Filed 8/1/06

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THOMAS WITTE, Plaintiff and Appellant, v. JAMES KAUFMAN et al., Defendants and Respondents.	C049472 (Super. Ct. No. 04AS03863)

APPEAL from a judgment of the Superior Court of Sacramento County, Loren E. McMaster, Judge. Reversed in part and affirmed in part.

Thomas M. Witte, in pro. per., for Plaintiff and Appellant.

Knox, Lemmon and Anapolsky, Thomas S. Knox, and Glen C. Hansen for Defendants and Respondents Knox, Lemmon & Anapolsky.

John E. Stefanki; and James J. Kaufman for Defendant and Respondent James Kaufman.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Parts I, II, III, IV, V, VII, and VIII of the Discussion.

Plaintiff appeals from several orders of the trial court granting defendants' special motions to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16; further undesignated section references are to the Code of Civil Procedure) and awarding defendants attorney fees. We conclude the court properly granted the anti-SLAPP motions but erred in the award of attorney fees. We reverse in part and remand for reconsideration of the motions for attorney fees.

FACTS AND PROCEEDINGS

Marven Stroh hired the law firm of Knox, Lemmon & Anapolsky (KLA) to represent him in a lawsuit against his brother, Douglas Stroh, for dissolution of their business partnership. On August 31, 2001, KLA filed a complaint on behalf of Marven Stroh against Douglas Stroh in Sacramento County Superior Court, case No. 01AS05353 (*Stroh v. Stroh*). Douglas Stroh hired attorney James Kaufman to represent him in the action.

In April 2003, KLA withdrew as attorney of record for Marven Stroh due to nonpayment of fees. On April 18, 2003, KLA filed suit against Marven Stroh in Sacramento County Superior Court, case No. 03AS02197 (*KLA v. Stroh*), seeking unpaid legal fees of $46,849.08. Marven Stroh hired plaintiff Thomas Witte to represent him in both *KLA v. Stroh* and *Stroh v. Stroh*. On June 2, 2003, plaintiff filed an answer and cross-complaint on behalf of Marven Stroh in *KLA v. Stroh*. On June 4, 2003, KLA obtained a prejudgment writ of attachment on several assets of

the Stroh brothers partnership, including the Cozy Villa Mobile Home Park (Cozy Villa).

Trial in *Stroh v. Stroh* commenced on October 7, 2003. On February 4, 2004, Judge Steven Rodda issued a tentative decision directing that the partnership assets be sold and the proceeds divided between the Stroh brothers. James Sullivan of Sullivan Group Commercial Real Estate was assigned to handle the sale of Cozy Villa. An interlocutory judgment to this effect was entered on March 30, 2004.

On May 18, 2004, the Stroh brothers partnership entered into an agreement to sell Cozy Villa to Frans Roodenburg. Escrow for the sale was scheduled to close on June 16, 2004.

On June 2, 2004, *KLA v. Stroh* was arbitrated before Robert Biegler. On June 8, 2004, Biegler issued a decision awarding KLA $39,527.47 on its complaint and awarding Marven Stroh nothing on his cross-complaint. On June 10, 2004, plaintiff informed Marven Stroh of the arbitration award.

On June 11, 2004, KLA and plaintiff signed an agreement providing for the release of KLA's lien on Cozy Villa and the deposit of $51,846.14 of the proceeds from the sale of Cozy Villa in a trust account on behalf of KLA, plaintiff and Marven Stroh to be retained until *KLA v. Stroh* was resolved.

Also on June 11, Marven Stroh informed plaintiff he wanted to accept the arbitration award and directed him to contact KLA and Sullivan to facilitate settlement of the matter in order for the sale of Cozy Villa to close as scheduled. Plaintiff refused to comply, explaining that he believed he could negotiate a

reduction of the arbitration award. Stroh insisted that plaintiff settle the matter for the amount of the award. When plaintiff again refused, Stroh informed him he was fired.

Later that day, Marven Stroh faxed plaintiff a note offering to pay him $15,000 for his services on condition that he obtain KLA's agreement to the arbitration award. The note also complained about the quality of plaintiff's services and threatened that, if plaintiff did not accept the $15,000, Stroh would obtain another attorney to litigate the matter. In closing, Stroh stated: "Take my offer of $15,000, get [KLA] to agree, and our attorney-client relationship is terminated, whether you agree or not."

By June 14, 2004, Marven Stroh had heard nothing more from plaintiff. He contacted Sullivan and asked him to inform KLA that Stroh was willing to pay the amount of the arbitration award in order to close escrow on the sale of Cozy Villa. Sullivan called KLA and spoke with attorney Glen Hansen. Sullivan told Hansen he was representing Marven Stroh in the sale of Cozy Villa and that Stroh requested that KLA accept the arbitration award. Hansen informed Sullivan he could not deal with Stroh or Sullivan directly because plaintiff represented Stroh.

Sullivan informed Stroh that KLA would not deal with him directly because he was represented by counsel. Stroh faxed plaintiff a note stating: "This fax is your notification that I am terminating your services as my attorney as-of June 14, 2004. [¶] Please prepare a substitution of attorney right away so

that close of Cozy Villa escrow will not be delayed. [¶] I would like to pick-up my files on Wednesday afternoon, June 16, 2004. [¶] Please confirm and [*sic*] the time I can pick-up the files."

Also on June 14, Stroh faxed KLA a note explaining that he had terminated plaintiff as his attorney and was representing himself. Stroh informed KLA he was willing to accept the arbitration award and requested an immediate response in order to facilitate the property sale by June 16. Stroh likewise informed Kaufman that he had fired plaintiff in connection with *Stroh v. Stroh*.

The next day, June 15, 2004, Stroh spoke with John Lemmon of KLA and informed Lemmon that he had fired plaintiff. Lemmon prepared a substitution of attorney form for Stroh and informed Stroh he needed plaintiff's signature on the form before Stroh could dismiss his cross-complaint against KLA.

That same day, plaintiff sent Marven Stroh a letter stating: "I do not consent to my substituting out of either case that I am the attorney of record for you. I do not believe that [KLA] can communicate with you directly as long as I am attorney of record, since it would be in violation of the Rules of Professional Conduct." Plaintiff explained how Stroh's direct contact with KLA had jeopardized plaintiff's strategy to negotiate a reduction of the arbitration award. Plaintiff further asserted that he is entitled to attorney fees from the settlement proceeds and demanded $6,159.34. Plaintiff stated: "I have prepared a lien for at least that amount and will demand

payment of that amount from the proceeds from the sale of Cozy Villa."

The following day, Marven Stroh sent plaintiff a note indicating the attorney-client relationship had ended effective June 11, 2004, and requesting that plaintiff send him a substitution of attorney form and contact him immediately in order to arrange for the transfer of files.

Marvin Stroh entered into a settlement agreement with KLA effective June 15, 2004. The agreement provided for Stroh to pay KLA $39,527.47 on or before June 17, 2004, and for KLA and Stroh to dismiss their respective complaint and cross-complaint.

Escrow on the sale of Cozy Villa closed on June 16 as scheduled. KLA received a check from Stroh in the amount of $39,527.47.

On July 8, 2004, KLA received a pleading entitled "Rejection of Arbitrator's Award and Request for Trial De Novo" signed by plaintiff on behalf of Marven Stroh. Marven Stroh had not authorized plaintiff to reject the arbitration award or request trial de novo.

On July 13, 2004, Marven Stroh spoke with John Lemmon about plaintiff's refusal to sign a substitution of attorney form or release Stroh's files. He asked Lemmon to contact plaintiff and convince him to comply. Later that day, Lemmon called plaintiff and left a message asking him to sign the substitution form. Plaintiff never returned the call. On August 31, 2004, plaintiff signed the substitution of attorney form.

On September 27, 2004, plaintiff filed this action against Marven Stroh, Kaufman and KLA. The first and second causes of action allege breach of contract and fraud by Stroh. The third cause of action alleges interference with contract by Kaufman, and the fourth cause of action alleges interference with contract by KLA. In the third and fourth causes of action, plaintiff alleges Kaufman and KLA interfered with plaintiff's contract with Stroh by communicating with Stroh while plaintiff still represented him and by advising Stroh that he did not have to pay plaintiff from the proceeds of the sale of partnership assets.

On October 28, 2004, KLA and Kaufman filed special motions to strike the third and fourth causes of action under section 425.16. The trial court granted the motions, concluding plaintiff failed to establish a probability of prevailing on the merits against either defendant. The court also awarded each defendant attorney fees, the amounts to be determined by subsequent motion. The court thereafter awarded Kaufman attorney fees and costs in the amount of $7,160 and awarded KLA attorney fees and costs in the amount of $13,665.

On February 8, 2005, plaintiff filed a motion for new trial, which the trial court denied on March 3, 2005.

Plaintiff appeals the orders granting defendants' special motions to strike and the subsequent orders awarding attorney fees.

DISCUSSION

I

Motion to Dismiss

Kaufman has filed a motion to dismiss this appeal and for sanctions, asserting the appeal is totally without merit and was filed solely for the purpose of delay. Appellate courts have inherent powers to dismiss any appeal that is filed to delay, vex, or harass the other party or the court, or is based on wholly frivolous arguments. (*Ferguson v. Keays* (1971) 4 Cal.3d 649, 658.) However, this is a power that should not be used except in the clearest case. (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1318.) In this matter, as we shall explain, plaintiff's appeal is not totally without merit. Kaufman's motion to dismiss is therefore denied. We shall address Kaufman's request for sanctions later in the opinion.

II

Introduction

Due to a "disturbing increase" in lawsuits brought primarily for the purpose of chilling the valid exercise of free speech and petition rights, the so-called strategic lawsuit against public participation (SLAPP), The Legislature enacted section 425.16, the anti-SLAPP statute. (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1159.) It 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." (§ 425.16, subd. (b)(1).)

Section 425.16 presents a two-step process for determining whether a cause of action is subject to a special motion to strike. First, the court determines if the challenged cause of action arises from protected activity. If the defendant makes such a showing, the burden shifts to the plaintiff to establish, with admissible evidence, a reasonable probability of prevailing on the merits. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) The trial court's ruling on these issues is subject to independent appellate review. (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807.)

III

Standing

Plaintiff contends as a threshold matter that Kaufman has no standing to file a motion under the anti-SLAPP statute, because any acts done by Kaufman in connection with *Stroh v. Stroh* were not in furtherance of *Kaufman's* right of petition but that of Kaufman's client, Douglas Stroh. We disagree.

Attorneys have consistently been permitted to pursue anti-SLAPP motions in actions stemming from lawsuits filed on behalf of their clients or statements made in connection with those lawsuits. (See, e.g., *Zamos v. Stroud* (2004) 32 Cal.4th 958; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*

(2005) 133 Cal.App.4th 658; *Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495; *White v. Lieberman* (2002) 103 Cal.App.4th 210; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400.) In *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, the Supreme Court applied section 425.16 to a tenant counseling service. The court said: "Contrary to plaintiffs' implied suggestion, the statute does not require that a defendant moving to strike under section 425.16 demonstrate that its protected statements or writings were made *on its own behalf* (rather than, for example, on behalf of its clients or the general public)." (*Id.* at p. 1116.) In *White v. Lieberman*, *supra*, at pages 220-221, the Court of Appeal concluded this same reasoning applies to an attorney acting on behalf of his or her client. (See also *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 629.)

IV

Protected Activity

"It is beyond dispute the filing of a complaint is an exercise of the constitutional right of petition and falls under section 425.16. [Citation.] Section 425.16 may also apply to conduct that relates to such litigation. [Citation.] Courts have adopted a 'fairly expansive view' of litigation-related conduct to which section 425.16 applies." (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1125, review pending Apr. 28, 2006, S142990.)

The conduct at the heart of the third and fourth causes of action of plaintiff's complaint involves litigation-related communications between Stroh and KLA and between Stroh and Kaufman in an effort to resolve *Stroh v. Stroh* and *KLA v. Stroh*. Plaintiff contends his claims do not arise out of protected activity, because they are not based on the *content* of any communications between defendants and Stroh but on the *conduct* of defendants in communicating with a party represented by counsel.

Plaintiff cites as support *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624 (*Jespersen*), and *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179 (*Benasra*). In *Jespersen*, former clients sued their attorneys for malpractice and the Court of Appeal concluded the cause of action was not based on any act in furtherance of the client's right of petition but on a failure to act, inasmuch as the client's case was dismissed because the attorneys failed to comply with discovery. (*Jespersen*, *supra*, at p. 631.)

In *Benasra*, the Court of Appeal concluded the anti-SLAPP statute did not apply to a claim that an attorney breached a duty of loyalty to a former client. The plaintiff's claim was based on a violation of rule 3-310(E) of the Rules of Professional Conduct, which prohibits an attorney from accepting representation of an interest adverse to that of a former client where, by virtue of the earlier representation, the attorney obtained confidential information material to the new matter. (*Benasra*, *supra*, 123 Cal.App.4th at pp. 1186-1187.) The court

rejected the attorney's claim that the lawsuit was based on the use of confidential information in the new litigation. According to the court, in the final analysis, the attorney's misdeed was in placing himself in a position to disclose confidential information by accepting representation of an adverse interest, not the actual disclosure of confidential information. (*Id.* at p. 1188.)

The foregoing cases do not assist plaintiff. Both were based on conduct, or lack thereof, distinct from any statements made by the defendants. Here, notwithstanding plaintiff's assertions to the contrary, his claims in the third and fourth causes of action for intentional interference with contract stem from the alleged content of the communications between defendants and Stroh. Plaintiff contends those communications, whatever they were, induced Stroh to breach his contract with plaintiff. For example, plaintiff alleges Kaufman "advised Marven Stroh that he did not have to pay [plaintiff] from the proceeds from the sale of real property because [plaintiff] did not have a valid lien." Plaintiff alleges KLA "entered into a settlement with Marven Stroh of a lien paid from the proceeds of a sale of real property without the consent of [plaintiff]." Obviously, if the content of the statements made by KLA or Kaufman had no potential for interfering with the Witte-Stroh relationship, such as comments about the weather, they would have no bearing on plaintiff's interference claim.

Plaintiff contends the communications of KLA and Kaufman are not protected because they violated sections 284 and 285.

Section 284 reads: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: [¶] 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; [¶] 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." Section 285 provides that, until receipt of written notice of a substitution as provided in section 284, the adverse party "must recognize the former attorney." Plaintiff argues that because he did not consent to the substitution, it was not effective under section 284, and defendants violated section 285 by not continuing to recognize him as attorney of record. Plaintiff further contends the communications violated rule 2-100(A) of the Rules of Professional Conduct, which prohibits communication directly with a party represented by an attorney.

Plaintiff's arguments are misplaced. Under the first prong of the anti-SLAPP analysis, we ask whether the conduct at the heart of the claim arose from protected activity. That prong is satisfied if, as in this case, the conduct was directly related to a matter pending in court. Where it is alleged the conduct was illegal, and such illegality is not conceded, that issue must be considered in the second prong of the anti-SLAPP analysis, the probability of the plaintiff succeeding on the merits. (See *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245-1246; *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568,

583-584; *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1368, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68.)

Finally, plaintiff contends his interference with contract claim against KLA is not a SLAPP action, because there is no potential for this lawsuit to adversely impact KLA's right to petition. According to plaintiff, his cause of action against KLA "had no effect on KLA's right of petition in the KLA v. Stroh action since that action had already been dismissed." Plaintiff argues KLA failed to establish how its right to petition or free speech could have been chilled under these circumstances.

This argument is specious. The question under the anti-SLAPP statute is whether the current lawsuit stems from protected activity. It makes no difference that the protected activity was completed. A moving defendant need not demonstrate the plaintiff intended to chill petition or free speech rights or that the action has that effect. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) If a suit is permitted based on past protected conduct, future protected conduct would be chilled. (See *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1016.)

V

Probability of Prevailing

Once the defendant establishes the case involves an exercise of the right of petition or free speech, the burden shifts to the plaintiff to establish a probability of

prevailing. To meet this burden, the 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.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) "The burden on the plaintiff is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment." (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.) The plaintiff need only establish the challenged cause of action has "minimal merit." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 94; *id*. at pp. 93-94.)

First, we address plaintiff's contentions regarding sections 284 and 285 and rule 2-100(A) of the Rules of Professional Conduct. As explained above, plaintiff argues defendants violated those provisions by communicating with Stroh at a time when plaintiff had not agreed to being substituted out of the case. However, plaintiff's claims in the third and fourth causes of action are not based on a violation of these provisions but on interference with his contractual relationship

with Marven Stroh. Thus, even if defendants violated these provisions by communicating with Stroh before receiving a substitution form signed by plaintiff, plaintiff must still establish such communications interfered with that contractual relationship. As we shall explain, he cannot do so.

"[T]he tort of interference with contract is merely a species of the broader tort of interference with prospective economic advantage." (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 823, disapproved on other grounds in *Della Pena v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393, fn. 5.) "In the attorney-client context, the elements of intentional interference with prospective economic advantage are: (1) an economic relationship between attorney and client containing the probability of future economic benefit to the attorney, (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) damages to the plaintiff proximately caused by the acts of the defendant. [Citation.] Confined to an action for interference with a contractual relationship, the elements are substantially similar. The defendant must have had knowledge of the contract and must have intended to induce a breach thereof." (*Frazier, Dame, Doherty, Parrish and Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink and Bell* (1977) 70 Cal.App.3d 331, 338.)

Although a client has an absolute right to discharge his or her attorney at any time, with or without cause (*Fracasse v.*

Brent (1972) 6 Cal.3d 784, 790), it is tortious for another, especially an attorney, to induce the exercise of this power (*Frazier, Dame, Doherty, Parrish and Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink and Bell*, *supra*, 70 Cal.App.3d at p. 339).

Plaintiff contends he set forth the following facts to support his interference with contract claim against Kaufman: "[Plaintiff] informed Kaufman that he ([plaintiff]) expected to get paid his attorney's fees owed by Marven Stroh pursuant to his contract that created a lien on the case [plaintiff] litigated on behalf of Marven; Kaufman communicated with Stroh for the sole purpose of ensuring that the escrow would close so that Kaufman would be paid for legal services from the sale of the real property; that Kaufman informed the court and [plaintiff] that he doubted the validity of [plaintiff]'s lien for legal services and informed Marven Stroh of his belief; and that Kaufman communicated with Marven and interfered with the attorney-client relationship between Marven and [plaintiff] for Kaufman's own economic gain and to the economic detriment of [plaintiff]."

Plaintiff cites no evidence to support any of the foregoing assertions of fact. His only citation to the record is to a portion of his memorandum in opposition to motion to strike. Furthermore, the facts on which plaintiff relies do not establish an interference with the plaintiff-Stroh contract. Even if Kaufman communicated with Stroh in order to insure close of escrow on the Cozy Villa sale so that Kaufman would be paid

and even if Kaufman informed Stroh he doubted plaintiff's lien was enforceable, this all occurred after Stroh terminated his contractual relationship with plaintiff. The undisputed evidence is that Stroh discharged plaintiff as his attorney at least by June 14, 2004, following plaintiff's refusal to comply with Stroh's wishes to accept the arbitration award in *KLA v. Stroh*. It was not until Stroh informed Kaufman of such discharge that Kaufman had any dealings with Stroh directly. Even then, Kaufman denies telling Stroh that he was not required to pay plaintiff. Plaintiff cites nothing other than his speculation to refute this evidence.

As for KLA, plaintiff contends he submitted the following evidence: "KLA negotiated a settlement directly with Marven Stroh that was favorable to KLA. On Friday, June 11, 2004, KLA and [plaintiff] executed a stipulation that would allow the KLA lien funds from the proceeds from the sale of the real property to be placed in a trust account pending the resolution of the KLA v. Stroh action. [Citation.] KLA then communicated with Marven directly on Monday, June 14, 2004 and settled the case on June 15. [Citation.] KLA had been communicating with [plaintiff] through Friday, June 11 and then failed to communicate with [plaintiff] concerning the ex parte Stroh communication on Monday, June 14. The reasonable inference is that KLA wanted to negotiate directly with Marven since it would obtain a result better than had been agreed upon on June 11 with [plaintiff]. KLA's interference with [plaintiff]'s contract

with Marven was driven by KLA's economic motive in getting paid from the sale of the real property."

Again, plaintiff cites as support his memorandum in opposition to the motion to strike. He also cites a copy of the stipulation entered into between plaintiff and KLA on June 11. However, that stipulation merely provided that KLA would release its lien on Cozy Villa in exchange for the deposit of $51,846.14 from the proceeds of the sale of that property into a trust account to remain until resolution of *KLA v. Stroh*. It provides no basis for an inference that KLA wanted to negotiate directly with Stroh in order to obtain a better deal. Finally, plaintiff cites excerpts from the declaration of John Lemmon, a KLA attorney. Lemmon states that Sullivan contacted KLA on June 14 to discuss settlement of *KLA v. Stroh* and release of the lien but KLA told Sullivan it could not deal directly with Stroh. Thereafter, KLA received a faxed letter from Stroh indicating plaintiff had been discharged. Lemmon thereafter discussed settlement with Sullivan. The next day, Lemmon further discussed settlement with Stroh. This evidence does not assist plaintiff.

Plaintiff cites nothing to refute the evidence produced by KLA that it engaged in no discussions with Stroh until after being informed that Stroh had discharged plaintiff as his attorney. Even if KLA preferred dealing with Stroh rather than plaintiff, and therefore had a motive for getting plaintiff out of the picture, there is no evidence to support even an inference that KLA did anything to facilitate Stroh's actions.

All the evidence suggests Stroh discharged plaintiff as his attorney because plaintiff refused to comply with Stroh's wishes regarding resolution of the pending litigation and neither KLA nor Kaufman had any dealings with Stroh until after such discharge. Plaintiff therefore failed to establish a probability of prevailing on his interference with contract claims, and the trial court correctly granted defendants' motions to strike.

VI

Attorney Fees

Section 425.16, subdivision (c), provides for an award of attorney fees to a prevailing defendant on an anti-SLAPP motion to strike. The trial court awarded Kaufman attorney fees and costs in the amount of $7,160 and awarded KLA attorney fees and costs of $13,665. Plaintiff contends neither defendant is entitled to attorney fees, because they represented themselves in the litigation and, therefore, did not incur attorney fees. We agree in part.

In *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*), the state high court concluded a law firm that represented itself in litigation against its client for breach of contract was not entitled to attorney fees. Although the contract between the parties contained a provision for attorney fees, and Civil Code section 1717 permits the recovery of reasonable attorney fees incurred to enforce a contract that contains an attorney fees clause, the court concluded the law firm had not incurred

attorney fees in representing itself. (*Trope, supra,* at p. 292.) The court explained the reasonable and ordinary meaning of "incur" is to become liable for or obligated to pay and the normal meaning of attorney fees is the consideration a litigant becomes liable to pay for legal representation. (*Id.* at p. 280.) The court pointed out that case law prior to the enactment of Civil Code section 1717 interpreted "reasonable attorney's fees" not to include fees for time spent by an attorney representing himself or herself. (*Trope, supra,* at pp. 280-282.) Finally, the court explained the Legislature did not intend to allow compensation to nonlawyers for the time they spend litigating a case on their own behalf, and there is no support in the language or legislative history of Civil Code section 1717 for treating lawyers any differently. (*Trope, supra,* at pp. 284-285.)

Plaintiff cites *Soukup v. Stock* (2004) 118 Cal.App.4th 1490 in support of his contention that defendants are not entitled to attorney fees. In that case, the Court of Appeal concluded an attorney who represents himself as a defendant in a SLAPP suit is not entitled to attorney fees for a successful motion to strike. However, long before plaintiff filed his opening brief in this appeal, the Supreme Court granted review in that case, rendering it no longer citable authority. (See Cal. Rules of Court, rules 976(d)(1), 977.) We shall revisit plaintiff's violation of the Rules of Court in connection with defendants' request for sanctions.

At least one other Court of Appeal decision has recognized that an attorney litigating an anti-SLAPP motion on his own behalf is not entitled to attorney fees. In *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, the court indicated the definition of attorney fees in Civil Code section 1717 applies as well to Code of Civil Procedure section 425.16, subdivision (c). According to the court: "Where an attorney-client relationship exists, the courts uniformly allow for the recovery of attorney fees under Civil Code section 1717. [Citations.] [¶] Cases that have allowed the recovery of attorney fees under the anti-SLAPP statute are similarly marked by the existence of an attorney-client relationship. [Citations.] [¶] This decisional authority and the plain language of section 425.16, subdivision (c) supports the conclusion that the commonly understood definition of attorney fees [as determined in *Trope*] applies with equal force to section 425.16 and a prevailing defendant is entitled to recover attorney fees if represented by counsel." (*Ramona Unified School Dist. v. Tsiknas, supra,* at p. 524.)

Defendants contend an award of attorney fees under Code of Civil Procedure section 425.16, subdivision (c), is more akin to an award of sanctions under Code of Civil Procedure section 128.5 than an award of attorney fees under Civil Code section 1717. They cite *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264 (*Abandonato*), in which the Court of Appeal affirmed an award of attorney fees as sanctions under Code of Civil Procedure section 128.5 to an attorney who represented himself against a frivolous

lawsuit. The court explained that, unlike awards of attorney fees under Civil Code section 1717, awards of sanctions "are not routine and are not necessarily related to the size of the recovery or the amount of time billed by the attorney." (*Id.* at p. 268.) Sanctions may also be awarded to both attorney and nonattorney pro se litigants. (*Id.* at p. 269.) Finally, the court noted that awarding sanctions to a self-represented attorney will further the intent of Code of Civil Procedure section 128.5 to weed out meritless claims and punish frivolous or delaying conduct. (*Ibid.*)

KLA also cites *Laborde v. Aronson* (2001) 92 Cal.App.4th 459 (*Laborde*), where the court relied in part on *Abandonato* to conclude an attorney litigant is entitled to an award of attorney fees under section 128.7. Section 128.7, subdivision (c), permits an award of sanctions against any attorney or unrepresented party who falsely certifies that a filed motion or similar paper is not presented for an improper purpose, the legal contentions are warranted, and the factual contentions are supported by the evidence. The court concluded that to deny an award of sanctions to a self-represented litigant, including an attorney, would create an artificial category of litigants who would not be adequately protected from the opponent's bad faith tactics. (*Laborde v. Aronson*, *supra*, at p. 469.)

Abandonato and *Laborde* are inapposite. An award of sanctions is markedly different from an award of attorney fees under section 425.16. Like a punitive damages award in civil litigation, an award of sanctions is intended to punish a party

for bad faith conduct, not to compensate or reward the opposing party. Section 425.16, subdivision (c), on the other hand, is intended to compensate the SLAPP defendant for attorney fees incurred in bringing a motion to strike, not to punish the SLAPP plaintiff. Like Civil Code section 1717, an award under Code of Civil Procedure section 425.16, subdivision (c), is limited to costs and attorney fees, whereas sanctions may cover any expenses incurred. In *Trope*, the high court was concerned with treating self-represented attorneys more favorably than other self-represented parties. The same concern applies to section 425.16, subdivision (c), but not sections 128.5 and 128.7, under which both an attorney litigant and a nonattorney litigant may obtain sanctions.

Defendants argue an award of attorney fees under section 425.16, subdivision (c), like an award of sanctions, is not "routine." We disagree. Section 425.16, subdivision (c), says a prevailing defendant on an anti-SLAPP motion "shall be entitled to recover his or her attorney's fees and costs." In other words, in all cases where a SLAPP defendant prevails, an award of costs and attorney fees is mandatory, i.e., routine. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141-1142.) It is only an award of costs and attorney fees to a plaintiff who prevails on an anti-SLAPP motion that is not routine. Such an award, like an award of sanctions, is allowed only where the court concludes the anti-SLAPP motion was frivolous or intended to cause unnecessary delay. (§ 425.16, subd. (c).)

Defendants argue one purpose of section 425.16, subdivision (c), is to limit the cost of defending SLAPP suits, and prohibiting an award of attorney fees to an attorney who represents himself in an effort to keep costs down would not serve that purpose. However, the same may be said for a nonattorney litigant, yet such party could not recover for lost time. Furthermore, to say that one purpose of section 425.16, subdivision (c), is to limit expenses is not to say that the purpose is to eliminate expenses altogether. A reduction in expenses comes primarily from the introduction of an expedited procedure, not from the award of attorney fees to a prevailing defendant.

KLA contends it is nevertheless entitled to attorney fees because it is not appearing in this action in propria persona. Rather, according to KLA, it is being represented by three of the firm's attorneys. We are not persuaded. The only way KLA could possibly appear in this action is through one or more of its attorneys, or through outside counsel. By KLA's theory, it could never represent itself in litigation. In *Trope*, the party that was denied attorney fees under Civil Code section 1717 was a law firm that appeared through one of its attorneys.

In *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084 (*PLCM Group*), the state high court permitted an award of attorney fees under Civil Code section 1717 to a corporation that appeared in the action through its in-house attorney. The court explained that none of the considerations that animated *Trope* apply in the case of in-house counsel. "There is no problem of disparate

treatment; in-house attorneys, like private counsel but unlike pro se litigants, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer. A corporation represented by in-house counsel is in an agency relationship, i.e., it has hired an attorney to provide professional legal services on its behalf. Nor is there any impediment to the effective and successful prosecution of meritorious claims because of possible ethical conflict or emotional investment in the outcome. The fact that in-house counsel is employed by the corporation does not alter the fact of representation by an independent third party. Instead, the payment of a salary to in-house attorneys is analogous to hiring a private firm on a retainer." (*Id.* at p. 1093.) The court could "discern no basis for discriminating between counsel working for a corporation in-house and private counsel engaged with respect to a specific matter or on retainer." (*Id.* at p. 1094.)

In *Gilbert v. Master Washer & Stamping Co., Inc.* (2001) 87 Cal.App.4th 212 (*Gilbert*), Master Washer asserted a claim against Gilbert and Gilbert's attorney, Gernsbacher, for breach of contract and conversion of property. In the litigation, members of Gernsbacher's law firm represented him, and the trial court denied his motion for attorney fees under Civil Code section 1717. The Court of Appeal reversed. According to the appellate court, "a member of a law firm who is represented by other attorneys in the firm 'incurs' fees within the meaning of Civil Code section 1717. Either the represented attorney will

experience a reduced draw from the partnership (or a reduced salary from the professional corporation) to account for the amount of time his or her partners or colleagues have specifically devoted to his or her representation, or absorb a share of the reduction in other income the firm experiences because of the time spent on the case. This is different from the 'opportunity costs' the attorney loses while he or she is personally involved in the same case, because the economic detriment is caused not by the expenditure of his or her own time, but by other attorneys working on his or her behalf." (*Gilbert*, *supra*, at p. 221.)

The *Gilbert* court found the existence of an attorney-client relationship dispositive: "*Trope v. Katz*, denied fees to an attorney litigant acting in propria persona based in large part on the absence of an attorney-client relationship, because a pro se attorney litigant does not become liable to pay fees 'in exchange for legal representation.' By contrast, *PLCM Group* approved a fee award for the representation of in-house counsel because unlike an individual attorney acting in propria persona, '"an organization is always represented by counsel. . . . and thus, there is always an attorney-client relationship."'

"There can be no question an attorney-client relationship is also present where an attorney litigant is represented by other attorneys in his or her own firm. In this case, Messrs. Beach and McGarrigle of Gernsbacher & McGarrigle, like the in-house counsel in *PLCM Group* but unlike Messrs. Trope and Trope in *Trope*, represented not their personal interests or even those

of their law firm, but the separate and distinct interests of Gernsbacher himself. Beach and McGarrigle were Gernsbacher's agents, and he was the recipient of legal services performed by them on his behalf." (*Gilbert*, *supra*, 87 Cal.App.4th at p. 222, fns. omitted.)

Here, unlike *PLCM Group* and *Gilbert*, but like *Trope*, there is no attorney-client relationship between KLA and its individual attorneys. The individual KLA attorneys are not comparable to in-house counsel for a corporation, hired solely for the purpose of representing the corporation. The attorneys of KLA are the law firm's product. When they represent the law firm, they are representing their own interests. As such, they are comparable to a sole practitioner representing himself or herself. Where, as in *Gilbert*, an attorney is sued in his or her individual capacity and he obtains representation from other members of his or her law firm, those other members have no personal stake in the matter and may, in fact, charge for their work. Not so with a law firm that is sued in its own right and appears through various members.

Here, KLA incurred no attorney fees in bringing its motion to strike, because all the work was done by members of the firm on their own behalf. Thus, KLA is not entitled to attorney fees.

Kaufman contends he is entitled to attorney fees because he enlisted the help of outside counsel. An attorney appearing in an action on his own behalf may nevertheless retain outside counsel for assistance, and the legal expenses incurred for such

outside representation may be included in an award of attorney fees. (*Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1324-1325.)

Kaufman contends that, from the outset, he "retained attorney John Stefanki, a separate professional corporation, for the purposes of overseeing, reviewing, and litigating this matter." Kaufman asserts "the hours recognized by the trial court are an accurate and fair representation of the amount of time that John Stefanki and those paid to assist him spent consulting, reviewing, researching, and writing in conjunction with attorney Kaufman in pursuing this matter."

Kaufman's assertions are disingenuous at best. In his motion for attorney fees, Kaufman sought fees in the amount of $6,410. This amount was later increased to $7,160 to include work done after the motion was filed. The declaration of John Stefanki submitted with the motion indicated in an attached exhibit B, listed the services rendered in support of the amount requested. Exhibit B is a billing invoice on the letterhead of James Kaufman, not John Stefanki. Without going through each entry in that invoice, we note, for example, that the bill includes one hour for attending a hearing on December 16, 2004. A quick review of the reporter's transcript shows that on December 16, 2004, plaintiff appeared on behalf of himself and Thomas Knox (of KLA) and James Kaufman appeared on behalf of the defendants. There is no indication of John Stefanki's presence. Exhibit B also includes two hours for conferring with Dave Barrett of KLA on October 18, 2004, and working on the

memorandum in support of motion to strike and supporting declarations. However, the billing statement of KLA reveals that on October 18, 2004, "DSB" had a telephone conference with Kaufman, not Stefanki.

In a declaration in support of his reply memorandum, Kaufman states that he and Stefanki, "acting together as co-counsel, spent 24.25 hours in research, writing, interviewing and conferring with necessary individuals, preparing the declarations of Marven Stroh and John Stefanki, and drafting the Anti-SLAPP motion filed on October 28, 2004. The hours also include the appearance at the hearing in this matter and the preparation of the pleadings, judgment, etc." At the $250 per hour rate charged by Kaufman and Stefanki, this comes to $6,062.50. There is no attempt to differentiate the hours spent by Kaufman from those spent by Stefanki. This will have to be sorted out by the trial court.

VII

Further Attorney Fees

Defendants contend they are entitled to further attorney fees in connection with this appeal. "A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise." (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499.) Section 425.16 does not preclude attorney fees on appeal. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.) Because KLA is not entitled to attorney fees at the

trial level, it is not entitled to attorney fees on appeal. However, to the extent Kaufman is entitled to attorney fees, as discussed above, he is awarded attorney fees on appeal, the amount to be determined by the trial court.

VIII

Sanctions

Both defendants have moved this court for an award of sanctions against plaintiff for bad faith conduct in connection with this appeal. They point out that, on three occasions, plaintiff submitted an application for extension of time to file his appellate brief in which he declared, under penalty of perjury, that the opposing parties were unwilling to stipulate to an extension. Both KLA and Kaufman have submitted declarations asserting that they were never asked to stipulate to an extension. On at least one occasion, plaintiff also filed a proof of service, signed by himself, that declared he is "not a party to the within action." Finally, defendants rely on the fact plaintiff cited a case in his appellate brief that is on review to the Supreme Court and has otherwise pursued a frivolous appeal.

"[A] Court of Appeal may impose sanctions, including the award or denial of costs, on a party or an attorney for: [¶] (A) taking a frivolous appeal or appealing solely to cause delay; [¶] (B) including in the record any matter not reasonably material to the appeal's determination; or [¶] (C) committing any other unreasonable violation of these rules." (Cal. Rules

of Court, rule 27(e)(1).) An appeal is considered frivolous if "it is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit--when any reasonably attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

We have already concluded this appeal is not totally and completely without merit, inasmuch as we reverse in part the award of attorney fees. Nevertheless, plaintiff's repeated applications for extension could be seen as an attempt to delay final resolution of this matter. However, it is readily apparent defendants were not harmed by plaintiff's misstatements in his applications. Both KLA and Kaufman assert they would have stipulated to the extensions if asked. As for the faulty proof of service, this shows nothing more than sloppy lawyering.

As noted earlier, plaintiff repeatedly cited in his opening brief a case, *Soukup v. Stock*, *supra*, 118 Cal.App.4th 1490, that is not citable because the Supreme Court granted review. There is no excuse for this violation of the Rules of Court, inasmuch as plaintiff's brief was filed nearly a year after review was granted. Nevertheless, we do not find this rule violation sufficient to warrant an award of sanctions.

DISPOSITION

The orders granting defendants' special motions to strike under the anti-SLAPP statute are affirmed. The subsequent orders granting defendants' motions for attorney fees are

reversed. The case is remanded to the trial court with directions to deny KLA's motion for attorney fees and to reconsider Kaufman's motion in light of the views expressed in this opinion. Kaufman is also awarded attorney fees on appeal on the same basis as they are allowed below, the amount to be determined by the trial court. The parties shall bear their own costs on appeal.

HULL, J.

We concur:

RAYE, Acting P.J.

MORRISON, J.