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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIMOTHY DEMARTINI, et al.,
Plaintiffs,
v.
MICHAEL DEMARTINI, et al.,
Defendants.

No. 2:14-cv-2722 JAM CKD PS

ORDER

Pending before the court is plaintiff’s motion to compel defendants to post bond, security or undertaking and to dismiss defendants’ counterclaims. The matter was submitted on the papers. Upon review of the documents in support and opposition, THE COURT FINDS AS FOLLOWS:

By their motion, plaintiffs request that defendants be declared vexatious litigants and be required to post a bond, security or undertaking. Plaintiffs do not seek security in a specific amount but simply request that it be in an amount the court determines to be appropriate. As part of their vexatious litigant motion, plaintiffs seek the additional relief of dismissal of defendants’ counterclaims. Plaintiffs contend that there is a lack of evidence supporting defendants’ counterclaims. The present motion fails to make an adequate showing in this regard. Because plaintiffs have also filed a motion for summary judgment with respect to defendants’

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1 counterclaims, the court will deny without prejudice that part of plaintiffs' motion which seeks
2 dismissal of the counterclaims.

3 Litigants who abuse the judicial process by repeatedly filing "unmeritorious motions,
4 pleadings, or other papers," or engaging "in other tactics that are frivolous or solely intended to
5 cause unnecessary delay" are vexatious litigants. Cal. Civ. Proc. Code § 391 (adopted in the
6 Eastern District of California under L.R. 151(b)). In order to impose a limiting order on a
7 vexatious litigant, four conditions must be met: (1) the litigant must have adequate notice to
8 oppose the order; (2) an adequate record must be provided, listing the pleadings that led to the
9 court's decision that a vexatious litigant order was necessary; (3) the court must make substantive
10 findings that the filings were frivolous or harassing; and (4) the order must be narrowly tailored.
11 See DeLong v. Hennessey, 912 F.2d 1144, 1147-48 (9th Cir. 1990); Molski v. Evergreen Dynasty
12 Corp., 500 F.3d 1047, 1057-58 (9th Cir. 2007).

13 Plaintiffs contend that defendants should be declared vexatious because defendants
14 previously had a restraining order entered against them, removed this action from state court to
15 the wrong District Court, filed an answer and counterclaim which expanded the scope of this
16 action, filed an ambiguous amended counterclaim, failed in their attempt to disqualify plaintiffs'
17 counsel, had sanctions issued against them in connection with plaintiffs' anti-SLAPP motion,
18 abused the subpoena process, were ordered to produce electronically stored information pursuant
19 to a motion to compel, were compelled to serve an amended Rule 26 initial disclosure, were
20 restrained again pursuant to a second temporary restraining order, failed in their motion to compel
21 further deposition of one of the plaintiffs in this action, failed in a motion to extend the discovery
22 cut-off, and did not prevail on a motion for protective order.

23 The court has carefully reviewed the entirety of the docket in this matter. In determining
24 whether defendants should be declared vexatious, the court has considered both the number and
25 content of defendants' filings. See DeLong v. Hennessey, 912 F.2d at 1148 (number and content
26 indicia of frivolousness of litigant's claims). While it appears that many times defendants'
27 litigation position has been on the losing side, in light of defendants' pro se status, allowances
28 must be made for a layman's understanding of the law. On each of the motions referenced above,

1 defendants appear to have extensively researched the law and presented arguments in support of
2 their positions which were apparently made in good faith. In this court's experience, it is not
3 uncommon for pro litigants to file two, and sometimes three, amended complaints before they are
4 able to articulate a claim upon which relief may be granted. With respect to the discovery
5 motions, it appears that sometimes defendants have either produced or identified a surplusage of
6 documents in an attempt to fully disclose, an understandable position for a pro se litigant. The
7 discovery motions noticed by defendants were nothing out of the ordinary for litigation in which
8 both sides have vigorously advocated their positions. The kind of discovery motions plaintiffs
9 complain about here are not so out of the ordinary – review of the court's law and motion
10 calendar for the past year shows that these types of motions appear frequently on the court's
11 docket. Losing a discovery motion is not necessarily indicative of frivolousness or harassment.
12 When this court has directed defendants to cease and desist conduct that was not in conformance
13 with the Federal Rules of Civil Procedure, defendants have complied upon being advised by the
14 court of what was required under the Rules. Defendants have also fully complied with respect to
15 this court's orders regarding payment of expenses incurred by the prevailing side. Although this
16 court found that plaintiffs/counterdefendants should be awarded their attorneys' fees in
17 connection with their anti-SLAPP suit, the court notes that this is a very complex area of the law,
18 an award of expenses was required under the governing statute, and it is not unsurprising that a
19 pro se litigant would be unaware of the nuances that bar certain claims under the anti-SLAPP
20 statute. In regard to the temporary restraining orders that have been issued against defendants,
21 each time they have quickly complied with the court's restraint and it does not appear that
22 defendants' conduct which led to the restraining orders was so out of line that such conduct could
23 be considered harassing.

24 In sum, the court cannot find that defendants' litigation activity reflects a "pattern of
25 harassment." See DeLong v. Hennessey, 912 F.2d at 1148. In addition, the present motion does
26 not articulate a sufficient basis upon which this court can conclude that defendants have no
27 reasonable probability of succeeding on the merits of their counterclaims. The present record
28 fails to establish that defendants' filings are so numerous, abusive, or inordinate such that a

1 vexatious litigant order is warranted.

2 Accordingly, IT IS HEREBY ORDERED that:

3 1. Plaintiffs' motion to require defendants to post bond, security or undertaking (ECF No.
4 198) is denied; and

5 2. Plaintiffs' request to dismiss the counterclaims is denied without prejudice.

6 Dated: April 14, 2017



7 _____
8 CAROLYN K. DELANEY
9 UNITED STATES MAGISTRATE JUDGE

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