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LARRY GERACI and REBECCA BERRY

10
11 **SUPERIOR COURT OF CALIFORNIA**
12 **COUNTY OF SAN DIEGO, HALL OF JUSTICE**

13 AMY SHERLOCK, an individual and on behalf of
her minor children, T.S. and S.S., ANDREW
14 FLORES, an individual,

15 Plaintiffs,

16 vs.

17 GINA M. AUSTIN, an individual; AUSTIN LEGAL
GROUP, a professional corporation, LARRY
18 GERACI, an individual, REBECCA BERRY, an
individual; JESSICA MCELFRISH, an individual;
19 SALAM RAZUKI, an individual; NINUS MALAN,
an individual; FINCH, THORTON, AND BARID, a
20 limited liability partnership; ABHAY
SCHWEITZER, an individual and dba TECHNE;
21 JAMES (AKA JIM) BARTELL, an individual;
NATALIE TRANG-MY NGUYEN, an individual,
22 AARON MAGAGNA, an individual; BRADFORD
HARCOURT, an individual; SHAWN MILLER, an
23 individual; LOGAN STELLMACHER, an
individual; EULENTHIAS DUANE ALEXANDER,
24 an individual; STEPHEN LAKE, an individual,
ALLIED SPECTRUM, INC., a California
25 corporation, PRODIGIOUS COLLECTIVES, LLC,
a limited liability company, and DOES 1 through 50,
26 inclusive,

27 Defendants.
28

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
10/26/2022 at 10:04:00 AM
Clerk of the Superior Court
By Elizabeth Reyes, Deputy Clerk

Case No. 37-2021-00050889-CU-AT-CTL

Judge: Hon. James A. Mangione

**DEFENDANTS LARRY GERACI AND
REBECCA BERRY'S MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S EX
PARTE APPLICATION TO STAY
ACTION PENDING APPEAL**

(Related to ROA #142)

Date: October 27, 2022

Time: 8:30 a.m.

Dept: C-75

[IMAGED FILE]

Action Filed: December 3, 2021

Trial Date: Not Yet Set

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **IN OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION**

3 Defendants, LARRY GERACI (“Geraci”) and REBECCA BERRY (“Berry”), submit this
4 Memorandum in opposition to Plaintiffs’ ex parte application *to stay this entire action* pending their
5 appeal of the Court’s order granting the anti-SLAPP motion of two of the nineteen named defendants,
6 GINA AUSTIN and AUSTIN LEGAL GROUP (collectively “Austin”).

7 **I. EX PARTE RELIEF REQUESTED BY PLAINTIFFS**

8 In their ex parte application, Plaintiffs seek the following relief:

- 9 (1) That the court stay the entire action; or, alternatively,
10 (2) Should the court find the action is not automatically stayed, that the court grant them leave
11 to file oppositions to defendants Geraci/Berry’s (i) demurrer to the First Amended
12 Complaint; (ii) motion to strike portions of the First Amended Complaint; and (iii) motion
13 to strike the First Amended Complaint pursuant to C.C.P. § 425.16 (the anti-SLAPP
14 motion).

15 **II. ARGUMENT IN OPPOSITION TO THE REQUESTED RELIEF**

16 Summary

17 Defendants LARRY GERACI (“Geraci”) and REBECCA BERRY (“Berry”) oppose the
18 granting of the relief requested. As further discussed below, the application should be denied
19 because: first, contrary to the Plaintiffs’ assertion, the appeal of the order granting Austin’s anti-
20 SLAPP motion does not automatically stay the entire action pending resolution; and second,
21 Plaintiffs have not provided the court with facts establishing good cause for their failure to timely file
22 any oppositions to Geraci/Berry’s three motions.

23 Argument

24 Geraci and Berry are two (2) of nineteen (19) named defendants. After being served with the
25 operative First Amended Complaint, Geraci and Berry filed three motions: 1) a Demurrer to each of
26 the four causes of action asserted against them (the First Cause of Action for conspiracy to
27 monopolize in violation of the Cartwright Act, the Fifth Cause of Action from unfair competition in
28 violation of the Unfair Competition Law or “UCL,” the Sixth Cause of Action for Declaratory Relief

1 seeking to have declared void a judgment in favor of Geraci/Berry and against a non-party to this
2 action, Darryl Cotton, entered in a prior action, and the Seventh Cause of Action for Civil
3 Conspiracy); 2) a motion to strike certain improper allegations requesting non-restitutionary
4 disgorgement not recoverable in UCL actions; and 3) an anti-SLAPP motion to strike. The court
5 previously issued a tentative ruling on those motions to sustain the demurrer without leave to amend
6 and to deny the remaining motions as moot. The court has not yet issued a final ruling.

7 Plaintiffs failed to timely file any oppositions to Geraci/Berry's three motions. Rather, *on the*
8 *day before the hearing*, the Plaintiffs filed a brief Memorandum claiming that their appeal of the
9 granting of an anti-SLAPP motion by different defendants, Gina Austin and Austin Legal Group,
10 deprived the court of jurisdiction over the Geraci and Berry motions; specifically, they argued "The
11 pending [Geraci and Berry] motions are *necessarily* 'embraced' or 'affected' by the pending appeal
12 of the anti-SLAPP motion." (Italics added.) This is the same argument being made in this ex parte
13 application, namely, the argument that the appeal of the order granting Austin/Austin Legal Group's
14 anti-SLAPP motion *automatically* stay this entire action. This legal conclusion is plainly wrong.

15 Code of Civil Procedure § 916, captioned "Stay of proceedings on perfecting appeal,"
16 provides:

17 (a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section
18 116.810, the perfecting of an appeal stays proceedings in the trial court upon the
19 judgment or order appealed from or upon the matters embraced therein or affected
20 thereby, including enforcement of the judgment or order, but the trial court may proceed
21 upon any other matter embraced in the action and not affected by the judgment or order.

22 (b) When there is a stay of proceedings other than the enforcement of the
23 judgment, the trial court shall have jurisdiction of proceedings related to the enforcement
24 of the judgment as well as any other matter embraced in the action and not affected by
25 the judgment or order appealed from. (Yellow highlighting added.)

26 Here, Plaintiffs appeal is from the courts' granting of the anti-SLAPP motion brought by
27 the Austin defendants. That appeal stays trial court proceedings *upon that order*, i.e., the trial
28 court proceedings relating to the claims by Plaintiffs against those two other defendants, and

1 Plaintiffs do not argue otherwise. Rather, Plaintiffs make the flawed argument that the pending
2 Geraci/Berry motions are *necessarily* “embraced” or “affected” by their appeal of the granting of
3 the anti-SLAPP motion brought by those two different.

4 As stated in the very case cited by Plaintiffs (*Young v. Tri-City Healthcare Dist.* (2012) 210
5 Cal.App.4th 35, 49, 148 Cal. Rptr. 3d 119, citing *Varian Med Sys. Inc. v. Delfino* (2005) 35 Cal.4th
6 180, 188), at pages 49-50:

7 *Varian, supra*, 35 Cal.4th 180 teaches us, “In determining whether a proceeding is
8 embraced in or affected by the appeal, we must consider the appeal and its possible
9 outcomes in relation to the proceeding and its possible results. **‘[W]hether a matter is
10 “embraced” in or “affected” by a judgment [or order] within the meaning of
11 [section 916] depends on whether postjudgment [or postorder] proceedings on the
12 matter would have any effect on the “effectiveness” of the appeal.’** [Citation.] ‘If so,
13 the proceedings are stayed; if not, the proceedings are permitted.’ (*Betz v. Pankow* (1993)
14 16 Cal.App.4th 931, 938 [20 Cal. Rptr. 2d 841] (*Betz*).)” (*Varian, supra*, at p. 189.)
(Bold added for emphasis.)

12 Here, it is obvious that the Plaintiffs’ appeal of the granting of Austin’s anti-SLAPP
13 motion does not “embrace” or “affect” the Geraci/Berry motions within the meaning of Section
14 916 because the Court’s decisions on the Geraci/Berry motions, which challenge Plaintiffs’
15 claims against Geraci/Berry, **will have absolutely no effect on the effectiveness of the
16 Plaintiff’s appeal of the order granting of Austin’s anti-SLAPP motion** directed at Plaintiffs’
17 claims against Gina Austin and Austin Legal Group. The motions are independent and mutually
18 exclusive and deal with claims against different parties. Plaintiffs have cited to no caselaw in
19 which a court applied Section 916 to stay trial court proceedings in a similar circumstance.
20 **Plaintiffs’ have provided no explanation of how the granting or denial of Geraci/Berry’s
21 motions or any subsequent court proceedings in this action would have any effect on the
22 “effectiveness” of their pending appeal.**

23 This Court, as expressly allowed by Section 916, “may proceed upon any other matter
24 embraced in the action *and not affected by the judgment or order*” (Code Civ. Proc., § 916(a))
25 and retains “jurisdiction of proceedings related to ... any other matter embraced in the action *and
26 not affected by the judgment or order appealed from*” (Code Civ. Proc., § 916(b)).

27 Finally, in the alternative, in the event the court declines to stay the entire action, Plaintiffs
28 ask this court to grant it leave to file oppositions to the three Geraci/Berry motions. Plaintiffs,

1 however, have provided no factual basis that excuses their failure to time file an opposition. They
2 had months to raise the argument they make today. Plaintiffs had months to prepare and file their
3 oppositions to the Geraci/Berry motions, which motions were served and filed on July 25, 2022, with
4 a noticed hearing date of October 21, 2022. The Austin anti-SLAPP motion was heard and ruled
5 upon on August 11, 2022, and Plaintiffs filed their Notice of Appeal from that order on August 23,
6 2022. Plaintiffs' oppositions to the Geraci/Berry motions were not due until on or before October 10,
7 2022 (nine (9) court days before the October 21, 2022 hearing date. Yet Plaintiffs did not timely file
8 any oppositions to the Geraci/Berry motions. In the approximately 48 days between the filing of their
9 Notice of Appeal and the date their oppositions were due to the Geraci/Berry motions, they did not
10 seek any ex parte relief to address their belated contention that this entire action was stayed. They
11 did not even timely file any opposition by the required due date making this contention. Rather, *on*
12 *the day before the hearing*, the Plaintiffs filed a brief Memorandum claiming that their appeal of the
13 order granting of Austin's anti-SLAPP motion stayed this entire action and deprived the court of
14 jurisdiction over the Geraci/Berry motions. Plaintiffs claimed misunderstanding of the law is not a
15 valid excuse for failure to timely file any oppositions. Plaintiffs had months to raise this issue with
16 the parties and the Court.

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18 Dated: October 26, 2022

FERRIS & BRITTON

A Professional Corporation

20
21 By: 
22 Michael R. Weinstein
23 Scott H. Toothacre
24 Attorney for Defendants
25 LARRY GERACI and REBECCA BERRY