UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEN ARONSON, Plaintiff - Appellant, v. DOG EAT DOG FILMS, INC., Defendant - Appellee.	)	No. 10-35815 DOG EAT DOG'S REPLY TO ARONSON'S RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

This dispute arises from Appellant Ken Aronson's claims that inclusion of one minute of footage in *Sicko*, a documentary about the modern healthcare crisis, gives rise to claims for copyright infringement, invasion of privacy, and misappropriation of likeness against Appellee Dog Eat Dog Films, Inc. ("Dog Eat

Dog").[1] The district court, recognizing that the First Amendment and a Washington statutory exemption bar the misappropriation claim, the footage reveals no private facts, and the Copyright Act preempts both claims, granted Dog Eat Dog's special motion to strike them under Washington's anti-SLAPP law. *See Aronson v. Dog Eat Dog Films, Inc.*, --- F. Supp. 2d ----, No. C10-5293 KLS, 2010 WL 3489590 (W.D. Wash. Aug. 31, 2010). It awarded Dog Eat Dog a $10,000 statutory penalty and its attorneys' fees, *id.* at *10-*11, and denied Aronson's two motions for reconsideration, Dkt. 33, 44. Aronson seeks review of all three orders.

This Court lacks jurisdiction to hear the appeal. The orders are not final: Aronson's copyright claim and Dog Eat Dog's attorneys' fees petition remain in the district court. They are also not appealable collateral orders because they resolve questions on the merits and are reviewable on appeal. Dog Eat Dog requests the Court dismiss the appeal and award it its reasonable attorneys' fees.

II. ARGUMENT

A. The District Court's Interlocutory Order Granting Appellees' Anti-SLAPP Motion Is Not Subject to Appellate Review.

Because the orders granting Dog Eat Dog's SLAPP motion and denying reconsideration are neither final nor appealable collateral orders, this Court does not have jurisdiction to hear Aronson's appeal.

[1] The Complaint improperly named as the defendant Dog Eat Dog Films, Inc., rather than the film's producer, Goldflat Productions, LLC.

"The courts of appeals. . . have jurisdiction of appeals from all *final* decisions of the district courts. . . ." 28 U.S.C. § 1291 (emphasis added). A court may exercise jurisdiction over non-final collateral orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Branson v. City of Los Angeles*, 912 F.2d 334, 335-36 (9th Cir. 1990) (citations and quotation marks omitted). "[T]he challenged order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the underlying action; and (3) be effectively unreviewable from a final judgment." *Id*. (citations and quotation marks omitted).

1. The collateral order doctrine allows appeals of orders denying but not granting substantive immunities, including immunities under anti-SLAPP statutes.

Dog Eat Dog has located no federal appellate cases deciding whether to exercise jurisdiction over an order granting a special motion to strike a SLAPP, i.e., a strategic lawsuit against public participation. But in analogous cases, this Court (and others) routinely find district court orders that grant immunity do not confer appellate jurisdiction. *See, e.g., Branson,* 912 F.2d at 335-36 (appellate jurisdiction did not exist over order dismissing claims based on judicial immunity); *see also Morris-Hayes v. Bd. Of Educ. of the Chester Union Free School Dist*., 423

F.3d 153, 163 (2d Cir. 2005) (Eleventh Amendment immunity); *Baird v. Palmer*, 114 F.3d 39, 42 (4th Cir. 1997) (qualified immunity); *Winfrey v. School Bd. of Dade County, Fla.*, 59 F.3d 155 (11th Cir. 1995) (same); *Theis v. Smith*, 827 F.2d 260, 261 (7th Cir.1987) (judicial immunity).

For example, in *Branson*, this Court found it did not have jurisdiction to review a district court's order granting a state court commissioner's motion to dismiss claims based on judicial immunity. *Id.* at 335. The court declined to analyze the first two factors of the collateral order doctrine, because the third factor was "clearly absent." *Id*. It distinguished review of orders denying immunity. Those decisions, it reasoned,

> fall within the collateral order doctrine because a party entitled to immunity has the right to be free from the burden of going to trial. Since the entitlement is immunity from suit and not mere defense to liability, such a right is effectively lost if the party cannot appeal until the final order is given.

Id. at 336 n.1. Other federal appellate courts explicitly recognize the same distinction, reviewing orders denying, but not granting, immunities. *See, e.g.*, *Morris-Hayes*, 423 F.3d at 163; *Baird*, 114 F.3d at 42; *Winfrey*, 59 F.3d at 155.

Anti-SLAPP statutes convey substantive immunities, the denial of which are appealable. *See Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003). In *Batzel*, this Court found that the California anti-SLAPP statute created an "immunity" that was "designed to protect the defendant from having to litigate meritless cases

aimed at chilling First Amendment expression." *Id*. at 1025. Accordingly, it could review denial of the defendant's anti-SLAPP motion: "A district court's *denial* of a claim of immunity, to the extent that it turns on an issue of law, is an appealable final decision within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 333 F.3d at 1026 (emphasis added).

2. Because the district court granted an immunity under Washington's anti-SLAPP statute, its orders are unreviewable on appeal.

Enacted earlier this year, Washington's statute is modeled after California's and is virtually the same. *See* RCW 4.24.525. The statute was designed to curb "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech." S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wa. 2010). The legislature found such lawsuits "are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities," deterring them from "fully exercising their constitutional rights." *Id.* In other words, the Washington statute, like its California counterpart, creates a substantive immunity.

Thus, the district court's order granting Dog Eat Dog's anti-SLAPP motion (and orders denying reconsideration) are not appealable. They are not final: The copyright claims and a motion for attorneys' fees remain pending. And although the order "conclusively determined the disputed question" (i.e., that Aronson's

state law claims lacked legal merit) under the first collateral order doctrine factor, the order did not resolve an issue "separate from the merits of the underlying action"—indeed, the district court decided the merits by dismissing the claims.[2] And, as in *Branson*, the third factor is "clearly absent" because the grant of immunity is "effectively reviewable from a final judgment."

B. Jurisdiction Is Not Based on Diversity, and Even If It Were, the Anti-SLAPP Statute's Right of Appeal Is Inapplicable.

Aronson appears to argue that because jurisdiction is founded on diversity, the Court must recognize the anti-SLAPP statute's right of appeal as a substantive state law applicable under the *Erie* doctrine. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).[3] But jurisdiction here exists by virtue of Aronson's copyright claims. *See* Dkt. 1, Complaint ¶ 3.1 (pleading federal question jurisdiction). Even so, this Court squarely rejected this argument in *Englert v. MacDonell*, 551 F.3d

[2] The case for review here is particularly weak because Aronson's state law claims were, on their face, legally insufficient, and also could have been dismissed under Fed. R. Civ. P. 12(c); the grant of the additional SLAPP remedies (a $10,000 penalty, and attorneys' fees) does not, itself, confer jurisdiction on this Court. *See, e.g.*, *Hillery v. Rushen*, 702 F.2d 848, 848-49 (9th Cir. 1988) ("An interim award of attorneys' fees is not a collateral order appealable under 28 U.S.C. § 1291.").

[3] Generally, the cases Aronson cites are inapposite. This case does not involve a "marginally final order" that disposes of "an unsettled issue of national significance." *See Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1350 (9th Cir. 1994). Two cases Aronson cites, *Curlott v. Campbell*, 598 F.2d 1175, 1179 (9th Cir. 1979), and *Carroll v. United States*, 354 U.S. 394, 405 (1957), find that non-finals orders are not appealable. And *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431 (2010) addresses whether certain federal procedural rules are valid.

1099, 1107 (9th Cir. 2009). There, the Court found that Oregon's anti-SLAPP statute did not create a substantive immunity because it did not provide an automatic right of appeal. *Id.* However, the Court carefully noted that the absence or presence of such a provision is not dispositive of the right of appeal, stating:

> [F]ederal law is controlling on this issue. Nor did *Batzel* suggest otherwise. *Batzel* did not hold that an order denying a special motion to strike was appealable under the collateral order doctrine *merely because California authorized an appeal as a matter of right*. Instead, it held that, if a legislature provided an appeal unique to its anti-SLAPP statute, as was the case in California, it could be inferred that its purpose was to confer immunity from suit—an immunity which can only be vindicated by permitting an interlocutory appeal.

Id. (emphasis added). So, too, here, the Washington anti-SLAPP statute conveys a substantive immunity, the denial of which can only be vindicated by interlocutory review, but the grant of which does not confer jurisdiction on this Court.

C. The Court Should Award Dog Eat Dog Its Fees on Appeal.

Under the Washington anti-SLAPP statute, "[t]he court *shall* award to a moving party who prevails, in part or in whole, on a special motion to strike. . . [c]osts of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed." RCW 4.24.525(6). The fees provision in the analogous California statute is applicable in federal court. *See Thomas v. Fry's Electronics, Inc.*, 400 F.3d 1206, 1206-07 (9th Cir. 2005). The Court has authority to issue such a fee award, even if it lacks jurisdiction to hear

the appeal. *See Colt Indus. Operating Corp. v. Index-Werke K.G.*, 739 F.2d 622, 623-24 (Fed. Cir. 1984) (awarding fees where appellant sought review of sister court's order); *Stichting Mayflower Rec. Fonds v. City of Park City, Utah*, No. 05-4307, 2007 WL 495293, at *1-2 (10th Cir. Feb. 16, 2007) (awarding fees where court lacked jurisdiction over non-final order).

The Court should therefore award Dog Eat Dog its attorneys' fees incurred in response to this purported appeal.

III. CONCLUSION

For the foregoing reasons, Dog Eat Dog requests that this Court dismiss Aronson's appeal and award it its reasonable attorneys' fees on appeal.

DATED this 12th day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 12, 2010.

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