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Fatal and sanctionable: Filing an untimely anti-SLAPP motion

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Not only can filing an anti-SLAPP motion more than 60 days after service of the complaint kill your motion, it might even result in sanctions against you. A recent state appellate court decision appears to sharpen the teeth in the 60-day filing requirement in Section 425.16(f).

The anti-SLAPP statute provides that a motion "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (Code of Civil Procedure Section 425.16(f).) This 60-day period starts running from the most recent, amended complaint. (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 283.)

Despite the permissive-sounding language of this subsection, the appellate court in *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, upheld a trial court's discretion to refuse to hear the merits of an untimely motion. There, the defendants filed their anti-SLAPP motion some 113 days after being served with the complaint by substitute service, without seeking leave from the trial court to file a late motion. Plaintiff opposed and sought to strike the anti-SLAPP motion as untimely; the trial court agreed, resulting in the denial of the anti-SLAPP motion.

The appellate court affirmed the denial, holding that the "plain meaning" of the statute was that a motion must be filed within 60 days unless the trial court exercises its discretion to consider a later-filed motion. That discretion allows the trial court to choose whether to consider or not consider the merits of an untimely motion. And, tying up a jurisdictional loose-end, the court also held that the granting of plaintiff's motion to strike (the anti-SLAPP motion) was an appealable order, because it operated as a denial of the anti-SLAPP motion (which is specifically appealable under Section 425.16(i)).

The *Chitsazzadeh* decision builds on some earlier decisions by the 2nd, 3rd and 4th District Courts of Appeal that had held that trial courts can refuse to consider anti-SLAPP motions filed outside of this 60-day period. For example, in *Platypus Wear Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, the appellate court held that the trial court abused its discretion in allowing a defendant to file an anti-SLAPP motion more than two years after the complaint was filed. The court emphasized that defendant had not provided a "compelling explanation" for why he didn't file the motion earlier, and the parties had already completed substantial discovery. It explained that the dual purposes behind the 60-day deadline are to ensure quick resolution before litigation expenses mount, and to "avoid tactical manipulation of the stays that attend anti-SLAPP proceedings." The court concluded that "in this case, the delay was extreme, the reasons Goldberg offered in his application for the delay in filing the motion were weak, the court's reasons for granting the application were unrelated to the purpose of the SLAPP statute, and the potential prejudice to Platypus, given the lengthy delay occasioned by the appeal, is great."

If you don't have compelling reasons, or the case has already progressed substantially (e.g. significant discovery has been taken), you face a real risk of being sanctioned for filing a late motion.

A much shorter delay, only six weeks past the 60-day deadline, was enough in *Morin v. Rosenthal* (2004) 122 Cal.App.4th 673, to justify the trial court's refusal to hear the untimely anti-SLAPP motion.

Finally, in *Olsen v. Harbison*, the appellate court affirmed the denial of an anti-SLAPP motion as untimely that was filed 278 days after service of the complaint. First, the court held that a plaintiff opposing an untimely motion does not have to demonstrate prejudice. Second, the court ruled that, although a trial court might "peek" at the strength of a motion's merits, "[d]iscretion to permit or deny an untimely motion cannot turn on the final determination of the merits of the motion."

But *Olsen* went further - wading into the swamp of sanctions. Not only was the trial court right about the untimeliness of the motion, the court said, but the appeal was frivolous since appellant had "made no colorable showing that the trial court's exercise of discretion in denying his untimely anti-SLAPP motion was whimsical, arbitrary, or capricious." Sanctions are available to prevailing plaintiffs under the anti-SLAPP statute if "the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay." (Code of Civil Procedure Section 425.16(c)(1).) The *Olsen* court awarded almost \$17,000 in sanctions to the respondent for his appellate attorney fees, awarded \$2,500 to the court for its expenses, but refused to award him his trial court attorney fees because he had not sought them below.

In contrast, both the courts in *Chitsazzadeh* and *Morin* reversed the award of sanctions by the trial court for filing an untimely motion. In *Morin*, the appellate court faulted the trial court for not explicitly finding that the anti-SLAPP motion was frivolous or solely intended to delay and for not reciting in detail its reasoning (all requirements for sanctions under Sections 425.16 and 128.5). But the court remanded to give the trial court a chance to enter a new, proper order for sanctions or to deny them. In *Chitsazzadeh*, the trial court *had* stated its reasoning - namely, that the defendant had filed an untimely motion without first seeking leave of court - but the appellate court held that alone did not show the motion was frivolous, and reversed with directions to deny the sanctions.

Yet the trend of awarding sanctions to plaintiffs appears to be gaining some momentum. In *Gerbosi v. Gaims, Weil, West & Epstein LLP* (2011) 193 Cal.App.4th 435, the appellate court partially affirmed the granting of \$220,000 in sanctions to the prevailing plaintiffs on an anti-SLAPP motion. The court found that it was not an abuse of discretion to award sanctions because, as to one of the plaintiffs, the motion was frivolous since he was a stranger to the underlying litigation which gave rise to the constitutional conduct upon which the anti-SLAPP motion was based.

These cases show that, as long as a trial court follows the requirements of Sections 425.16 and 128.5 to explain specifically why the anti-SLAPP motion is frivolous or intended for delay, the appellate court will rarely reverse the trial court's exercise of discretion in awarding sanctions. And the state Supreme Court does not appear to be interested in altering this flow of the law. It denied review in *Platypus*, *Olsen* and *Morin*, and review has not been sought in *Chitsazzadeh*.

So how do you avoid this mess? Here are some tips:

File your anti-SLAPP motion within 60 days of the service of the most recent complaint - that avoids any problems.

If you know you're too late, file a motion seeking leave to file a late anti-SLAPP motion. Even though the statute does not strictly require such a motion for leave, it will

make it much less likely that you will be sanctioned for just directly filing an untimely motion.

When seeking leave, provide specific and compelling reasons why you couldn't file your motion earlier, particularly when there has been a long delay, and don't rely simply on the fact that there is no prejudice to the plaintiffs.

If you don't have compelling reasons, or the case has already progressed substantially (e.g. significant discovery has been taken), you face a real risk of being sanctioned for filing a late motion. Consider filing a summary judgment motion or some other dispositive motion instead.

As the filing of anti-SLAPP motions proliferates like weeds on an organic farm, the courts appear to be getting more serious about enforcing the 60-day filing requirement, and appear more willing to use sanctions against moving defendants to enforce that requirement. Save yourself the headache and do your homework on this requirement ahead of time.