

# Tracy Smith v. Shane Cartwright

21CV45132

## PLAINTIFF’S MOTION FOR ATTORNEYS’ FEES

Plaintiff Tracy Smith moves, pursuant to Code of Civil Procedure sections 425.16, *et seq.*, for an order awarding reasonable attorneys’ fees and costs in the amount of \$27,335, against Defendant Shane Cartwright on the grounds that Defendant’s special motion to strike was filed primarily for an improper purpose, contains contentions not warranted by existing law and allegations that do not and are not reasonably likely to have evidentiary support and/or contained denials of contentions that are not warranted based on the evidence.<sup>1</sup> Plaintiff also moves for an award of sanctions against Defendant’s counsel Ashley Gonzalez, pursuant to Section 128.7, on the same asserted grounds.

As to Plaintiff’s request pursuant to section 426.16, “[i]f the court finds that a special motion to strike [brought pursuant to this section] is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.” (Code Civ. Proc., § 425.16, subd. (c)(1).) “[T]he reference to section 128.5 in section 425.16, subdivision (c) means a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute.” (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4<sup>th</sup> 1382, 1392, superseded by statute on other grounds as stated in *Hall v. Time Warner, Inc.* (2007) 153 Cal. App. 4<sup>th</sup> 1337, 1349.) Sanctions ordered pursuant to section 128.5 “shall be ordered pursuant to” the conditions and procedures set forth in subdivision (f) thereof. (§ 128.5, subd. (f).) Among these, a Court’s award of sanctions is specifically subject to the following condition: “[i]f the alleged action or tactic is the making...of a written motion...that can be withdrawn or appropriately corrected, a notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court, unless 21 days after service of the motion or any other period as the court may prescribe, the challenged action or tactic is not withdrawn or appropriately corrected.” (§ 128.5, subd. (f)(1)(B).)

Similarly, as to Plaintiff’s request for sanctions against counsel, Section 128.7 also contains a so-called safe-harbor provision that requires a party seeking sanctions to serve the notice of motion at least 21 days before filing with the court, to permit the receiving party time to withdraw or appropriately correct the challenged filing. (§ 128.7, subd. (c)(1).) “Section 128.7 is designed to be remedial, not punitive. [Citation.] The offending party can ““avoid sanctions by withdrawing

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<sup>1</sup> All subsequent statutory references herein are to the Code of Civil Procedure unless otherwise noted.

the improper pleading during the [21-day] safe harbor period. [Citation.] This permits a party to withdraw a questionable pleading without penalty, thus saving the court and the parties time and money litigating the pleading as well as the sanctions request.’ [Citations.]’ [Citation.] A formal noticed motion is required to begin the 21-day period. [Citation.] Strict compliance with the statute's notice provisions serves its remedial purpose and underscores the seriousness of a motion for sanctions. [Citation.]” (*Galleria Plus, Inc. v. Hanmi Bank* (2009) 179 Cal.App.4th 535, 538.

The Court concludes that Defendant’s special motion to strike was a motion that could have been withdrawn or appropriately corrected. The proof of service on file indicates that the notice of motion was served on Defendant on July 12, 2021, the same day the motion was filed with the Court. As such, the Court is without discretion to award sanctions pursuant to Section 425.16, subdivision (c)(1). Moreover, Plaintiff failed to comply with the safe-harbor provision of Section 128.7, subd. (c)(1).)

Even if Plaintiff’s motion was not procedurally defective, Plaintiff would not be entitled to the prayed-for award of attorneys’ fees because Plaintiff fails to make a sufficient showing that the fees sought were reasonable in amount or reasonably necessary to the conduct of the litigation.

Both of the statutes relied on by Plaintiff provide for an award of “reasonable attorney’s fees.” (See § 425.16 at subd. (c)(1), and § 128.7 at subd. (c)(1).) “The [party] seeking such an award ‘is not necessarily entitled to compensation for the value of attorney services according to [their] own notion or to the full extent claimed by [them]. [Citations.]’ [Citation.]” (*Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th 807, 815 816.) Rather, the party moving for an award of attorneys’ fees bears the burden of showing “that the fees incurred were ‘allowable,’ were ‘reasonably necessary to the conduct of the litigation,’ and were ‘reasonable in amount.’” (Id. at 816.)

“In determining a reasonable attorney fee award under fee-shifting statutes, the trial court begins by calculating a lodestar figure based on the hours reasonably spent, multiplied by the prevailing hourly rate for private attorneys in the community conducting litigation of the same type.” (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1240 (Rey).)

Plaintiff fails to submit any evidence of the “prevailing hourly rate for private attorneys in the community conducting litigation of the same type.” (See, generally, Declaration of Roy W. Loving (Loving Decl.)) Plaintiff fails even to submit competent evidence of the rates typically charged by his own counsel in matters of this type. The Loving Decl. contains a chart with a column populated with the number “350.” (See *id.* at ¶ 11.) It may be presumed that this figure represents the hourly rate that Mr. Loving charged Plaintiff in this matter. The fact is not, however, declared, resulting in ambiguity. More importantly, there is no evidence that this hourly rate is the rate typically charged by Plaintiff’s counsel for work of this type. There is no evidence at all regarding what hourly rate Mr. Latini charged in the matter, and none regarding what hourly rate he typically charges for work of this type. Moreover, Plaintiff’s counsel practices in Sacramento, California. The Court does not consider Sacramento practitioners to be a part of the Calaveras legal community, underscoring the lack of any presented evidence as to reasonableness or community prevailing hourly rate.

Finally, the Court shares Defendant's concerns that the size of the request does not appear to be reasonable in light of the type and amount of work generally required to defend against the special motion to strike.

For the foregoing reasons, the motion is DENIED. The denial is With Prejudice to seek attorney's fees regarding the special motion to strike as the failure to comply with safe harbor provisions cannot be corrected.

The clerk shall provide notice of this ruling to the parties forthwith. Defendant is to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.