

RESOLUTION 09-02-2008

DIGEST

Civil Procedure: Discretionary Attorney’s Fees for Successful SLAPP Defendant

Amends Code of Civil Procedure section 425.16, subdivision (c), to make the award of attorney’s fees to a prevailing party defendant discretionary rather than mandatory.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to Resolution 01-12-03, which was disapproved; Resolution 03-03-02, which was approved; Resolution 04-11-05, which was disapproved; and Resolution 10-10-06, which was disapproved.

Reasons:

This resolution amends Code of Civil Procedure section 425.16, subdivision (c), to make the award of attorney’s fees to a prevailing party defendant discretionary rather than mandatory. This resolution should be disapproved because there are sound reasons why attorney’s fees are routinely awarded to a defendant who obtains dismissal of a SLAPP action under Code of Civil Procedure section 425.16, but a plaintiff who wins an anti-SLAPP motion can recover fees only if the motion was frivolous.

Code of Civil Procedure section 425.16 is designed to protect the exercise of First Amendment rights by providing a remedy against frivolous lawsuits that would chill the exercise of rights of free speech and petition. A defendant who wins an anti-SLAPP motion both promotes and protects the assertion of those fundamental rights.

The legislature, therefore, found it appropriate to apply the rule of *Christiansburg Garment Co. v. EEOC* [(1978) 434 U.S. 412], to anti-SLAPP motions by providing in section 425.16, subdivision (c) that a defendant who obtains a dismissal under the statute should recover attorney’s fees, but a plaintiff who prevails against an anti-SLAPP motion should recover fees only if the motion was frivolous.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 425.16 to read as follows:

- 1 § 425.16
- 2 (Subdivision (a) unchanged.)
- 3 (b)(1) A cause of action against a person arising from any act of that person in
- 4 furtherance of the person's right of petition or free speech under the United States or
- 5 California Constitution in connection with a public issue shall be subject to a special
- 6 motion to strike, unless the court determines that the plaintiff has established that there is a
- 7 probability that the plaintiff will prevail on the claim.

8 (2) In making its determination, the court shall consider the pleadings, and
9 supporting and opposing affidavits stating the facts upon which the liability or defense is
10 based.

11 (3) If the court determines that the plaintiff has established a probability that he or
12 she will prevail on the claim, neither that determination nor the fact of that determination
13 shall be admissible in evidence at any later stage of the case, and no burden of proof or
14 degree of proof otherwise applicable shall be affected by that determination.

15 (c) In any action subject to subdivision (b), a prevailing defendant on a special
16 motion to strike ~~shall~~ may be entitled to recover his or her attorney's fees and costs. If the
17 court finds that a special motion to strike is frivolous or is solely intended to cause
18 unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff
19 prevailing on the motion, pursuant to Section 128.5.

20 (Subdivisions (d) through (k), inclusive, unchanged.)

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS:

Existing Law: Subdivision (c) of Code of Civil Procedure section 425.16 specifically provides that the trial court shall award attorney fees to a defendant who prevails on a special motion to strike, but may award attorney fees to a plaintiff who succeeds in having such a motion denied. Current case law confirms the mandatory nature of an award of attorney fees to prevailing defendant, even if the trial court concludes the action on a procedural basis other than the granting of a Special Motion to Strike, for example by dismissal on its own motion or by the sustaining of a demurrer. (*Pfeiffer Venice Properties v. Bernard (2002) 101 Cal.App.4th 211*)

This Resolution: Would change the provision regarding availability of attorney fees to a defendant prevailing through a SLAPP motion from one where the trial court is forced to award fees regardless of the interests of justice, to one where the trial court has discretion not to award fees.

The Problem: Mandatory attorney fees to a successful defendant made sense when the gist of a SLAPP motion was to nip a case filed by a large corporation against an individual for reasons unrelated to its merits, a ““Stategic Lawsuit Against Public Participation””, maintained for the purpose of chilling the free speech of individuals. An example of this type of case is where a developer sues an individual on a tort theory for successfully speaking out against a development at a public hearing. The purpose of the lawsuit is no to recover damages so much as to drag the defendant through the courts to discourage him or her from speaking out in the future.

However, in situations where the trial court rightly or wrongly has institutional sympathy for a SLAPP plaintiff, for example when the plaintiff is an individual who improperly sues an institution, sometimes the court is loathe to expose the plaintiff to the fees that would currently be mandatory if the motion were granted. Even if upon full review it would be obvious the plaintiff has no case, and the speedy resolution goal of the SLAPP motion process would merit

conclusion of the case, because of the fee requirement, the trial court will find some “reason” to deny the motion, for example by reviewing the complaint “demurrer” style and concluding from its allegations (without review of the evidence offered by either side) that the action does not “arise” from protected activity.

The effect of this is to force both sides to continue litigation to the point where the defense can file some other sort of dispositive motion like a summary judgment, or force the case on indefinite hold while the aggrieved defendant appeals the trial court’s error.

The trial court should be able to exercise its discretion as to whether attorney fees should be available to a prevailing SLAPP defendant, so that it has the option, in the interests of justice, to end a case early without being forced to saddle a plaintiff with a large attorney fee.

IMPACT STATEMENT:

This proposed resolution does not affect any other law, statute or rule.

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COUNTERARGUMENTS

SACRAMENTO COUNTY BAR ASSOCIATION

There are sound reasons why attorney fees are routinely awarded to a defendant who obtains dismissal of a SLAPP action under CCP § 425.16, but a plaintiff who wins an anti-SLAPP motion can recover fees only if the motion was frivolous.

The statute adopts the rule of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 54 L.Ed.2d 648 (1978). In *Christiansburg*, the Court held that a plaintiff who wins a civil rights action should ordinarily recover statutory attorney fees; that promotes the purpose of the statute, which is designed to encourage private enforcement of civil rights. But routinely awarding fees to prevailing defendants prevail in civil rights cases would discourage lawsuits to enforce civil rights. Therefore, a defendant who prevails in a civil rights action should not recover fees unless “the action brought is found to be unreasonable, frivolous, meritless or vexatious.” *Id.*; see also *Hughes v. Rowe*, 449 U.S. 5, 14, 66 L.Ed.2d 163 (1980) (same rule in actions under 42 USC § 1983).

CCP § 425.16 is designed to protect the exercise of First Amendment rights by providing a remedy against frivolous lawsuits that would chill the exercise of rights of free speech and petition. A defendant who wins an anti-SLAPP motion both promotes and protects the assertion of those fundamental rights.

The Legislature, therefore, found it appropriate to apply the *Christiansburg* rule to anti-SLAPP motions by providing in § 425.16(c) that a defendant who obtains a dismissal under the statute should recover attorney fees, but a plaintiff who prevails against an anti-SLAPP motion should recover fees only if the motion was frivolous.

SAN DIEGO COUNTY BAR ASSOCIATION

SDCBA disagrees with this resolution. First, the proponent offers no evidence – not even a personal anecdote – that judges are wrongly denying anti-SLAPP motions because they do not want to award attorney fees. Anti-SLAPP jurisprudence has developed reasonably, and there is no justification offered for this modification.

Second, the resolution raises a substantial risk of doing irremediable harm. Anti-SLAPP motions often protect the free speech and petition rights of unpopular people and causes. It is more likely that judges would wrongly deny attorney fees to such parties than that they are now wrongly denying anti-SLAPP motions. A wrongful denial of an anti-SLAPP is appealable and *reviewable de novo* since the applicable standards are those of summary judgment. A wrongful denial of attorney fees would be appealable but *reviewable only for abuse of discretion*, which often means there is no meaningful review.

SANTA CLARA COUNTY BAR ASSOCIATION

This resolution would make the award of attorney’s fees following a successful “anti-SLAPP” motion discretionary, as compared to the current mandatory requirement. This idea should be rejected. The proponent claims that courts are loathe to grant anti-SLAPP motions when it has “institutional sympathy” for a plaintiff defending against the motion, and would not want to expose that party to having to pay fees, even though the motion is a valid one. The proponent, though, puts this position out there without any support or evidence that this is a common occurrence, or has ever occurred at all. Passage of this resolution, moreover, would actually encourage large corporations to bring the sorts of lawsuits that have been dismissed via the anti-SLAPP procedure as they would no longer have to fear the threat of mandatory fees. Deleting this deterrent, simply because a court may, on occasion, deny a motion it should grant, is no reason to change this particular statutory section. The Santa Clara County delegation recommends disapproval of this resolution.