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How to take the wind out of an appellant's sails

MOTIONS TO DISMISS AN APPEAL, ESPECIALLY FRIVOLOUS ANTI-SLAPP APPEALS

Throughout the pendency of an appeal, there may be varying circumstances warranting motions, applications and informal requests filed with the court. While many of these motions and applications are routine and simply serve to set the stage for the big show – consideration of the merits of the appeal as framed by the appellate briefs – some motions can be used as a sword to summarily dispose of the appeal at the outset.

Under the right circumstances, a motion to dismiss an appeal can be granted before any briefing has even been filed. While not a favored means to dispose of an appeal, appellate courts have recently grown tired of seeing litigants abuse the immediate appealability of certain orders where there is practically no merit to the legal position and the purpose of the appeal appears to be to delay the trial.

As outlined below, this is particularly true in the context of anti-SLAPP motions where denial of the motion is immediately appealable. In the last few years, appellate courts have granted more and more motions to dismiss anti-SLAPP appeals and have lambasted defense counsel for pursuing such frivolous appeals for the purpose of delay. This article explores the power of a motion to dismiss an appeal and the circumstances that warrant its use.

The usual suspects: motions to dismiss based on a procedural defect

A motion to dismiss an appeal is most often successful in those circumstances where the notice of appeal is untimely or where the appeal arises from a non-appealable order. Such procedural grounds are ripe for a motion to dismiss.

The late filing of the notice of appeal is an absolute bar to appellate court jurisdiction. Thus, an appeal that was filed too late must be dismissed on respondent's motion or the court's own motion. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667.) On occasion, an untimely appeal will be accepted for filing and the court of appeal may dismiss sua sponte. Other times, however, untimeliness of the appeal may not be readily apparent and it is not until briefing that the defect is discovered. As a respondent, the first step should be to verify that the notice of appeal was timely. If it appears that the appeal is untimely, a motion to dismiss should be immediately sought to prevent unnecessary expense and delay.

Likewise, appellate courts cannot entertain an appeal taken from a nonappealable judgment or order. This is a jurisdictional principle. (*Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 696.) As noted by one court: "question whether an order is appealable goes to the jurisdiction of an appellate court, which is not a matter of shades of grey but rather of black or white." (*Farwell v. Sunset Mesa Property Owners Ass'n, Inc.* (2008) 163 Cal.App.4th 1545, 1550.)

Where an appellate court lacks jurisdiction to entertain an appeal from a non-appealable judgment or order, the appeal must be dismissed on respondent's motion or the court's own motion. (*Canandaigua Wine Co., Inc. v. County of Madera* (2009) 177 Cal.App.4th 298, 302.) Even if the respondent does not raise the issue, an appeal taken from a non-appealable order should be dismissed. "Appealability of the order goes to our jurisdiction, leaving us dutybound to consider it on our own motion." (*Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1216.)

Some appeals erroneously taken from a non-appealable order may be "saved" by the court of appeal if the defect is one in formality. Such discretion is usually invoked only where the appeal is mistakenly taken from an order preliminary to rendition of a final judgment. In the interests of justice and to prevent unnecessary delay, the appellate court has discretion to entertain the appeal by construing it as taken from the judgment and is thus not required to dismiss the appeal and await a subsequent appeal from the judgment. (*Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 69.)

Again, however, such "saving" power is entirely discretionary with the court of appeal. Indeed, several courts in the Second Appellate District Court of Appeal (Los Angeles) have rebuffed the practice, stating that the court is "wearying of 'appeals' from clearly non-appealable orders" and "henceforth we will no longer bail out attorneys who ignore the statutory limitations on appealable orders." (See *Cohen v. Equitable Life Assur. Soc.* (1987) 196 Cal.App.3d 669, 671; *Munoz v. Florentine Gardens* (1991) 235 Cal.App.3d 1730, 1732; *Good v. Miller* (2013) 214 Cal.4th 472, 474.)

Thus, despite the ability of the court to "save" an improper appeal taken from a non-appealable order, such power is entirely discretionary. If the appellant has filed a defective notice of appeal from a non-appealable order, consider filing a motion to dismiss as it may just summarily dispose of the appeal and if not, at least cast a shadow over the legitimacy of the defendant's position.

Motion to dismiss frivolous anti-SLAPP appeals

"California courts have the inherent power to dismiss frivolous appeals." (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1318, citing *Ferguson v. Keays* (1971) 4 Cal.3d 649, 658.) "Appellate courts have an inherent power to summarily dismiss any appeal which is designed for delay or which is based on sham or frivolous grounds." (*Zimmerman v. Drexel Burnham* (1988) 205 Cal.App.3d 153, 161.) Dismissal is appropriate when the frivolous character of the appeal can readily be determined from a brief inspection of the record. (See *Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 283-285.) As explained in *Zimmerman*, "[a]lthough appellate courts do not normally dismiss an appeal as frivolous without a full briefing on the merits, 'where the interests of justice require it,

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the court may exercise such power.'" (*Zimmerman,* at p. 161, citing *Toohey v. Toohey* (1950) 97 Cal.App.2d 84, 85.)

With the recent outbreak of anti-SLAPP litigation, appellate courts have looked to motions to dismiss as a mechanism to curb frivolous and dilatory appeals. The California Supreme Court acknowledged the problem and the potential for abuse flowing from the automatic stay of trial proceedings when an order denying an anti-SLAPP motion is appealed. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 195-196.) "The court urged lower courts to do what they could to deter frivolous motions and appeals by dismissing them promptly and, where appropriate, awarding sanctions." (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1185, fn. 8.) The court was "hopeful" that this would "somewhat reduce the risk of abuse." (*Ibid*.)

Citing the Supreme Court's encouragement to resolve such appeals as expeditiously as possible, another appellate court dismissed a frivolous anti-SLAPP appeal before full briefing. (*Olsen*, *supra*, 134 Cal.App.4th at p. 283, and fn. 5.) The court explained:

> [Appellant] submits that an appeal should never be dismissed if the motion to dismiss requires a consideration of its merits. He cites the "general rule" to that effect. [Citation.] The general rule is grounded on policies of avoiding double work by this court and avoiding unwarranted advancement of the case on calendar. [Citation.] The Supreme Court's admonition for dispatch in *Varian* [], warrants *an exception from the general rule here*. (*Id*.)

In yet another appellate decision granting a motion to dismiss a frivolous anti-SLAPP appeal, the court held: "In the case before us, though, much appears to be gained by dismissal rather than affirmance – specifically, prevention of the abuse of the anti-SLAPP statute to buy time from the day of reckoning in the trial court." (*People ex rel. Lockyer v. Brar* ("*Brar*") (2004) 115 Cal.App.4th 1315, 1318-1320.)

In *Brar,* the appellate court granted the respondent's motion to dismiss the appeal as frivolous, explaining that the appeal "practically has the words 'brought for reasons of delay' virtually tattooed on its forehead," illustrating the fact that "under a rule of automatic stay ... the incentive to appeal even the denial of a patently frivolous anti-SLAPP motion is overwhelming." (*Brar,* at p. 1319.)

In *Hewlett, supra*, the Court cautioned against the disturbing trend of meritless anti-SLAPP motions and the problems caused by the immediate appealability of orders denying such motions. "[M]any courts and commentators have attempted to draw attention – particularly legislative attention – to this 'explosion of anti-SLAPP motions' and resulting appeals, and to particular 'ways in which the anti-SLAPP procedure is being misused – and abused.' [Citations.] A major reason for this explosion is that the statute *rewards* the filer of an unsuccessful anti-SLAPP motion with what one court has called a "free time–out" from further litigation in the trial court. [Citation]." (*Id*. at pp 1184-1186 (emphasis added).) "[B]y entitling the unsuccessful movant to immediately appeal the denial of such a motion" – even one which wholly lacks merit – such an appeal automatically stays all further trial proceedings on causes of action "affected by the motion." (*Id*., at 1184-1885.) "This means that however unsound an anti-SLAPP motion may be, it will typically *stop the entire lawsuit dead in its tracks* until an appellate court completes its review." (*Ibid*.)

In yet another anti-SLAPP appeal, the appellate court began its opinion by stating: "Another appeal in an anti-SLAPP case. Another appeal by a defendant whose anti-SLAPP motion failed below. Another appeal that, assuming it has no merit, will result in an inordinate delay of the plaintiff's case and cause him to incur more unnecessary attorney fees. [Citation.] And no merit it has." (*Moriarty v. Laramar Management Corp*. (2014) 224 Cal.App.4th 125, 133.)

Earlier this year, the First District, Division Two, Court of Appeal, *acting on its own motion,* sent a letter to the appellant's counsel in an anti-SLAPP case noting its consideration of imposing sanctions for taking an appeal "that is frivolous or filed for purposes of delay." (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 221-222.) Highlighting the inordinate delay caused by the meritless appeal and the tremendous legal fees spent preparing and responding to the appeal, the Court quoted its own prior opinion in *Grewal v. Jammu* (2011) 191 Cal.App.4th 977 noting: "A well-known saying, generally attributable to William Gladstone, is that 'Justice delayed is justice denied.' A lesser known saying, known to be attributable to prominent defense lawyers from major law firms, is that 'Justice delayed is justice.'" (*Id*., citing *Grewal*, at p. 999.)

These cases reflect the increasing rationale of courts that an appellant should not be permitted to stall justice under a rule of automatic stay for a patently frivolous appeal. "Review on the merits, after briefing (as distinct from review as here, of the papers on a motion to dismiss) only rewards a frivolous appeal." (*Brar, supra,* 115 Cal.App.4th at p. 1319.)

"Bluntly speaking, the judicial system does not have the resources to indulge petulant litigants," nor are "[o]ur courts [ ] obliged to provide a forum for litigation that has no objective chance of success." (*Neufeld v. State Bd. of Equalization* (2004) 124 Cal.App.4th 1471, 1477-1478.) As explained by the Supreme Court: "'An appeal taken for an improper motive [such as mere desire for delay] represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts.'" (*Papadakis v. Zelis* (1991) 230 Cal.App.3d 1385, 1388.)

Motion to dismiss under the disentitlement doctrine

Appellate courts further have inherent power to dismiss an appeal taken by a party who is in contempt of a trial court order issued in the action or who, although not adjudged in contempt, has

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willfully disobeyed court orders in the action. The notion supporting the so-called "disentitlement doctrine" is that where an appellant "flagrantly and persistently" defies court orders, "[t]his is a more than adequate ground for dismissing the appeal …" (*Say & Say v. Castellano* (1994) 22 Cal.App.4th 88, 94; *In re E.M.* (2012) 204 Cal.App.4th 467, 474-478; *Gwartz v. Weilert* (2014) 231 Cal.App.4th 750, 757-758.)

Appellate courts are not required to come to the "aid and assistance" of a party who is in "flagrant contempt" of legal orders and processes of the courts. (*Stone v. Bach* (1978) 80 Cal.App.3d 442, 444.) The doctrine is particularly likely to be invoked where the appeal arises out of the very order the party has disobeyed. (*Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265.)

The disentitlement doctrine is not jurisdictional; rather, it is discretionary and appropriate only when the balance of equitable concerns makes it a proper sanction. (*San Francisco Unified School Dist. ex rel. Contreras v. First Student, Inc.* (2013) 213 Cal.App.4th 1212, 1239-1240.) In applying the disentitlement doctrine, the court will not consider the merits of the appeal. (*Ironridge Global IV, Ltd. v. Scrips America, Inc.* (2015) 238 Cal.App.4th 259, 265.) Rather, the doctrine is used as a justification for the sanction of outright dismissal of an appeal.

While the circumstances warranting application of the doctrine are narrow, a motion to dismiss based on the disentitlement doctrine may prove successful to avoid a long and drawn out appeal by a party lacking any respect for the orders of the court.

Procedural rules governing motions to dismiss

Generally, there is no specific deadline to file a motion to dismiss an appeal. Rather, the appropriate time is usually dictated by the ground on which the motion is based. Where the motion to dismiss is based on an untimely notice of appeal or an appeal from a non-appealable order, the motion can be filed at any time. Obviously, the earlier such a procedural defect is discovered and brought to the attention of the court, the better.

With respect to motions to dismiss frivolous appeals, the timing can be tricky. While there may be an inclination to file the motion at the outset, it may also be prudent to wait until the appellant's opening brief is filed so that the court will have the frivolous arguments at their fingertips. By citing the opening brief, an argument of frivolousness may be more accessible and indeed any argument of dilatory tactics can be highlighted by multiple extensions of time.

Notably, filing a motion to dismiss at the outset of the appeal does not necessarily mean that the appellate court will rule on the motion right away. The court may defer a decision on the motion, or deny it summarily, and subsequently consider the dismissal issue at the time for full consideration of the appeal on its merits. A summary denial of the motion will not preclude its later consideration.

As to the format, a motion to dismiss must be prepared in accordance with California Rule of Court rule 8.54(a), which outlines the general formality rules for motions in a reviewing court (i.e., a separate written motion stating the grounds and papers on which it is based and the relief requested, accompanying memorandum of points and authorities, plus supporting declarations and/or evidence if based on matters not in the record). (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 565.) Where the motion is filed before the record is filed in the appellate court, it generally must be accompanied by a declaration setting forth basic information about the appeal and the posture of the case. Even if filed after the record on appeal, it is generally advisable to include a declaration stating the general posture of the appeal.

One advantage to filing the motion is that an opposition is due fairly soon thereafter. An appellant has 15 days after filing of the motion to file written opposition. (Cal. Rules of Court, rule 8.54(a)(3).) Failure to oppose the motion may, in the appellate court's discretion, be deemed a consent to granting of the motion. (Cal. Rules of Court, rule 8.54(c).)

An order granting dismissal of an appeal operates as an affirmance of the judgment, leaving the judgment intact. (*County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1005.)

Conclusion

Thus, although the circumstances warranting a motion to dismiss may be narrow, its utility in providing a means of early disposition of an appeal should not be overlooked. As plaintiffs' attorneys, we are superheroes fighting for our day in court to vindicate those that have been harmed, and a motion to dismiss may prove to be yet another superpower we can use in the fight between good and evil.

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