

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
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DEANNA MICHELLE MORY,

Plaintiff,

vs.

CITY OF CHULA VISTA, et al.,

Defendants.

CASE NO. 07-CV-462 JLS (WVG)

ORDER: (1) GRANTING MOTION FOR CLARIFICATION, (2) CLARIFYING THAT THE ANTI-SLAPP FEES ARE JOINT AND SEVERAL AGAINST PLAINTIFF AND HER COUNSEL, AND (3) OVERRULING OBJECTIONS

(Doc. No. 179)

Presently before the Court is non-party Jackson DeMarco Tidus & Peckenpaugh’s (Jackson DeMarco) motion to clarify the Court’s Order of August 25, 2009 and to object to that Order as it applies to Jackson DeMarco. (Doc. No. 179.) Also before the Court are a response from Defendant City of Chula Vista, (Doc. No. 183 (Chula Vista Opp.)) a response from Plaintiff Deanna Michelle Mory, (Doc. No. 184 (Mory Opp.)) and Jackson DeMarco’s Reply. (Doc. No. 18.) Jackson DeMarco’s motion for clarification is **GRANTED** and their objections are **OVERRULED**.

A short review of the history of this case will be helpful in understanding the Court’s decision. Plaintiff filed this case on March 13, 2007. (Doc. No. 1.) On April 30, 2007, Defendants filed a special motion to strike pursuant to California Code of Civil Procedure § 425.16(c). (Doc. No. 22.) Section 425.16 allows a Defendant to bring a motion to strike causes of action “aimed at chilling the

1 valid exercise of the constitutional rights of freedom of speech and petition for the redress of
2 grievances.” (Doc. No. 98 (Anti-SLAPP Order) at 13 (citations omitted).)

3 On June 14, 2007, Plaintiff filed her First Amended Complaint. (Doc. No. 27.) As a result
4 the first Anti-SLAPP motion was denied as moot. (Doc. No. 28.) However, on July 2, 2007,
5 Defendants filed a renewed Anti-SLAPP motion. (Doc. Nos. 33, 34.) In this motion Defendants
6 specifically requested that the Court “order Plaintiff Mory and her attorneys of record, jointly and
7 severally, to pay to Defendants attorneys’ fees and costs.” (Doc. No. 34 at 24.) Plaintiff’s opposition
8 never disputed the propriety of a joint and several award of fees and costs. (*See* Doc. No. 44.)

9 Later, on January 7, 2008, the Court specifically requested more briefing on the issue of
10 attorneys’ fees, particularly whether only those related to the Anti-SLAPP motion were recoverable.
11 (Doc. No. 78.) On January 25, 2008, the parties filed their supplemental briefing. (Doc. Nos. 90–93.)
12 Again, however, neither Plaintiff nor her counsel challenged the propriety of a joint and several
13 award.

14 The parties appeared before the Court on January 29, 2008 to argue this motions and on
15 February 11, 2008, the Court issued its order granting Defendants’ anti-SLAPP motion. (Doc. No.
16 98.) Although the Court did not specify whether the fees were to be joint and several, that is the
17 implication of the Order given Defendants’ request. Again, the issue of joint and several liability was
18 never contested.

19 On March 12, 2008, Plaintiff filed a notice of appeal. (Doc. No. 106.) On May 13, 2008,
20 while the case was still on appeal, Jackson DeMarco filed a motion to withdraw as attorneys for
21 Plaintiff. (Doc. No. 123.) Defendants opposed this motion, arguing, *inter alia*, that Jackson
22 DeMarco’s motive was to avoid “negative financial consequences for their law firm, such as
23 responsibility for payment of Defendants’ attorneys’ fees in connection with this Court’s granting of
24 Defendants’ anti-SLAPP motion.” (Doc. No. 124.) In response, Jackson DeMarco simply stated that
25 it is not trying “to get out from under any liability,” but did not challenge the joint and several award
26 or suggest that they might do so in the future. (Doc. No. 126.) On August 20, 2008, the Court granted
27 Jackson DeMarco’s motion to withdraw. (Doc. No. 137.)

28 On March 12, 2009, Plaintiff voluntarily dismissed her appeal. (*See* Doc No. 145.) Again,

1 Jackson DeMarco did not come to the Court with the concerns raised in this motion. In May of 2009,
2 the Court began the process of ascertaining the total sum of attorneys' fees with respect to the anti-
3 SLAPP motion, requesting both briefing and evidence from the parties. (Doc. No. 149.) While the
4 Plaintiff and Defendants were briefing this issue, Jackson DeMarco remained silent. On August 25,
5 2009, the Court awarded Defendants \$76,275.00 in attorneys' fees. (Doc. No. 164.)

6 Finally, on September 16, 2009, more than twenty-six months after Defendants filed the anti-
7 SLAPP and more than nineteen months after the Order granting that motion, Jackson DeMarco first
8 indicated that it had a problem with the Court's Order of February 11, 2008. (*See* Doc. No. 165.)

9 In light of the procedural record and the failure to raise this issue during the course of the
10 motion's briefing or any reasonable time thereafter, the Court finds that Jackson DeMarco's objection
11 to its jointly and severally liable on the anti-SLAPP fees is untimely. Jackson DeMarco could have
12 raised this objection at any time after Defendants first requested this relief in the anti-SLAPP motion.
13 It could have argued, however briefly, in opposition to the anti-SLAPP motion that joint and several
14 liability is not allowed under section 425.16(c).¹ The objection could have been contained in the
15 supplemental attorneys' fees briefing order in January of 2008. Jackson DeMarco also could have
16 mentioned this issue, or noted their intent to raise it, in the reply to the motion to withdraw. Once
17 Jackson DeMarco was actually allowed to withdraw, it could have immediately moved for
18 clarification and raised the present objection. If the problem was that this case was on appeal, then
19 Jackson DeMarco could have filed its motion in March 2009, once Plaintiff voluntarily dismissed her
20 appeal. Or, it could have filed its motion at the same time the parties were briefing the proper amount
21 of anti-SLAPP attorneys' fees in May 2009. However, it did not. It waited until September 2009 to
22 first raise this issue.

23 The fact that Jackson DeMarco filed this motion within 30 days of the second fees Order does
24 not make it timely. That Order had no bearing on who would be responsible for the fees, but merely

25
26 ¹ The Court recognizes that this *could* have created a conflict of interest between Plaintiff and
27 her counsel during the motion's briefing, but pointing out this supposed legal error would not
28 necessarily have created such a conflict. This is especially true if, as Jackson DeMarco claims, this
was simply an attempt by Defendants "to cause mischief and to place the attorney and client at odds."
(Reply at 2.) If Jackson DeMarco really believed this was the purpose of the request, it should have
pointed it out and not allowed Defendants to manipulate these proceedings.

1 determined how much of Defendants' attorneys' billing was compensable and reasonable in for
2 purposes of the Anti-SLAPP motion. The horse relevant to this objection left the barn with the
3 issuance of the anti-SLAPP Order on February 11, 2008.

4 Thus, the Court finds that, given the entirely unreasonable amount of time that has passed since
5 Defendants raised and the Court decided this issue, Jackson DeMarco's motion and objection to its
6 joint and several liability are untimely.

7 In any event, even if the Court were to address the substance of Jackson DeMarco's legal
8 arguments, the result would be the same. Section 425.16(c) does not specify from whom fees may be
9 recovered. Because the California legislature directs that this statute be construed broadly in order
10 to effectuate its purpose, a broad construction of section (c) allows for joint and several liability. *See*
11 *Moore v. Kaufman*, 2005 WL 249336, at *5 n.3 (Cal. Ct. App. 2005) ("[W]e believe the order making
12 [plaintiff's counsel] jointly and severally liable for [defendant's] fees and costs is correct on the
13 merits." (citing *Dowling v. Zimmerman* 85 Cal.App.4th 1400, 1414 (2001) for the proposition that the
14 anti-SLAPP statute should be broadly construed to give effect to the Legislature's intent to provide
15 a swift and effective remedy to SLAPP suit defendants)); *cf. Brooks v. Legacy Long Distance Int'l,*
16 *Inc.*, 2006 WL 3086274 (Cal. Ct. App. 2006) (upholding a joint and several award on procedural
17 grounds and noting that counsel's failure to object in writing or at the hearing precluded counsel from
18 raising that argument later). This helps protect a defendant from bearing the burden of the costs
19 required to defend a suit designed to chill its right of free speech and petition. Moreover, the Court
20 will not follow the unpublished case upon which Jackson DeMarco relies, *Foster v. Warner*, 2008 WL
21 2445106 (Cal. Ct. App. 2008), because it fails to consider or implement the explicit legislative
22 directive of broad statutory construction.

23 //

24 //

25 //

26 //

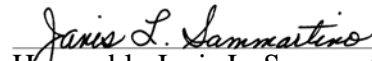
27 //

28 //

1 Thus, for the reasons stated, the motion for clarification is **GRANTED**. The Court
2 **CLARIFIES** that the anti-SLAPP award detailed in Document Numbers 98 and 164 is joint and
3 several against Plaintiff and her counsel. Further, the Court finds that Jackson DeMarco's objections
4 to that finding are untimely, having been filed more than nineteen months after anti-SLAPP Order
5 issued. Those objections are therefore **OVERRULED**.

6 IT IS SO ORDERED.

7
8 DATED: May 7, 2010

9 
10 Honorable Janis L. Sammartino
11 United States District Judge
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28