

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CLEAR CHANNEL OUTDOOR, INC.,

Plaintiff,

No. C 08-2955 PJH

v.

**ORDER DENYING MOTION FOR  
ATTORNEY'S FEES**

CHEOL HOON LEE,

Defendant.

Before the court is defendant's motion for attorney's fees. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES the motion.

Plaintiff Clear Channel Outdoor, Inc. ("Clear Channel") filed this action on June 13, 2008, asserting claims for breach of written contract, promissory estoppel, and declaratory relief. Defendant Cheol Hoon Lee ("Lee") filed a motion to dismiss, arguing that Clear Channel's claims were barred by the Noerr-Pennington doctrine; that Clear Channel's claims were barred by California's anti-SLAPP statute, California Code of Civil Procedure § 425.16; that the complaint failed to state a claim for breach of contract or promissory estoppel; and that the court lacked jurisdiction for the declaratory relief claim, under the Rooker-Feldman doctrine.

At the September 17, 2008, hearing on Lee's motion to dismiss, the court noted its

1 responsibility to determine the existence of subject matter jurisdiction, and questioned  
2 counsel for Clear Channel regarding the allegations in the complaint that the amount in  
3 controversy exceeded \$75,000. When counsel was unable to articulate a basis for those  
4 allegations, the court advised him that he would be required to make a showing, in writing,  
5 establishing jurisdiction, and that if he failed to do so, the case would be dismissed. The  
6 court advised further that even if the case were not dismissed, it would likely be stayed  
7 pending resolution of the related state court petition for writ of mandate. The court did not  
8 rule on Lee’s motion to dismiss at the hearing.

9         On October 1, 2008, Clear Channel filed a statement asserting that the complaint  
10 met the amount-in-controversy requirement based on the allegation that prior to Clear  
11 Channel’s removal of its advertising from Lee’s building, Lee had sent Clear Channel a  
12 demand letter stating that a penalty of \$150,000 a week would be assessed until the  
13 advertising was removed;<sup>1</sup> and on the allegations in the complaint that the damages for  
14 breach of contract exceeded \$75,000 (citing Complaint ¶ 24). Clear Channel also claimed  
15 that it had “incurred expenses and fees” in connection with the permit process and Lee’s  
16 challenge to the issuance of the permit to Clear Channel.

17         Also on October 1, 2008, Clear Channel filed a notice of voluntary dismissal of the  
18 entire action, without prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i).

19         On October 15, 2008, Lee filed the present motion for attorney’s fees, arguing that  
20 he is entitled to fees as the prevailing defendant in a motion to strike under California Code  
21 of Civil Procedure § 425.16(c). He asserts that Clear Channel’s voluntary dismissal of the  
22 claims before the court had ruled on the motion does not preclude a finding that he was the  
23 prevailing party under the anti-SLAPP statute for purposes of an award of attorney’s fees.  
24 He argues that under Coltrain v. Shewalter, 66 Cal. App. 4th 94 (1998), where a plaintiff  
25 voluntarily dismisses an alleged SLAPP suit while a motion to strike is pending, a

26

---

27                 <sup>1</sup> However, counsel for Clear Channel had previously conceded at the September 17,  
28 2008, hearing that Clear Channel had not paid a penalty and had not been billed for the  
penalty.

1 presumption arises that the defendant is the prevailing party. See id. at 106-07.

2 Clear Channel opposes the motion, arguing that Lee is not a prevailing defendant  
3 because he has not established that he is entitled to anti-SLAPP relief on the merits, and  
4 because Clear Channel established a probability of success on its claims; and also  
5 because a there is still an ongoing dispute between the parties (referring to the state court  
6 petition for writ of mandate). In addition, Clear Channel asserts, it did not dismiss the  
7 complaint for reasons related to the likelihood of success on the merits, but rather because  
8 the court indicated its inclination to stay the action pending further developments in the  
9 state court action.

10 The court finds that Lee is not a prevailing defendant in an anti-SLAPP suit. While a  
11 defendant might be entitled to attorney’s fees following a voluntary dismissal by the plaintiff  
12 in certain cases, the “critical issue” in determining whether the defendant is entitled to  
13 attorney’s fees following a voluntary dismissal is “which party realized its objectives in the  
14 litigation.” Id. at 107. The court should not consider the defendant to be “prevailing” if the  
15 plaintiff dismissed the complaint because of reasons unrelated to its probability of success  
16 on the merits. Id.

17 Here, the court issued no ruling regarding the merits of Lee’s motion to dismiss or  
18 regarding the anti-SLAPP claim, and did not even address the merits of the anti-SLAPP  
19 issue at the hearing. Clear Channel dismissed the action because of the court’s stated  
20 intention to stay the case pending resolution of the state court writ action, and also possibly  
21 because of the court’s stated intention to dismiss the case in the absence of some showing  
22 by Clear Channel of the existence of an amount in controversy exceeding \$75,000. The  
23 court finds that under these circumstances, Lee is not entitled to a presumption that he is  
24 the prevailing defendant for purposes of the anti-SLAPP statute.

25 Moreover, while Clear Channel voluntarily dismissed the complaint, Lee never  
26 objected to the fact that the dismissal was without prejudice. Had he considered himself  
27 the prevailing defendant, he should have attempted to protect himself by requesting that  
28 the dismissal be with prejudice.

1 Finally, even were Lee correct in arguing that he is a prevailing defendant, the court  
2 would nonetheless decline to consider the motion for attorney’s fees because there is no  
3 federal subject matter jurisdiction. Subject matter jurisdiction is fundamental and cannot be  
4 waived. Fed. R. Civ. P. 12(h)(3); see Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006).  
5 The court is required to consider sua sponte whether it has subject matter jurisdiction.  
6 Valdez v. Allstate Ins. Co., 372 F.3d 1115, 1116 (9th Cir. 2004) (citing Allstate Ins. Co. v.  
7 Hughes, 358 F.3d 1089, 1093 (9th Cir. 2004)). Diversity jurisdiction exists only when the  
8 parties are in complete diversity and the amount in controversy exceeds \$75,000. 28  
9 U.S.C. § 1332(a).

10 As the plaintiff, Clear Channel bears the burden of establishing subject matter  
11 jurisdiction. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).  
12 In the complaint, Clear Channel alleged jurisdiction under 28 U.S.C. § 1332, asserting that  
13 “this is a civil action in which the amount in controversy exceeds the sum of \$75,000, and is  
14 between citizens of different states.” Complaint ¶ 2. Clear Channel asserted further that it  
15 was a Delaware corporation with its principal place of business in Arizona, and that Lee  
16 was a citizen of California. Id. ¶ 4.

17 Clear Channel also alleged that it “seeks recovery in excess of \$75,000, exclusive of  
18 costs and interest.” Id. ¶ 3. In the breach of contract and declaratory relief causes of  
19 action, Clear Channel asserted that it had incurred damages that exceeded \$75,000, in an  
20 amount “to be proven at the time of trial.” Id. ¶¶ 24, 29. In the prayer for relief, Clear  
21 Channel sought declaratory relief and “actual damages in an amount to be determined at  
22 trial.” However, no facts pled in the complaint reflected damages even approaching  
23 \$75,000.

24 Because it was not facially evident from the complaint that Clear Channel could  
25 meet the jurisdictional amount, and because counsel for Clear Channel was unable, at the  
26 hearing, to articulate a basis for the allegations that the amount in controversy exceeded  
27 \$75,000, the court ordered Clear Channel to file a statement showing that it met the  
28 jurisdictional requirement. Clear Channel’s October 1, 2008, jurisdictional statement

1 provides no facts showing that it meets that requirement. Because Clear Channel failed to  
2 meet its burden of showing that more than \$75,000 is at issue in this case, the court finds  
3 that Clear Channel has failed to establish subject matter jurisdiction under 28 U.S.C.  
4 § 1332.

5 The hearing on the motion for attorney's fees, previously set for Wednesday,  
6 January 14, 2009, is VACATED.

7  
8 **IT IS SO ORDERED.**

9 Dated: January 8, 2009



---

PHYLLIS J. HAMILTON  
United States District Judge

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28