

Court of Appeal, First Appellate District, Division Four - Nos. A151300, A152298

S253459

IN THE SUPREME COURT OF CALIFORNIA

En Banc

**SUPREME COURT
FILED**

DAVID FENNELL, Plaintiff and Appellant,

FEB 20 2019

Jorge Navarrete Clerk

v.

CHARLES MUNGER, JR., Defendant and Respondent.

Deputy

DAVID FENNELL, Plaintiff and Appellant,

v.

CALIFORNIA REPUBLICAN PARTY, Defendant and Respondent.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

DAVID FENNELL,
Plaintiff and Appellant,
v.
CHARLES MUNGER, JR.,
Defendant and Respondent

DAVID FENNELL,
Plaintiff and Appellant,
v.
CALIFORNIA REPUBLICAN PARTY,
Defendant and Respondent.

A151300
(San Mateo County
Super. Ct. No. CIV-492126)

A152298
(San Mateo County
Super. Ct. No. CIV-492126)

MEMORANDUM OPINION¹

I.

Before us are two appeals arising from rulings by two different trial judges in the same case. The first is appeal No. A151300, which seeks review of an order dismissing the action for non-prosecution. The second is appeal No. A152298, which seeks review of an order denying a motion for reconsideration of a final judgment that had been

¹ We resolve these appeals by a memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1.

affirmed on appeal following the grant of an anti-SLAPP motion in 2010, six years before reconsideration was sought. On our own motion, we have consolidated these two appeals for oral argument and for disposition. Because the parties are aware of the relevant background and of the specific rulings being appealed, we will not reiterate any of that for either appeal.

The opening briefs here are word-for-word identical to each other, except on the caption page of the brief in No. 152298, appellant appears to have crossed out the name of the trial judge who ruled on the dismissal at issue in No. 151300 and written in the name of the trial judge who ruled on the reconsideration motion. As broadly summarized in identical sections of both briefs, entitled “STATEMENT OF FACTS,” we are told that the underlying case “involves the libeling of a whistleblower who found money laundering and potential political influence peddling conducted by staff of the California Republican Party and related campaigns.” This sweeping statement is accompanied by no citations to the record, which violates California Rules of Court, rule 8.204.

What is apparently intended to be the legal basis of the appeal in both cases, set forth in identical sections of both opening briefs, both entitled “ARGUMENT,” is the following contention, quoted here in its entirety. Because “[t]he original Judge in this case is being reported to the Judicial Council of California for Misconduct[,]” “[t]he Appellant is requesting the case be sent back down for the new unbiased Law & Motion Judge to review this case.” That request for relief is accompanied by no citation to legal authority, which violates California Rules of Court, rule 8.204(1)(B).

In his reply brief in No. A151300, appellant presents for the first time some factual detail, but in a meandering style that bears no apparent relationship to the single issue of bias raised in the opening brief and instead appears to be an attempt to discuss the merits of the respective rulings at issue. The reply brief in No. A152298 wanders afield from the sole issue presented by the opening brief in the same way. Here, again, in both appeals, the replies supply no citations to the record, in violation of California Rules of Court, rule 8.204, or to pertinent authority, in violation of California Rules of Court, rule 8.204(1)(B).

II.

Because not a word is said about judicial bias in the reply briefs, everything appellant presents in those briefs constitutes new argument not raised in his opening brief. We normally do not, and we will not in this case, entertain argument going beyond issues framed in an opening brief. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 [for “[o]bvious reasons of fairness,” declining to consider issue raised by appellant for first time in reply brief]; cf. *People v. Crow* (1993) 6 Cal.4th 952, 960, fn. 7 [declining to address issue raised for first time at oral argument].)

Appellant must overcome the presumption of correctness that a judgment enjoys on appeal. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Even if we were to consider his opening briefs, despite his rule violations in submitting them, the sparse offering he provides is insufficient to overcome this presumption. We cannot tell what, exactly, his claim of judicial bias is. Judicial bias, obviously, is a serious charge, and it can take a number of forms, some of which are waivable for failure to raise the issue in a timely way according to specified procedures, and some of which are so fundamental that they are unwaivable. (See Rothman, California Judicial Conduct Handbook (3d. Ed. 2007) §§ 7.16, 7.24; Code Civ. Proc., § 170.3, subd. (b)(2).)

The bias issue appellant apparently wishes to raise is too cryptic for us to review in a meaningful way. Because it is not properly presented or sufficiently developed to be cognizable, we must treat it as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Simply put, “[i]t is not our responsibility to develop an appellant’s argument” for him. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) We are aware, of course, that appellant is proceeding in propria persona. But “[t]he reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment.” (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.) “[W]e are unable to ignore rules of procedure” just because an appellant chooses to proceed without an attorney. (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267.) “When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other

litigants and attorneys [citations]. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney [citation].” [Citations.]’ ” (*Ibid.*)

III.

Respondents’ motions for sanctions and for judicial notice in No. A151300 are denied.

DISPOSITION

The judgments in case Nos. A151300 and A152298 are affirmed. Respondents are entitled collect their costs incurred on appeal.

Streeter, Acting P.J.

We concur:

Tucher, J.

Reardon, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

A152298, A153100/*Fennel v. California Republican Party, Fennell v. Munger*

ORIGINAL

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FILED
SAN MATEO COUNTY

JUN 29 2017
Clerk of the Superior Court
By DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

DAVID FENNELL,

Plaintiff,

CASE NO. CIV 492126

v.

MEMORANDUM DECISION AND
ORDER ON PLAINTIFF'S APPLICATION
FOR CLARIFICATION AND/OR
RECONSIDERATION OF ORDERS

CIV492126
ORD
Order
578143



CALIFORNIA REPUBLICAN PARTY,
et al.; and DOES 1through 1000, inclusive,

Defendants.

The Court is in receipt of a Letter/Application, a copy of which is attached hereto, in which Plaintiff David Fennell seeks Reconsideration of certain Law & Motion rulings made earlier on in this case.¹

Nature of the Case / This Application

In general, Plaintiff's claims here assert election-rigging in the 2008 and 2010 general elections by Defendant Republican candidates -- including Meg Whitman, and six other candidates who ran for

¹ The Application was submitted October 21, 2016, and then renewed December 15, 2016. Due to the busy trial calendar ever since then, including jury trials in several felony criminal cases, complex civil case proceedings, and jury trials in other long-cause civil cases, the Court (Dept. 10) has not been able to attend to this matter until now.

1 Governor in 2010; McCain-Palin 2008, Inc. -- and the California Republican Party by use of so-called
2 "dark money". He also asserts a biased candidate selection process within the California Republican
3 Party, in the Party's internal selection of its chairman, that unfairly discriminated against him.

4 Although what is styled as a "Notice of Motion and Motion for...Reconsideration of Orders" is
5 submitted with the Letter/Application, it does not appear to have been filed or calendared for a Hearing
6 in the Law & Motion Department. The motion papers, however, appear to have been served on some
7 Defense Counsel, without any identification of which of the multiple Defendants those attorneys
8 represent. But, as far as the Court is aware, no Defendant has submitted any response.

9 **Application Untimely**

10 Even if properly served, the current Letter/Application, and its apparently unfiled motion papers
11 and attachments, suffers from obvious untimeliness: Plaintiff seeks Reconsideration of Orders made *six*
12 *to seven years ago*. And, under any relevant scenario, the ten-day period for seeking such
13 Reconsideration (ten days from service of notice of entry of order under CCP § 1008 (a)), has long-ago
14 expired.

15 By the subject Orders, this Court granted several Defendants' Anti-SLAPP Special Motions to
16 Strike (pursuant to CCP § 425.16) and then awarded those Defendants recovery of related statutory
17 attorneys fees and costs (see CCP § 425.16, subd. (c) (1).) Those Orders were entered pursuant to the
18 Court's rulings after hearings held September 10, 2010 and September 15, 2010. And, as those Orders
19 called for a Dismissal of the case, they were subject to immediate Appeal (See CCP § 425.16, subd. (i);
20 see also, *Melbostad v. Fisher* (1st Dist. 2008) 165 Cal. App.4th 987, holding that trial court's order
21 awarding attorneys fees under § 425.16 is appealable.)

22 Plaintiff David Fennell in fact filed his Notice of Appeal, from the Orders pertinent here, on
23 December 2, 2010, *over 6½ years ago*. And, on September 22, 2011, this Court's rulings were
24 subsequently affirmed by the Court of Appeal (1st Dist. No. A129558). As a matter of law, where there
25 is such an affirmed final dismissal already entered, the trial court has no jurisdiction to consider an
26 application for reconsideration as the one presented here. (See, e.g., *APRI Ins. Co. v. Superior Court* (2nd
27 Dist. 1999) 76 Cal. App.4th 176, 181, where trial judge had already signed order of dismissal before
28 later erroneously granting the motion for reconsideration.)

1

2 **Application Lacks Merit**

3 Not only is the Plaintiff's pending Letter/Application untimely, but also it is patently
4 unmeritorious.

5 The gravamen of Plaintiff's Reconsideration request appears to be an argument that this Court's
6 rulings on the subject Anti-SLAPP Motions were somehow invalid because the Defendants' respective
7 counsel failed to lodge copies of their motion papers, this Court's Orders, and related Notice of Appeal
8 with the Judicial Council of California (which Plaintiff erroneously refers to as the "Judicial Board of
9 California").

10 Such lodging of Anti-SLAPP Motion papers, etc., with the Judicial Council *is required* under
11 subd. (j) of CCP §425.16, subd. (j) (1), and Plaintiff appears to be saying that the requirement is
12 jurisdictional. I.e., That due to the moving Defendants' failure to do that lodging with the Judicial
13 Council in conjunction with their Notice of Motion, the Court had no jurisdiction to hear and decide the
14 Defendants' Anti-SLAPP Motions and issued Orders that were void *ab initio*.

15 Plaintiff, however, is in error in his contention. The purpose of subdivision (j) is to put the
16 California Legislature in a position to track the actual impact of the Anti-SLAPP statute. That
17 subdivision was the result of a 2005 amendment that deleted a prior subdivision (i) which had required
18 the Judicial Council to "...report to the Legislature on the frequency and outcome of special motions
19 made pursuant to this section [CCP § 425.16], and on any matters pertinent to the purposes of this
20 section." (See Historical and Statutory Notes to § 425.16 in the current West's annotated CCP.) And
21 subdivision (j) (2) expressly provides that the purpose of the Judicial Council lodging-of-documents
22 requirement is so that there will be a "public record" as to the transmitted information.

23 Accordingly, the Court is of the opinion, and I so find, that the purposes of the Judicial Council
24 lodging requirement is not a condition to the Court's jurisdiction to hear Anti-SLAPP Motions.
25 Therefore, this Court's prior Orders ruling on Defendants' referenced §425.16 motions here were
26 perfectly valid.

1 **Order**

2 For the reasons above-stated, Plaintiff David Fennell's Application for Reconsideration is
3 DENIED. Plaintiff's submitted Motion papers and attachments to be returned to him unfiled.

4

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6 June 28th, 2017.

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8 IT IS SO ORDERED

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10 Mark D. Burwood
11 JUDGE OF THE SUPERIOR COURT

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David Fennell

Fennell for Lieutenant Governor

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c/o Court Clerk Patrice
Dept. 10, Courtroom 8D
San Mateo County Superior Court
400 County Center
Redwood City, CA 94065
Ph: (650) 261-5110

2nd Request

(L)

Honorable Judge Robert D Foiles
c/o Court Clerk Alex Ortega
San Mateo County Superior Court
400 County Center, Dept 21/Rm 2J
Redwood City, CA 94063

**RE: CIV492126 David Fennell v. California Republican Party et al.
Motion for Clarification and/or Reconsideration**

Dear Honorable Judge Buchwald,

Thank you for taking your valuable time to review my request for a Motion for Clarification and/or Reconsideration

DY
It appears the Defense attorneys in CIV492126 have failed to file the proper documents required in the CCP 425.16 Motions and have not submitted signed settlement offers to their clients nor have they kept the clients they claim to represent informed on developments in the case.

OC
I have recently spoken directly with some of the Defendants in this case and they did not even know this case existed nor had they any knowledge of the lawyers who claimed to represent them. Clearly there is a need for Clarification and/or Reconsideration of the Motions filed and signed by you in 2010.

This week I spoke to your very helpful court clerk Patrice and due to the long period of time since the Motions were signed, she instructed me to send you a draft version of the Motion for you to review as you would have to confirm if this was a matter you would be willing to put on the court calendar. She also advised me to serve all defense attorneys which I have done.

The legal basis is simple.

California law requires 425.16 Motions to be filed with the Judicial Board of California in 2010. The Judicial Board confirmed this was not done.

Therefore these Motions have no legal basis and should be reversed or in the least clarified or reconsidered.

It should be noted that I continue to be willing to settle this matter out of court for \$1. You will find signed settlement offers in the case file.

I was told that the attorneys who claim to represent these parties have not sent these offers to the parties they claim to represent and in the case of Senator John McCain I was instructed to file a complaint with the US Capitol Police. I have recently returned from meetings in DC with Federal investigators on this and related matters in the above case.

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SAN MATEO COUNTY

DEC 15 2016

DEPT. 10

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SAN MATEO COUNTY

DEC 14 2016

Clerk of the Superior Court

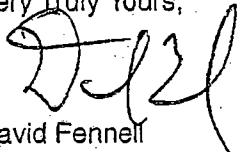
EXHIBIT

ONE to
Mem Decision/Order

PENCO-Boynton, N.J.

Clearly, there is a need for Clarification and/or Reconsideration and I would greatly appreciate the opportunity to state my case for this Motion for Clarification and/or Reconsideration before you and would accept any calendar date and time that best fits your schedule.

Very Truly Yours,



David Fennell
GOP Candidate
California Lieutenant Governor 2018
FPPC ID# 1374646

COPY

AC-S92

1 CHARLOTTE LOWELL No. 105992
2 1423 Hamilton Ave
3 Palo Alto CA 94301
4 (650)323-2742

5 Attorney for
6 DEFENDANT
7 CHARLES MUNGER, JR.

FILED
SAN MATEO COUNTY

MAR 16 2017

Clerk of the Superior Court
By *[Signature]*
DEPUTY CLERK

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9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN MATEO

12 DAVID FENNELL

13 Plaintiff(s),

14 vs.

15 CALIFORNIA REPUBLICAN PARTY, et al.,

16 Defendants.

17 Case No.: CIV 492126

18 } PROPOSED ORDER GRANTING
19 } MOTION FOR DISMISSAL OF
20 } DEFENDANT MUNGER PURSUANT TO
21 } CODE OF CIV. PROC. § 583.250 AND
22 } DISMISSING DEFENDANT MUNGER

23 } HEARING DATE: MARCH 2, 2017
24 } TIME: 9:00 A.M.
25 } DEPT: 16, LAW & MOTION

26 } Judge: HON. RICHARD H. DUBOIS
27 } Dept: 16, Law & Motion
28 } Action Filed: February 19, 2010
29 } Trial Date: Unassigned

30 CIV492126
31 ORD
32 Order
33 418939



34 Plaintiff's Complaint was filed on February 19, 2010. Defendant Munger filed a Motion for
35 Dismissal on February 2, 2017, seeking dismissal of Charles Munger, Jr., pursuant to Code of Civil
36 Procedure § 583.250, on the grounds that the summons and complaint had not been served on this
37 Defendant by February 2013, which would have been within three years of commencing the action,
38 as required in Code of Civil Procedure § 583.210; no opposition to Defendant's Motion was filed.
39 The Motion for Dismissal came on for hearing March 2, 2017, in Department 16, Hon Richard H.
40 DuBois presiding; Plaintiff David Fennell appeared in pro per, Charlotte Lowell appeared for
41 Defendant Charles Munger, Jr.

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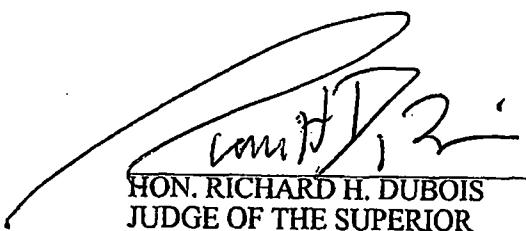
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MAR 10 2017
CLERK OF THE SUPERIOR COURT
SAN MATEO COUNTY

001408

1 Defendant and Moving Party Charles Munger, Jr., and Terry Martin appeared for Defendants
2 Deborah Wilder and the California Republican Party. Having considered the points and authorities
3 submitted, the file in this action, and the oral arguments of the parties, the Court found that the facts
4 were clear and undisputed that Defendant Munger had not been served with the complaint within
5 three years of when the action was commenced against this Defendant, and therefore dismissal of
6 Defendant Munger was mandatory under Code of Civil Procedure § 583.250; and the Motion
7 should be granted. The Court adopted the tentative ruling, which stated:
8 "Defendant Charles Munger, Jr.'s unopposed Motion to Dismiss is GRANTED under the provisions
9 of the Code of Civil Procedure § 583.250. Defendant Munger may submit a Memorandum of Costs
10 if he seeks an award of his costs after dismissal."
11 "Defendant's Request for Judicial Notice is DENIED for failure to comply with CRC 3.1113(l),
12 which requires submission of a separate document."
13
14 Accordingly: (1) Defendant Munger's Motion to Dismiss is granted;
15 (2) Defendant Munger's Request for Judicial Notice is denied;
16 (3) Defendant Charles Munger, Jr., is hereby DISMISSED from this action; and
17 (4) Defendant Munger is the prevailing party entitled to file a Memorandum of Costs
18

19 **IT IS SO ORDERED**

20 DATED: 3-15-17
21

22 
23 HON. RICHARD H. DUBOIS
24 JUDGE OF THE SUPERIOR
25 COURT

26
27
28 RICHARD H. DUBOIS