matter for a hearing because the complaint had been dismissed. Later that same afternoon, when the attorney attempted to file additional supporting documents, the clerk refused to accept them on the same ground.

On March 11, 2003, Berti filed a notice of motion to recover attorney's fees and costs under the anti-SLAPP statute. After a hearing on the motion, the trial court determined that it lacked jurisdiction to decide the matter because the complaint had been dismissed. The court declined to consider the merits.

DISCUSSION

The anti-SLAPP statute was enacted from our Legislature's concern about lawsuits brought primarily to chill a person's right to free speech and to petition the government for the redress of grievances. (§ 425.16, subd. (a).) A cause of action arising from an act in furtherance of the right to petition or free speech is subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of prevailing on the claim. (*Id.* at subd. (b)(1).) The defendant who prevails

on a special motion to strike is entitled to an award of attorney's fees and costs. (*Id.* at subd. (c).)

S. B. Beach argues it has an absolute right to dismiss its complaint. (Citing § 581, subd. (b)((1).) It claims that after the plaintiff dismisses its complaint, the court loses jurisdiction to enter further orders, except for fee and cost requests. (Citing *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784.) It is settled, however, that a dismissal of the complaint after the anti-SLAPP motion is filed, but prior to a hearing on the motion, does not deprive the court of jurisdiction. (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218-219; *Liu v. Moore* (1999) 69 Cal.App.4th 745, 751-753.) S. B. Beach seeks to distinguish those cases on the ground that here it dismissed its complaint before the motion was filed.

But the distinction S. B. Beach attempts to draw is not significant. If a dismissal prior to the hearing on the motion does not deprive the court of jurisdiction, there is no reason why a dismissal prior to filing the motion should.

S. B. Beach argues that the express language of section 425.16, subdivision (c), prohibits an award of fees when the complaint has been dismissed. It points out that the subdivision provides for an award of fees to "a prevailing defendant on a special motion to strike" (*Ibid.*) S. B. Beach reasons that because the complaint had already been dismissed, it is not possible for Berti to prevail on a motion to strike. Of course, that same logic should lead to the conclusion that a court loses jurisdiction anytime the complaint is dismissed prior to a hearing on the motion. Yet, the cases hold that the court retains jurisdiction. The answer to the apparent dilemma is in section 425.16, subdivision (a).

Section 425.16, subdivision (a), provides that "this section shall be construed broadly" to the end of encouraging participation in matters of public significance and to prevent such participation from being chilled through abuse of the judicial process.

The filing and service of a complaint demanding substantial damages can inhibit participation in matters of public significance. Once served, the typical defendant

must seek counsel to represent him. Counsel will no doubt inform him of the substantial fees and costs involved in defending the action. Visions of financial loss and public mortification may loom like a horrific specter before defendant's eyes. The likelihood of answering mind-numbing interrogatories, and enduring wearisome hours of contentious depositions can leave the most stalwart defendant dispirited. And this is just the prelude to the trial. But even if the complaint is dismissed relatively soon after service, the defendant is unlikely to forget the trauma. He will be reluctant to participate further in the public debate, and his example may deter others from participating. The purpose of the anti-SLAPP statute will not be achieved if an offending plaintiff can avoid sanctions simply by dismissing his complaint before the defendant files his motion.

S. B. Beach argues that the dismissal of its complaint makes Berti's anti-SLAPP motion hypothetical. Indeed, dismissal makes the motion to strike moot. But the striking of the complaint is only one of the remedies available under the anti-SLAPP statute. Even after the complaint is dismissed, there remains the question of whether the defendant is entitled to fees and costs, and if so, how much should be awarded. (See *Liu v. Moore, supra*, 69 Cal.App.4th at pp. 751-753.)

S. B. Beach fears that if an anti-SLAPP motion may be filed after an action is voluntarily dismissed, every dismissed action, no matter how meritorious, will be followed by an anti-SLAPP motion. As a result, plaintiffs will be reluctant to enter voluntary dismissals. That fear is unfounded. The defendant who files a frivolous anti-SLAPP motion is subject to sanctions in the form of attorney's fees and costs. (§§ 425.16, subd. (c); 128.5.)

S. B. Beach argues Berti's motion was untimely. It points out that section 425.16, subdivision (f), requires the motion to be filed within 60 days of service of the complaint. The motion the court heard was filed 68 days after service, on March 11, 2003.

But Berti originally filed his anti-SLAPP motion well within the 60-day period, on February 21, 2003. According to an affidavit by Berti's attorney, the clerk would not calendar the original motion because the complaint had been dismissed. Berti

should not be prejudiced by the clerk's refusal. If on remand the trial court finds Berti's attorney's declaration to be true, the court should treat the motion as timely.

Finally, the parties seek to argue the merits of the motion in their briefs on appeal. But the trial court, having decided it lacked jurisdiction, never reached the merits. The appropriate procedure is to have the trial court decide the merits in the first instance.

The judgment is reversed and remanded for further proceedings on the timeliness and merits. Costs on appeal are awarded to Berti.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Thomas P. Anderle, Judge
Superior Court County of Santa Barbara

Davis Wright Tremaine, Kelli L. Sager, Sonja R. West, Gary L. Bostwick,
Foley & Bezek and Peter J. Bezek for Defendants and Appellants.

Cappello & Noel, A. Barry Cappello, T. A. Thielemann and Christoph T.
Nettesheim for Plaintiffs and Respondents.