NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MARIO DELIS, Plaintiff and Appellant, v. JEFFREY D. THORN, et al., Defendants and Respondents.	F084879 (Super. Ct. No. BCV-21-102152) **OPINION**

APPEAL from an order of the Superior Court of Kern County. Thomas S. Clark, Judge.

Rushing McCarl, John M. Rushing, Ryan P. McCarl, and Davit Avagyan, for Plaintiff and Appellant.

Lynch and Lynch, Craig M. Lynch; Heller & Edwards and Lawrence E. Heller for Defendants and Respondents.

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Mario Delis sued his business partner Jeffrey Thorn. Thorn, and businesses he owned,[1] cross-complained.

[1] For simplicity, we refer to respondents collectively as Thorn.

Delis filed an anti-SLAPP motion seeking to strike Thorn's cross-complaint. (Code Civ. Proc.,[2] § 425.16.) After Delis prevailed in part, he filed a separate motion for attorney fees. (*Ibid.*)

The trial court awarded Delis less attorney fees than Delis had requested, so he filed this appeal. Thorn subsequently moved[3] to dismiss the appeal, and this court issued an order deferring a ruling "pending consideration of the appeal on its merits."

After further consideration, we conclude the appeal is premature. Accordingly, this court lacks jurisdiction and we will dismiss the appeal in the disposition.

BACKGROUND

"Delis filed a complaint against … Thorn and several of Thorn's business entities alleging, among other things, that Delis and Thorn are equal partners in a … business but … Thorn has deprived Delis of his rightful share of that business."[4] Thorn filed a cross-complaint alleging five causes of action—four involving breaches of contract and one seeking declaratory relief.

Delis moved to strike all five of Thorn's claims pursuant to section 425.16. The trial court granted the motion in part, striking the four breach causes, but denied it as to declaratory relief.

After the ruling, Delis moved for attorney fees and costs. Although he sought more than $85,000, the trial court ultimately awarded only $15,500. Delis's original complaint, and Thorn's claim for declaratory relief, remained pending when this appeal was filed.

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[2] Undesignated statutory references are to the Code of Civil Procedure.

[3] Along with the motion, Thorn filed a request to judicially notice an unpublished decision from the Fourth District Court of Appeal. We deny the request in the disposition.

[4] This synopsis is borrowed from Delis's anti-SLAPP motion. Delis's original complaint is not in the record.

DISCUSSION

Thorn argues this appeal is from a "non-appealable" order and we should accordingly dismiss. Delis contends the order is collateral and thus appealable pursuant to the collateral order doctrine. Alternatively, he asserts " '[a]n appeal may be taken from an order awarding fees for a successful anti-SLAPP motion.' " Thorn has the better argument.

A. Governing Law – The Order is Not Appealable

"The existence of an appealable judgment is a jurisdictional prerequisite to an appeal. A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by … section 904.1." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.)

"The right to appeal in California is generally governed by the 'one final judgment' rule, under which most interlocutory orders are not appealable." (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 754 (*Baycol*).) "Under the one final judgment rule, ' "an appeal may be taken only from the final judgment in an entire action." ' [Citation.] ' "The theory [behind the rule] is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case." ' " (*Id.* at p. 756.) "The one final judgment rule is 'a fundamental principle of appellate practice ….' " (*Ibid.*)

Section 904.1, which codifies the one final judgment rule, does not, however, authorize an immediate appeal from an order awarding attorney fees pursuant to section 425.16. Nor does any other statute. (See *Doe v. Luster* (2006) 145 Cal.App.4th 139, 144-150 (*Luster*) ["The plain meaning of the actual words used in section 425.16, subdivision (i)—'an order granting or denying a special motion to strike'—manifests the Legislature's intent to limit this exception to the one final judgment rule to the court's ruling on the special motion to strike itself, not to make related, but ancillary, rulings or orders separately appealable."]; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751,

781 (*Colton*) ["section 904.1 does not include an award of attorney's fees among the exception to the one final judgment rule."].) Put simply, it is not appealable by statute.

One exception to the one final judgment rule is the collateral order doctrine. An order is collateral and immediately appealable if it involves "some distinct issue in the case" and "direct[s] the payment of money *by appellant* or the performance of an act by or against him." (*Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119 (*Sjoberg*), emphasis added.) Recently, the Second District Court of Appeal reiterated a "caution[] against an expansive interpretation of the collateral order doctrine." (*Dr. V Productions, Inc. v. Rey* (2021) 68 Cal.App.5th 793, 799 (*Dr. V*), quoting *Conservatorship of Rich* (1996) 46 Cal.App.4th 1233, 1235.)

We heed the caution against an expansive interpretation of the collateral order doctrine. Which orders are appealable and whether judicial resources are efficiently utilized are initially "question[s] for the Legislature …." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 195-196.) Because the order in this case does not involve "the payment of money *by appellant* or the performance of an act by or against him," it is not appealable as a collateral order.[5] (*Sjoberg, supra,* 33 Cal.2d at p. 119, emphasis added.) Should the Legislature wish to make an interim order for attorney fees in anti-SLAPP cases appealable, it may; we decline to do so.

B. Cases Suggesting a Right to Appeal

"In general, the party prevailing on a special motion to strike may seek an attorney fees award through three different avenues: simultaneously with litigating the special motion to strike, by a subsequent noticed motion, or as part of a cost memorandum at the conclusion of the litigation." (*Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 992.) Where, as here, the appeal involves "a separate attorney fee order," it "should not be

[5] The performance of an act, in our view, must mean something other than the payment of money.

heard on interlocutory appeal ...." (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 274 (*Baharian*); *Luster, supra,* 145 Cal.App.4th at p. 150 ["If the motion for fees under section 425.16, subdivision (c), is filed after the trial court rules on the special motion to strike—as it was in the case at bar—the order awarding or denying those fees is not an 'order granting or denying a special motion to strike'; and no plausible argument can be made that such an order is immediately appealable under section 425.16, subdivision (i)."].)

Nonetheless, our order deferring consideration of the motion to dismiss cited *Baharian* as follows: "it would be absurd to defer the issue of attorney fees until a future date, resulting in the probable waste of judicial resources." (*Baharian, supra,* 189 Cal.App.4th at p. 275.) The full quote, however, reads:

> "In cases where, as here, the issue of whether the anti-SLAPP motion should have been granted is properly before the appellate court, it would be absurd to defer the issue of attorney fees until a future date, resulting in the probable waste of judicial resources. When the first issue is properly raised, appellate jurisdiction over both issues under section 425.16, subdivision (i) is proper." (*Baharian, supra,* 189 Cal.App.4th at p. 275.)

This case is different—the propriety of whether the anti-SLAPP motion should have been granted is not at issue.[6]

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[6] As Delis points out, Thorn did originally appeal the anti-SLAPP ruling but later abandoned the appeal and this court granted a dismissal. (Case No. F084130.) Delis asks us to judicially notice those facts, based on the record in that case. We grant Delis's request in the disposition.

Delis also suggests the fact Thorn dismissed the appeal "should not ... affect[]" appealability. We believe the suggestion misses the mark.

Where the party *losing* the anti-SLAPP motion is also ordered to pay attorney fees, it makes sense both issues are simultaneously reviewable. (*Baharian, supra,* 189 Cal.App.4th at p. 275.) The converse—where the party prevailing on the motion is awarded fees—is not the same situation. In the latter situation, the attorney fees award should be added to the judgment at the case's conclusion. (§§ 685.090, subd. (a) & 1033.5, subd. (a)(10).) It then becomes appealable under section 904.1. (See *Dr. V,*

Next, in *Colton,* an "attorney fee award" "growing out of [an] anti-SLAPP motion" *was* found appealable because it was collateral and "involve[d] the payment of money by the appellant …." (*Colton, supra,* 206 Cal.App.4th at pp. 781-782.)[7] Again, this case is different—it does not involve the payment of money *by the appellant*: Delis.

Finally, a successful anti-SLAPP motion oftentimes leaves nothing to litigate. "When the trial court issues an appealable order akin to a final judgment, a party may appeal from a subsequent order granting or denying a request for an award of attorney fees and costs as an 'order made after a judgment'…." (*Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 251.)

There is no final judgment in this case.[8] Both parties have claims remaining to litigate. When the judgment is final, Delis may appeal and raise the attorney fees issue. (Cf. *Dr. V, supra,* 68 Cal.App.5th at p. 799 ["Appellant has an adequate remedy on appeal, just not at this time."].)

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supra, 68 Cal.App.5th at pp. 797-799 [right to appeal "not always reciprocal [between] the parties"].)

Notably, Thorn requested to dismiss appeal F084130 nearly nine full months before filing the motion to dismiss in this appeal. There appears no gamesmanship to the prior dismissal. We also think it makes little sense to suggest that, if one party files a statutory appeal, a *different* party may appeal related issues *not authorized* by statute.

[7] The appellate court in *Apex LLC v. Korusfood.com* likewise found an attorney fees award directly appealable as a collateral order. (*Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1015-1016.) Its posture, however, is identical to *Colton, supra,* in that it was the *appellant* ordered *to pay* the fee.

[8] Delis also cites to *Krikorian Premiere Theaters, LLC v. Westminster Central, LLC* (2011) 193 Cal.App.4th 1075. That case, and its progeny, are inapposite because they largely involve "the unique nature of an award of costs *on appeal*" where "the relevant final judgment is the judgment of the *Court of Appeal.*" (*Ibid.*, emphasis in original.) The anti-SLAPP ruling in this case is not a final judgment within the scope of section 904.1.

DISPOSITION

Delis's request for judicial notice, filed on May 5, 2023, is granted. Thorn's request for judicial notice, filed on March 22, 2023, is denied.

The motion to dismiss is granted and the appeal is dismissed. Costs are awarded to respondents.

SNAUFFER, J.

WE CONCUR:

PEÑA, Acting P. J.

MEEHAN, J.