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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 MCELFRESH, 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.

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
02/10/2023 at 01:47:00 PM
Clerk of the Superior Court
By Bernabe Montijo, 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 PLAINTIFFS'
SECOND EX PARTE APPLICATION TO
STAY ENTIRE ACTION PENDING
APPEAL**

(Related to ROA #142)

Date: February 14, 2023

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’ SECOND 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
5 Plaintiffs’ appeal of the Court’s order granting the anti-SLAPP motion of two of the nineteen named
6 defendants, GINA AUSTIN and AUSTIN LEGAL GROUP (collectively “Austin”).

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

8 In the instant ex parte application, Plaintiffs AMY SHERLOCK (“Sherlock”) and ANDREW
9 FLORES (“Flores”) ask the Court for a second time to stay the entire action. Once again, the Court
10 should deny the requested relief.

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

12 **Summary**

13 Defendants Geraci and Berry oppose the relief requested. The application should be denied
14 because: first, contrary to the Plaintiffs’ assertion, the appeal of the order granting Austin’s anti-
15 SLAPP motion does not automatically stay the entire action pending resolution; second, the Court has
16 already considered and rejected a first ex parte application heard more than three months ago, on
17 October 27, 2022, seeking the same relief based on the same argument; and third, the Plaintiffs have
18 not shown good cause to have this motion heard on an ex parte basis rather than on a noticed motion.

19 **Argument**

20 Geraci and Berry are two (2) of nineteen (19) named defendants. On February 2, 2023, the
21 Court entered judgment in favor of said defendants and against plaintiffs Amy Sherlock and Andrew
22 Flores, based on its prior order granting Geraci and Berry’s anti-SLAPP motion to strike. Geraci and
23 Berry will be serving a Notice of Entry of Judgment and thereafter intend to timely file their
24 Memorandum of Costs and Motion for Attorneys’ Fees as the prevailing party on their anti-SLAPP
25 motion to strike. Geraci and Berry would be harmed if the requested relief is granted because they
26 would be unable to file their cost memo and attorneys’ fees motion until after the pending appeal or
27 appeals are resolved, and therefore have an interest in opposing the requested relief.

28 Plaintiffs’ argument is that its appeal of the Court’s granting of Austin’s anti-SLAPP motion

1 to strike automatically *stays the entire action* pursuant to C.C.P. § 916(a) because, plaintiffs argue,
2 the Court is deprived of jurisdiction to issue any orders in the remainder of the action that are
3 “embraced” or “affected by” the subject of their appeal, which they characterize as a challenge to the
4 legality of the alleged “Strawman Practice.

5 It should be noted that this argument has already been raised and rejected by the Court in its
6 ruling denying the same relief requested on the same basis more than three (3) months ago in
7 connection with plaintiffs’ earlier ex parte application heard on October 27, 2022. Plaintiffs have not
8 provided good cause for now seeking the substantively identical relief for a second time on the same
9 grounds via an ex parte application rather than noticed motion.

10 Code of Civil Procedure § 916, captioned “Stay of proceedings on perfecting appeal,”
11 provides:

12 (a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section
13 116.810, the perfecting of an appeal stays proceedings in the trial court upon the
14 judgment or order appealed from or upon the matters embraced therein or affected
15 thereby, including enforcement of the judgment or order, but the trial court may proceed
16 upon any other matter embraced in the action and not affected by the judgment or order.

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

21 Here, Plaintiffs have appealed the Court order granting the anti-SLAPP motion brought
22 by the Austin defendants. That appeal stays trial court proceedings *upon that order*, i.e., the trial
23 court proceedings relating to the claims by Plaintiffs against those two other defendants, and
24 Plaintiffs do not argue otherwise. Rather, Plaintiffs make the flawed argument that their
25 remaining claims against other parties are *necessarily* “embraced” or “affected” by their appeal
26 of the granting of the anti-SLAPP motion brought by those two different parties because the
27 central issue underlying all the claims in the lawsuit is the legality of the alleged “Strawman
28 Practice.”

1 This Court, as expressly allowed by Section 916, “may proceed upon any other matter
2 embraced in the action *and not affected by the judgment or order*” (Code Civ. Proc., § 916(a))
3 and retains “jurisdiction of proceedings related to ... any other matter embraced in the action *and*
4 *not affected by the judgment or order appealed from*” (Code Civ. Proc., § 916(b)). As stated in
5 *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 49, 148 Cal. Rptr. 3d 119, citing
6 *Varian Med Sys. Inc. v. Delfino* (2005) 35 Cal.4th 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.)
15 (Bold added for emphasis.)

16 Here, it is obvious that the Plaintiffs’ appeal of the granting of Austin’s anti-SLAPP
17 motion does not “embrace” or “affect” the remainder of the action within the meaning of Section
18 916 because the Court’s subsequent decisions regarding the remaining claims against the other
19 remaining other parties in the action **will have absolutely no effect on the effectiveness of the
20 Plaintiff’s appeal of the order granting of Austin’s anti-SLAPP motion** directed at Plaintiffs’
21 claims against Gina Austin and Austin Legal Group. For example, the Court’s recent granting of
22 the various anti-SLAPP motions to strike by defendants Geraci/Berry, Schweitzer, and
23 McElfresh will have no impact on Plaintiff’s appeal of the order granting Austin’s anti-SLAPP
24 motion. Those various motions are independent and mutually exclusive and deal with claims
25 against different parties. Plaintiffs have cited to no caselaw in which a court applied Section 916
26 to stay trial court proceedings in a similar circumstance. **Plaintiffs’ have provided no
27 explanation of how the Court’s hearing and rulings in the future concerning the plaintiffs’
28 remaining claims against remaining parties would have any effect on the “effectiveness” of
29 their pending appeal.**


Put another way, even assuming for sake of argument that the central issue underlying
each of Plaintiffs claims against any and all remaining parties is the legality of the “Strawman
Practice” (a contention with which defendants Geraci/Berry flatly disagree), the conclusion that

1 any future proceedings in the action will “embrace” or be “affected by” the pending appeal
2 within the meaning of Section 916 is simply incorrect. There is no support for the argument that
3 court’s rulings and orders in connection with the litigation of the remaining claims against the
4 remaining parties would have any effect on the “effectiveness” of the pending appeal of the order
5 granting Austin’s anti-SLAPP motion to strike.

6
7 Dated: February 10, 2023

FERRIS & BRITTON

A Professional Corporation

8
9
10 By: 

Michael R. Weinstein

Scott H. Toothacre

Attorney for Defendants

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7 LARRY GERACI and REBECCA BERRY

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10 AMY SHERLOCK, an individual and on behalf of
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21 LAKE, an individual, ALLIED SPECTRUM, INC.,
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24 Defendants.

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

Judge: Hon. James A. Mangione
Dept: C-75

PROOF OF ELECTRONIC SERVICE

[IMAGED FILE]

Action Filed: December 3, 2021
Trial Date: Not Yet Set

26 I, DEBRA L. BARKER, declare that: I am over the age of 18 years and not a party to the case;
27 I am employed in the County of San Diego, California; and my business address is: 501 West
28 Broadway, Suite 1450, San Diego, California 92101.

On February 10, 2023, I served the following document(s):

1. DEFENDANTS LARRY GERACI AND REBECCA BERRY'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SECOND EX PARTE APPLICATION TO STAY ENTIRE ACTION PENDING APPEAL.

VIA ELECTRONIC MAIL. Based on an agreement of the parties to accept service electronically, I caused the above document(s) to be sent to the person(s) on the date above, to the following email addresses:


<p>Andrew Flores, Esq. Law Office of Andrew Flores 945 4th Avenue, Suite 412 San Diego, California 92101 Telephone: 619-256-1556/Fax 619-274-8253 afloreslaw@gmail.com Plaintiff in Propria Persona and Attorney for Plaintiffs AMY SHERLOCK, Minors T.S. and S.S</p>	<p>Steven W. Blake, Esq. Andrew E. Hall, Esq. Danielle S. Ward, Esq. Diane E. Bond, Esq. BLAKE LAW FIRM 533 2nd Street, Suite 250 Encinitas, California 92024 Phone: (858) 232-1290 steve@blakelawca.com andrew@blakelawca.com eservice@blakelawca.com Attorneys for Defendant, STEPHEN LAKE</p>
<p>Douglas A. Pettit, Esq. Kayla R. Sealey, Esq. PETTIT KOHN INGRASSIA LUTZ & DOLIN PC 11622 El Camino Real, Suite 300 San Diego, California 92130 Telephone: 858-755-8500/Fax: 858-755-8504 dpettit@pettitkohn.com; ksealey@pettitkohn.com knuthals@pettitkohn.com (Legal Assistant) lzamora@pettitkohn.com (Legal Assistant) Attorneys for Defendants GINA M. AUSTIN & AUSTIN LEGAL GROUP</p>	<p>Natalie T. Nguyen, Esq. NGUYEN LAW CORPORATION 2260 Avenida de la Playa La Jolla, California 92037 Phone: 858-757-8577 natalie@nguyenlawcorp.com Defendant in Propria Persona</p>
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6 Attorney for Defendants LARRY GERACI
7 And REBECCA BERRY

8 I declare under penalty of perjury under the laws of the State of California that the foregoing
9 is true and correct.

10 Dated: February 10, 2023

FERRIS & BRITTON,
A Professional Corporation

11 
12 _____
13 DEBRA L. BARKER, Paralegal