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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MARY MUSAELIAN, Plaintiff, v. WILLIAM L. ADAMS et al., Defendants and Respondents; JOHN G. WARNER, Objector and Appellant.	A112906 (Sonoma County Super. Ct. No. SCV236208)

We are familiar with the background of this case through our review of a previous appeal, *Reiter v. Musaelian* (June 30, 2006, A110100) [nonpub. opn.] (*Reiter*), which involved some of the same parties that are before us now. There, we reversed an order of the trial court awarding sanctions on appeal. Once again, the issue before us on appeal is the trial court's award of sanctions, this time against appellant John G. Warner, trial counsel for plaintiff Mary Musaelian,[1] in favor of defendants William L. Adams and Joseph Reiter. We reverse.

In the published portion of this opinion, we hold that, under Code of Civil Procedure[2] section 128.7, attorney fees cannot be awarded as sanctions to an attorney representing himself. In so doing, we disagree with the reasoning of *Laborde v. Aronson*

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I and II (B).

[1] We will refer to Mary Musaelian, the plaintiff in this action, as either plaintiff or Mary Musaelian, and will refer to her husband as Musaelian.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

(2001) 92 Cal.App.4th 459 (*Laborde*) and *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264 (*Abandonato*).

I. BACKGROUND

A. Proceedings in *Reiter*

As we explained in *Reiter*:

"Reiter brought [an] action against Musaelian in August 1999, alleging causes of action for malicious prosecution, abuse of process, unauthorized practice of law, assault, battery, vehicular assault, intentional infliction of emotional distress, and negligence. The caption of the complaint named as defendants, inter alia, 'Andrew Musaelian, individually and doing business as Attorney's Legal Research.' The body of the complaint alleged that Musaelian was an individual residing in Sonoma County, that he was 'employed by or a principal of defendant Attorney's Legal Research,' and that 'defendant Attorney's Legal Research' had a 'business form unknown at this time.' According to the complaint, Musaelian attacked [Reiter] and damaged his vehicle while attempting to serve legal documents.

"The trial court entered a default judgment against Musaelian, individually and doing business as Attorney's Legal Research (ALR) in November 1999, in the amount of $488,288, which included $13,100 in special damages, $225,000 in general damages, $250,000 in punitive damages, and $188 in costs. Musaelian moved to vacate the default and set aside the judgment, arguing that he had deposited the answer to the complaint at the superior court in a timely manner and that Reiter's counsel had received a copy of the answer. The trial court granted the motion. Musaelian then answered the complaint.

"[¶] . . . [¶] In July 2001, Reiter sought reinstatement of the default against ALR on the grounds that relief from default had only been sought as to Musaelian himself and that ALR had not appeared in the action. The trial court granted the motion and reinstated the default against 'Andrew Musaelian, doing business as Attorney's Legal Research.'[3]

[3] Because it had no relevance to the issues before us in *Reiter*, we had no occasion to comment on the discrepancy between the motion requesting reinstatement of the

"A court trial took place in August 2001. The trial court entered judgment against Musaelian on September 24, 2001, on the causes of action for malicious prosecution, abuse of process, unauthorized practice of law, battery, intentional infliction of emotional distress, and negligence; found damages in the amount of $33,920; and awarded Reiter attorney fees and costs.[4] The trial court entered an amended judgment on October 23, 2001, which included attorney fees and costs in the amount of $47,798.65, for a total judgment of $81,720.65.

"[¶] . . . [¶] The trial court granted Reiter's application for the sale of Musaelian's home on January 29, 2002. Musaelian's wife, Mary Musaelian, acting as trustee of the Musaelian Family Trust, filed a third party claim of ownership of the property on the ground that she was the owner of the residence.

"The trial court denied Mary Musaelian's third party claim on May 7, 2002, concluding that her claim was not superior to Reiter's claim, and entered judgment for Reiter. Mary Musaelian appealed that judgment on May 17, 2002 (*Reiter v. Musaelian* (Aug. 20, 2003, A098866) [dismissal order])." (*Reiter*, *supra*, A110100) Her appeal was consolidated with two separate appeals taken by Musaelian, and the consolidated appeals were later dismissed for failure to file an opening brief.

B. Proceedings Related to Bankruptcy Petition

The Musaelians filed a bankruptcy petition in the United States Bankruptcy Court for the Northern District of California on June 12, 2002. Reiter apparently moved to dismiss the bankruptcy proceeding on the theory that due to the default judgment for more than $488,000, Musaelian was over the debt limit for chapter 13 eligibility. The bankruptcy court denied the motion. In doing so, the court noted that, although Reiter's motion to reinstate the default was directed against *ALR*, "[f]or some reason which

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default against "[d]efendant [ALR]" only and the order reinstating the default against "Andrew Musaelian . . . doing business as [ALR]." In this appeal, the discrepancy moves front and center.

[4] "The damages were comprised of $14,922 in compensatory damages, $10,000 in general damages, and $9,000 in punitive damages. We note the discrepancy of $2. . . ."

counsel for Reiter is unable to explain, the form of order submitted by him and entered by the state court reinstated the default judgment as to 'Andrew Musaelian doing business as [ALR].' " In the course of its decision, the bankruptcy court stated: "After a full trial, the [state trial] court rendered a judgment for $81,000.00, keeping the debtors well within the debt limits of [title 11 United States Code section] 109(e). It is only by ignoring this judgment on the merits and focusing on the earlier default judgment—possibly procured by some sort of legal legerdemain—that Reiter is able to argue that Musaelian is not eligible for [c]hapter 13 relief." (Footnote omitted.)

Reiter made a request in the state trial court for findings concerning the validity, extent, and amount of Reiter's secured claim. In the notice of his request, he stated that the bankruptcy court had allowed him to make his request in the trial court and had indicated that the findings were necessary to clarify the previous state court proceedings and orders. In May 2003, the state trial court found that the reinstated default judgment had been intended to be entered only against ALR, not Musaelian personally. According to the court, "Mr. Musaelian's pleadings and discovery tactics resulted in [Reiter's] inability to deem [ALR] a sole proprietorship prior to entry of [j]udgment, and thus [Reiter's] request for reinstatement of the [d]efault [j]udgment was as against [ALR] not as against Andrew Musaelian, d.b.a. [ALR]." The court concluded that since the default judgment was enforceable against the assets of ALR, it was not a priority secured lien against Andrew Musaelian.[5]

The bankruptcy court issued another ruling in June 2003, after the Musaelians had apparently objected to a secured claim filed by Reiter based on the default judgment. The bankruptcy court sustained the objection, concluding that the state court had "confirmed that the default judgment [was] not enforceable against Musaelian or his property."

[5] At the hearing on the request for findings, the state court judge rejected the notion that the default judgment had been gained by trickery, stating: "[T]here has not been some legerdemain by [Reiter]. Any characterization of any legerdemain in the [c]ourt's mind throughout these proceedings, if any, would belong to the other side, with the hide-the-ball tactics that led in the [c]ourt's mind in large part to where we are today."

The Ninth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's disallowance of Reiter's secured claim in May 2004, concluding that the default judgment against ALR was unenforceable against Musaelian or the Musaelians' community property. On the same date, it affirmed the bankruptcy court's ruling that Reiter's lien on the Musaelian's home was void and of no effect.[6]

C. Award of Sanctions in *Reiter*

After the consolidated appeals in *Reiter* had been dismissed, Reiter moved in the trial court for attorney fees, costs, and sanctions on appeal. In March 2005, the trial court issued a minute order awarding Reiter costs and $20,000 in attorney fees, and ordered Musaelian and Warner to pay sanctions on appeal in the amount of $21,000.[7] Musaelian and Warner appealed from the minute order.

In May 2005, after Warner and Musaelian had filed their appeal from the minute order, Judge Knoel Owen issued a written order granting the motion for sanctions, costs, and attorney fees on appeal and finding that Reiter was the prevailing party both in the trial court and on appeal as against Musaelian, ALR, and Mary Musaelian. Plaintiff and Musaelian moved for reconsideration of the May 2005 order or, in the alternative, for correction of a clerical error, contending that Reiter had not prevailed against her. According to the motion, the trial court had ruled in its May 2003 findings on the validity of Reiter's secured claim that the judgment against ALR was not intended to be one

[6] According to the second decision of the Bankruptcy Appellate Panel, the Musaelians had sought and obtained an order declaring the lien created by the reinstated default judgment and all supporting documents null and void. Those documents included the 1999 abstract of judgment and the November 2001 writ of execution. The moving and opposing papers and the opinion affirmed by the Bankruptcy Appellate Panel are not included in the record before us on appeal.

[7] Reiter sought attorney fees pursuant to section 1029.8, subdivision (a), which authorizes courts to award costs and attorney fees where an unlicensed person has caused injury to another as a result of performing services for which a license is required under certain statutory provisions.

The award of sanctions and attorney fees was made after the Musaelians had apparently been discharged from bankruptcy. The parties engaged in legal wrangling about whether Reiter's request for sanctions on appeal violated the automatic bankruptcy stay. Those proceedings do not concern us here, and we will not attempt to unravel them.

against Musaelian individually and that plaintiff's community property home could not be used to satisfy ALR's debts, and she had been the prevailing party in both the trial court and the bankruptcy court.[8] Judge Owen denied the motion, stating in doing so: "The January order of sale [of the Musaelians' home] was never changed. Mr. Reiter was the prevailing party at all stages. The ALR lien was never removed. There were never any changes in the original order. [¶] I haven't seen anything voiding any judgment against the Musaelians.[9] Mr. Reiter has clearly been the prevailing party throughout against both Andrew and Mary Musaelian. They won nothing in this, ever. [¶] It is mind-boggling that editorial license or, more ominously, intentional innuendo takes it to where we are today."[10]

D. The Present Action

Plaintiff filed this action against Reiter and Adams, Reiter's former attorney, alleging causes of action for negligence, intentional infliction of emotional distress, abuse of process, slander of title, invasion of privacy, and malicious prosecution. The complaint alleged that defendants knew plaintiff was not responsible for the default judgment against ALR and knew they had no right to plaintiff's home, but that they had nevertheless obtained a writ of sale to force the sale of the home, and that they slandered plaintiff's title to the home by recording the default judgment against ALR as a lien against the home, thus impairing plaintiff's ability to refinance her home.

[8] We are not called upon to consider the effect of Musaelian's first appealing from the minute order and then seeking reconsideration of the later written order on the same motion. In *Reiter*, we held that the trial court did not have authority to award sanctions on appeal.

[9] In fact, as noted above, the bankruptcy court had declared the lien, the 1999 abstract of judgment, and the November 2001 writ of execution void.

[10] At the time of the hearing on the motion for reconsideration in *Reiter*, Judge Owen had already recused himself from hearing this action, *Musaelian v. Adams*, pursuant to section 170.3. Counsel for defendants made clear at the hearing on the motion for reconsideration that Judge Owen's ruling on the prevailing party issue could be dispositive in the proceedings in this action. Warner has not challenged the propriety of Judge Owen's making a ruling that would affect a case from which he had recused himself, and we do not reach the issue here. Judge Owen later consented to be disqualified from *Reiter*.

Adams demurred to the complaint in this action on March 21, 2005, and Reiter apparently joined in the demurrer. Among other things, the demurrer alleged that the causes of action for negligence, intentional infliction of emotional distress, abuse of process, slander of title, and invasion of privacy were subject to the litigation privilege of Civil Code section 47, and that the sixth cause of action, for malicious prosecution, had no merit because *Reiter* had terminated in favor of Reiter. On May 27, 2005, while the demurrer was pending,[11] Adams served a motion pursuant to section 128.7 seeking sanctions against plaintiff and her attorney, John Warner, on the grounds that the complaint was not warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; that it was devoid of evidentiary support; and that it was brought to cause delay and increase the cost of litigation.[12]

Plaintiff responded to the demurrer by notifying the trial court and defendants on June 9, 2005, that she intended to file an amended complaint pursuant to section 472, which allows pleadings to be amended "at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon . . . ." The next day—before plaintiff had filed an amended complaint—Adams filed an answer to the original complaint.

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[11] The demurrer was scheduled to be heard on June 22, 2005.

[12] Section 128.7, subdivision (b) provides in part: "By presenting to the court . . . a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [¶] (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. [¶] (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." A party may bring a motion for sanctions for a violation of section 128.7, subdivision (b), subject to procedural limitations. (§ 128.7, subd. (c).)

Adams filed his motion for sanctions against plaintiff and Warner on June 22, 2005. Reiter joined in Adams's motion and separately moved for sanctions against Warner pursuant to sections 128.5 and 128.7.

Plaintiff filed a supplemental declaration of Warner in opposition to the demurrer on June 22, 2005. The declaration attached a proposed first amended complaint, and stated that Warner had arranged to have Musaelian file the first amended complaint on June 15, 2005, but that the court clerk had refused to accept the amended complaint because an answer had already been filed.[13] The proposed first amended complaint withdrew the first cause of action, for negligent infliction of emotional distress, and—with additional factual allegations—retained the causes of action for intentional infliction of emotional distress, abuse of process, slander of title, invasion of privacy, and malicious prosecution based on the attempted sale of plaintiff's home pursuant to the default judgment obtained in *Reiter*.

The trial court sustained defendants' demurrer on August 2, 2005. In doing so, the court stated that the conduct complained of in the first five causes of action fell within the litigation privilege, and that defendants owed no duty to plaintiff. As to the sixth cause of action, for malicious prosecution, the court stated that defendants had prevailed in *Reiter*. The court denied leave to amend and ordered the case dismissed.

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[13] Although section 430.30, subdivision (c) and section 472a, subdivision (a) allow a party responding to a complaint to demur and answer at the same time, it has long been the rule that the answer is not before the court until the demurrer is overruled. (*Metropolitan Life Ins. Co. v. Rolph* (1920) 184 Cal. 557, 564.) Defendants draw our attention to no statutory authority for their procedure in answering the complaint while their demurrer was pending. Indeed, the wisdom of filing an answer with a demurrer pending is questionable in light of the authority that a demurrer is waived by filing an answer before the demurrer has been determined. (See *Nevada Irrigation Dist. v. Jones* (1945) 69 Cal.App.2d 262, 266.) Regardless of any possible legal ramifications of their strategy, we question the propriety of a move on defendants' part that appears designed to deprive plaintiff of the opportunity to avoid sanctions by amending the challenged complaint within the safe harbor period provided by section 128.7, subdivision (c)(1).

The trial court[14] granted the sanctions motions of Adams and Reiter under section 128.7, concluding that the action brought by plaintiff and filed by Warner was "utterly without merit" and " 'frivolous' within the legal meaning of that term." According to the court, "No reasonable attorney or party could have believed that the lawsuit against Mr. Adams or Mr. Reiter had merit. [(§ 128.7, subd. (b)(2).)] It is also clear that it was filed primarily for an improper purpose to delay, harass, increase the cost of litigation, or otherwise acquire a bargaining chip useable in the ongoing litigation between these parties. [(§ 128.7, subd. (b)(1).)]" On Adams's motion for sanctions, the court found plaintiff and Warner jointly and severally liable for sanctions of $25,050. On Reiter's motion, Warner was held liable for sanctions of $46,845.

Plaintiff and Warner appealed from the award of sanctions. After plaintiff and Reiter reached a settlement, this court dismissed plaintiff's appeal of the sanctions order, leaving only Warner as an appellant.

II. DISCUSSION

A. Adams Did Not Incur Attorney Fees

Adams is an attorney, and represented himself in propria persona below. Pursuant to section 128.7, he filed a motion for sanctions against plaintiff, Mary Musaelian, and her attorney, John Warner, contending that the lawsuit they had filed against him for abuse of process and other claims was frivolous and filed for an improper purpose. In support of his motion, Adams submitted declarations stating that his hourly fee was $250 an hour, and that he had spent a total of 100.2 hours working on the case, for total fees of $25,050. He asked the trial court to award as sanctions those fees, as well as any further amounts the court found necessary to deter Warner from repeating his conduct. The court awarded him $25,050 in sanctions.

Section 128.7, subdivision (c)(1) provides in part that, upon a motion for sanctions, "[i]f warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees *incurred* in presenting or opposing the motion."

[14] As noted above, Judge Owen had recused himself from this case, and Judge Dean A. Beaupré ruled on the motion.

(Italics added.) Warner contends that as a propria persona litigant, Adams did not incur any attorney fees.

Our Supreme Court considered a similar question in *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*). The statute in question there was Civil Code section 1717, subdivision (a), which provides in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." The issue before the court was whether an attorney representing himself could recover attorney fees as compensation for time and effort expended and professional opportunities lost as a result. (*Trope*, at p. 279.)

In analyzing the issue, the court first noted that Civil Code section 1717 applied only to contracts providing for attorney fees *incurred* to enforce the contract. As the court stated: "To 'incur' a fee, of course, is to 'become liable' for it (Webster's New Internat. Dict. (3d ed. 1961) p. 1146), i.e., to become obligated to *pay* it. It follows that an attorney litigating in propria persona cannot be said to 'incur' compensation for his time and his lost business opportunities." (*Trope*, *supra*, 11 Cal.4th at p. 280.) The court went on to note that the term " 'fee' " is defined variously as, " 'A recompense for an official or professional service or a charge or emolument or compensation for a particular act or service. A fixed charge or perquisite charged as recompense for labor; reward, compensation, or wage given to a person for performance of services or something done or to be done[]' (Black's Law Dict. (6th ed. 1990) p. 614);" " 'compensation often in the form of a fixed charge for professional service or for special and requested exercise of talent or of skill[]' (Webster's New Internat. Dict., *supra*, p. 833 . . .);" and " 'a payment' such as 'the remuneration paid or due to a lawyer, a physician, or (in recent use) any professional man, a director of a public company, etc. for an occasional service.' [(5 Oxford English Dict. (2d ed. 1989) p. 797.)]" (*Ibid*.) Additionally, Black's Law Dictionary defined " 'attorney fees' as a 'Charge to client for services performed (*e.g.*

hourly fee, flat fee, contingency fee).' ([Black's Law Dict., *supra*, p. 614.])" (*Trope*, at p. 280.) The court concluded that "the usual and ordinary meaning of the words 'attorney's fees,' both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation." (*Ibid*.)

The court in *Trope* also reviewed cases from before the enactment of Civil Code section 1717 that supported this interpretation of the meaning of the term " 'reasonable attorney's fees,' " and concluded that those cases "demonstrate[d] that the words 'attorney's fees' and 'counsel fees,' whether used in a contract or in a statute, had an established legal meaning at the time the Legislature enacted [Civil Code] section 1717. In the absence of some indication either on the face of that statute or in its legislative history that the Legislature intended its words to convey something other than their established legal definition, the presumption is almost irresistible that the Legislature intended them to have that meaning. [Citations.]" (*Trope*, *supra*, 11 Cal.4th at pp. 281-282.)

Our Supreme Court has since made clear that *Trope* should not be taken to mean that attorney fees can only be recovered when incurred on a "fee-for-service basis," but can extend to work performed by in-house counsel (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1097 & fn. 5) or to services provided pro bono (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 579, fn. 4.) However, in each of these cases, an attorney-client relationship exists—something that is not the case with a self-represented attorney. (See *Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, 1211 (*Witte*).)

We have reviewed *Trope* in detail because one published decision has concluded that a self-represented attorney is entitled to recover attorney fees as a sanction under section 128.7. In *Laborde*, *supra*, 92 Cal.App.4th at pages 467-469, Division Three of the Fourth Appellate District considered whether an attorney who had represented himself in an action could receive attorney fees from his opponent as a sanction. Acknowledging that there was no California authority directly on point, the court noted that section 128.7 is modeled on rule 11 of the Federal Rules of Civil Procedure (28

U.S.C.),[15] and that in interpreting section 128.7, California courts may look to federal decisions construing rule 11. (*Laborde*, at p. 467; see also *Hart v. Avetoom* (2002) 95 Cal.App.4th 410, 413.) Thus, the court relied on *Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff* (S.D.N.Y. 1986) 638 F.Supp. 714 (*Kramer, Levin*), a federal case decided under rule 11, which awarded rule 11 sanctions to a plaintiff law firm that had acted in propria persona. (*Laborde*, at pp. 467-468, citing *Kramer, Levin*, at p. 726.)

We are not persuaded by the *Laborde* court's reliance on *Kramer, Levin* for the proposition that rule 11 allows a self-represented attorney to recover attorney fees. First, *Kramer, Levin* does not address the question of whether such an attorney incurs fees. A case is not authority for a proposition it does not discuss. (*People v. Senior* (1992) 3 Cal.App.4th 765, 781.)

Second, more recent federal authority squarely addresses the question at issue and reaches the opposite result from that in *Laborde*. The court in *DiPaolo v. Moran* (E.D.Pa. 2003) 277 F.Supp.2d 528, 534-537 (*DiPaolo*) concluded that an attorney could not recover sanctions under rule 11 for time spent representing himself because the language of rule 11 implied an attorney-client relationship and the accumulation of fees. In reaching this conclusion, the court reviewed the three opinions by circuit courts of appeals that had addressed whether pro se attorney litigants could receive attorney fees as sanctions. In one of them, *Massengale v. Ray* (11th Cir. 2001) 267 F.3d 1298, 1302-1303, the court noted that the word attorney assumes an agency, or attorney-client relationship, and concluded such an award was not available under rule 11 because "a party proceeding *pro se* cannot have incurred attorney's fees as an expense." Construing similar language contained in rule 37(a)(4)(A),[16] the court in *Pickholtz, supra*, 284 F.3d at page 1375, likewise concluded that an attorney proceeding pro se does not incur attorney fees, reasoning "one cannot 'incur' fees payable to oneself, fees that one is not

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[15] Subsequent references to rules are to the Federal Rules of Civil Procedure.

[16] Rule 37 (a)(4)(A) allows as a discovery sanction "the reasonable expenses incurred in making the [discovery] motion, including attorney fees." (See *Pickholtz v. Rainbow Technologies, Inc.* (Fed. Cir. 2002) 284 F.3d 1365, 1375 (*Pickholtz*).)

obliged to pay. [Citation.] Moreover, the word 'attorney' connotes an agency relationship between two parties (client and attorney), such that fees a lawyer might charge himself are not 'attorney fees.' [Citation.] Nor are such fees a payable 'expense,' as there is no direct financial cost or charge associated with the expenditure of one's own time." The court in *DiPaolo* recognized that an earlier decision of the Ninth Circuit, *Ellis v. Cassidy* (9th Cir. 1980) 625 F.2d 227, 230-231, had upheld an award of attorney fees to a pro se attorney litigant under the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k)), but it was not persuaded by *Ellis*. First, as the *DiPaolo* court noted, the Ninth Circuit in *Ellis* did not address the implication of the statutory term "attorney." (*DiPaolo*, *supra*, 277 F.Supp.2d at pp. 535-536.) Second, the court reasoned that *Ellis* was of doubtful validity after the decision of which United States Supreme Court in *Kay v. Ehrler* (1991) 499 U.S. 432, 435-437, which concluded that an attorney proceeding in pro se could not receive attorney fees under title 42 United States Code section 1988(b), which allowed "a reasonable attorney's fee" to the prevailing party in certain civil rights actions.[17]

Thus, the current federal authority on the topic suggests that, contrary to the conclusion of *Laborde*, a self-represented attorney is not entitled to attorney fees under rule 11.

The *Laborde* court also relied for its decision on the reasoning of *Abandonato*, *supra*, 41 Cal.App.4th at pages 267-269. In ruling under a predecessor statute, section 128.5, the court in *Abandonato* concluded that the rationale of *Trope* did not compel the conclusion that an attorney appearing in propria persona was not entitled to fees as a sanction. The court in *Laborde* noted that *Abandonato* had distinguished *Trope* on two grounds: First, sanctions under section 128.5 were not limited to costs and attorney fees, but included other litigation-related expenses incurred as a result of the bad faith actions and tactics, including time spent by the party's personnel and compensation for airfare and lost vacation time. Second, unlike fees awarded under Civil Code section 1717,

[17] The court in *Kay* pointed out that the ordinary understanding of the word "attorney" assumes an attorney-client relationship. (*Kay v. Ehrler*, *supra*, 499 U.S. at pp. 435-438 & fns. 6, 8.)

judgments for sanctions were " ' "not routine and [were] not necessarily related to the size of the recovery or the amount of time billed by the attorney." ' " (*Laborde*, *supra*, 92 Cal.App.4th at pp. 468-469, quoting *Abandonato*, *supra*, 41 Cal.App.4th at pp. 268-269.) Finally, the court in *Laborde* found persuasive the policy considerations discussed in *Abandonato*—i.e., " '[h]olding that the attorney in that situation could not be compensated for reasonable expenses would create a separate and artificial category of litigants who would be inadequately protected against another party's bad faith tactics.' " (*Laborde*, at p. 469, quoting *Abandonato*, at p. 269.)

We find none of these considerations persuasive in light of our Supreme Court's decision in *Trope*. We have no quarrel with the proposition that an award of sanctions is not limited to attorney fees but may also include other expenses, and that sanctions are not necessarily related to the time billed by the attorney. (§ 128.7, subds. (c)(1) & (d); *Laborde*, *supra*, 92 Cal.App.4th at pp. 468-469.) Here, however, there is no evidence that Adams sustained any other expenses. Adams declared that his billing rate was $250 an hour and that the amount of time he had spent on the case was worth $25,050, and he asked for—and was awarded—precisely that amount. His declarations included no other expenses. Nor do we believe a rule that self-represented parties may not receive attorney fees as a sanction creates a class of litigants who would be inadequately protected against bad faith tactics. (See *Laborde*, at p. 469.) Section 128.7, subdivision (d) allows sanctions to include, in addition to attorney fees and other expenses, "directives of a nonmonetary nature, [or] an order to pay a penalty into court," and allows sanctions "sufficient to deter repetition of this conduct or comparable conduct by others similarly situated." Even without attorney fees to a self-represented party, a trial court has the resources to deter sanctionable conduct.

Cases decided under two analogous California statutes suggest the same result. *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1176-1180, interpreted former section 2023, subdivision (b) (now § 2023.030, subd. (a)), which allows sanctions for misuse of the discovery process. The available sanctions included "the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct."

(§ 2023.030, subd. (a); *Argaman*, 73 Cal.App.4th at p. 1177.) The Court of Appeal concluded the rationale of *Trope* was applicable to this statute, and that an attorney litigating in propria persona may not recover attorney fees. (*Argaman*, at p. 1179.) In doing so, the court disagreed with *Abandonato's* conclusion that a self-represented attorney incurs attorney fees. (*Argaman*, at pp. 1180-1181; see also *Kravitz v. Superior Court* (2001) 91 Cal.App.4th 1015, 1019-1020.)

The same result exists in the context of special motions to strike under the anti-SLAPP statute (strategic lawsuit against public participation). (§ 425.16.) Section 425.16, subdivision (c) provides that a prevailing party on a special motion to strike "shall be entitled to recover his or her attorney's fees and costs." The court in *Witte, supra*, 141 Cal.App.4th at pages 1207-1209, concluded that a self-represented attorney who had prevailed on a special motion to strike was not entitled to attorney fees because there was no attorney-client relationship.[18]

Because there is no attorney-client relationship and a self-represented attorney incurs no obligation to pay fees, we conclude an attorney appearing in propria persona is not entitled to attorney fees as a sanction under section 128.7. In reaching this conclusion, we must respectfully disagree with the contrary result of *Laborde*.

Because Adams claimed no other expenses, the award of sanctions must be reversed in its entirety as to Adams.

B. Violation of Section 128.7

Warner contends the trial court should not have awarded sanctions because he did not violate section 128.7. Under section 128.7, "there are basically three types of submitted papers that warrant sanctions: factually frivolous (not well grounded in fact);

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[18] In reaching this conclusion, the court distinguished *Laborde* and *Abandonato* on the grounds that the purpose of the section 425.16 fee award was to compensate the SLAPP defendant, not to punish the other party for bad faith conduct; that an award under section 425.16 is limited to costs and attorney fees, while a sanction award may include any expenses incurred; and that the concern expressed in *Trope* that self-represented attorneys not be treated more favorably than other self-represented parties did not exist under sections 128.5 and 128.7, under which both an attorney litigant and a nonattorney litigant may obtain sanctions. (*Witte, supra*, 141 Cal.App.4th at p. 1209.)

legally frivolous (not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law); and papers interposed for an improper purpose." (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167.) Warner contends there was legal and factual support for the causes of action for abuse of process and malicious prosecution.[19] We review a trial court's decision to impose sanctions for abuse of discretion. (*Ibid*.)

1. Abuse of Process

The claim for abuse of process was based on the following allegations: Reiter and his attorney Adams brought the *Reiter* action against plaintiff's husband. They obtained a default judgment against "Andrew Musaelian, doing business as Attorney's Legal Research." They later obtained a judgment in the same action against "Andrew Musaelian, an individual," in violation of the rule that there can be only one judgment against a defendant in a civil case. They then "dragged plaintiff into the Reiter case" by taking steps to force the sale of her home to satisfy the default judgment entered against Musaelian doing business as ALR, although they knew ALR had no interest in plaintiff's property and she had no ownership interest in ALR. In order to obtain a writ of sale, Reiter and Adams lied to the trial court, saying Musaelian was a different entity than "Andrew Musaelian, doing business as Attorney's Legal Research," while arguing inconsistently that all of Musaelian's property, including his community property, could be liquidated to satisfy the judgment against ALR. Nevertheless, Reiter and Adams arranged for a sale date for the home to be set. Before the sale date, plaintiff filed for bankruptcy protection, ultimately prevailing against Reiter and Adams.

In ruling the complaint was frivolous, the trial court stated: "The theory of the lawsuit brought by Ms. Musaelian thru [*sic*] her attorney Mr. Warner was that she had prevailed in [*Musaelian v. Adams* (Super. Ct. Sonoma County, 2006, No. SVC-222305)].

[19] Plaintiff's proposed first amended complaint withdrew the cause of action for negligence, and she later withdrew her cause of action for slander of title. She takes the position that the issues on appeal relevant to three of the remaining causes of action (intentional infliction of emotional distress, abuse of process, and invasion of privacy) are encompassed by the rules governing abuse of process.

This is a gross misrepresentation of the results of that case. The Honorable Knoel Owen who presided over that case found that Mr. Reiter was the prevailing party. He made that clear on numerous occasions including a written order on May 24, 2005." The court also referred to Judge Owen's comments on the Musaelians' motion for reconsideration in *Reiter*, in which he stated that the Musaelians had won nothing in the action and referred to their tactics as " 'editorial license or, more ominously, intentional innuendo.' "

"The tort of abuse of process constitutes the use of a legal process against another to accomplish a purpose for which it is not designed. [Citations.] Its elements are: (1) an ulterior motive; and (2) a willful act in the use of process not proper in the regular conduct of the proceedings. [Citations.] '[T]he essence of the tort "abuse of process" lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice. . . .' [Citations.]" (*Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1019 (*Drum*), disapproved on another ground in *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065 (*Rusheen*).)

Adams and Reiter argued, and the trial court agreed, that the cause of action for abuse of process necessarily failed—and was frivolous—because Reiter prevailed against plaintiff in *Reiter*. Assuming for purposes of argument that plaintiff could not succeed in her claim unless she had prevailed in *Reiter*, we reject this conclusion. It is true that the trial court denied plaintiff's third party claim of ownership based on the family trust and that the judgment denying her claim became final when her appeal was dismissed for failure to file an opening brief. However, there is ample evidence to support a theory that plaintiff's goal in filing the claim was to prevent her house from being sold to satisfy the default judgment—a goal she attained when Judge Owen ruled in his May 2003 findings that the default judgment was enforceable only against ALR, not against Musaelian doing business as ALR. Based on those findings, the bankruptcy court sustained the Musaelians' objection to Reiter's claim and found the lien against their home, the 1999

abstract of judgment, and the November 2001 writ of execution void. Thus, there was a nonfrivolous argument that plaintiff succeeded in her objectives in the *Reiter* case.[20]

Defendants contend, however, that their actions were protected by the litigation privilege of Civil Code section 47. The litigation privilege applies to communications "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.)

At the time the complaint was filed—and at the time the trial court made its ruling—a conflict existed in the law as to whether actions taken to collect a judgment, such as levying on a judgment debtor's property, were protected by the litigation privilege as communications in the course of a judicial proceeding. (*Rusheen*, *supra*, 37 Cal.4th at p. 1052; see Civ. Code, § 47, subd. (b).) Some cases had held that the litigation privilege protected both the process of applying for the writ of execution and the levy on the judgment debtor's property. In *Brown v. Kennard* (2001) 94 Cal.App.4th 40, 43 (*Brown*), the defendant had allegedly abused process by causing a wrongful writ of execution to be levied upon the plaintiff's exempt funds (i.e., Social Security and personal retirement benefits). The Court of Appeal noted that judgment enforcement efforts, "as an extension of a judicial proceeding and related to a litigation objective, are considered to be within the litigation privilege." (*Id.* at pp. 49-50.) The Court of Appeal rejected the plaintiff's argument that a wrongful *levy* was not a statement or a communication within the litigation privilege, concluding that the privilege extended not only to the application for a writ of execution, but also to the act of carrying out the writ. (*Ibid.*) Similarly, in *O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134-136 (*O'Keefe*),

[20] At oral argument defendants contended that the complaint was patently frivolous because plaintiffs' remedy was to appeal the ruling declaring Reiter the prevailing party, and not to file a new lawsuit. We disagree. The ruling might have been fatal to plaintiffs' cause of action for malicious prosecution, but it does not preclude any of the other claims. (See, e.g., *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103-104 [elements of the tort of abuse of process are an ulterior purpose and a willful act in the use of process not proper in the regular conduct of the proceeding].)

the court ruled that the defendant's actions in levying on a bank account and filing an abstract of judgment were protected by the litigation privilege.

The court in *Drum* reached a different conclusion about whether a party's action in levying on property can support a cause of action for abuse of process. The defendant there had caused a writ of execution to be issued in the underlying action while a stay was in effect. (*Drum*, *supra*, 107 Cal.App.4th at p. 1014.) The Court of Appeal noted that the litigation privilege protects communications, not conduct (*id*. at pp. 1024-1026, 1028, citing *Rubin v. Green* (1993) 4 Cal.4th 1187, 1195-1196 (*Rubin*); *Kimmel v. Goland* (1990) 51 Cal.3d 202, 211-212; *Ribas v. Clark* (1985) 38 Cal.3d 355; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 482), and concluded that levying on the property fell "squarely on the side of conduct." (*Drum*, at p. 1026.) The court reasoned: "This becomes clearer when one considers the process by which judgments are enforced. Initially the judgment is prepared, then the judgment creditor may make application for a writ of execution, the writ is issued, and instructions are given to the levying officer. The 'essential nature' of this part of the process is communicative, at least from the perspective of the judgment creditor and its lawyer. The various documents filed or delivered reflect *statements* that there is a judgment, that it is subject to execution, and that there exists certain property subject to levy. [¶] The line is crossed when the levying officer, on behalf of the judgment creditor, actually levies on the property. That is a taking: the *act* of removing property from one source (here a financial institution) and depositing it in a place controlled by the levying officer. Whatever *statements* may be inherent in that part of the process are tangential, or in the words of the court in *Rubin*, not 'essential.' " (*Ibid*.) In reaching this conclusion, the *Drum* court disagreed with the contrary conclusions of *Brown* and *O'Keefe*. (*Drum*, at pp. 1027-1028 & fn. 12.)

Our Supreme Court resolved the conflict in *Rusheen*, which was decided in February 2006, after the trial court in this case had granted defendants' motions for sanctions. The Supreme Court had granted review in *Rusheen* on May 12, 2004, limiting the issues to be briefed and argued the following: "(1) whether actions taken to collect a

judgment, such as obtaining a writ of execution and levying on the judgment debtor's property, are protected by the litigation privilege [of Civil Code section 47, subdivision (b),] as communications in the course of a judicial proceeding; and (2) whether a claim for abuse of process based on the filing of an allegedly false declaration of service is barred by the litigation privilege on the ground the claim is necessarily founded on a communicative act." (*Rusheen*, *supra*, 37 Cal.4th at p. 1055.) The court answered those questions in the affirmative, concluding that "where a cause of action is based on a communicative act, the litigation privilege extends to those noncommunicative actions which are necessarily related to that communicative act." (*Id.* at p. 1052) Thus, where "the claim for abuse of process was based on the communicative act of filing allegedly false declarations of service to obtain a default judgment, the postjudgment enforcement efforts, including the application for writ of execution and act of levying on property, were protected by the privilege." (*Ibid.*)[21]

Thus, at the time plaintiff brought her complaint, and at all times relevant to the motions for sanctions, there was authority that at least the act of levying on property was not protected by the litigation privilege. (See *Drum*, *supra*, 107 Cal.App.4th at p. 1026.) There was also authority that obtaining a judgment by filing false documents—such as a false declaration of service—could be the "willful act" for purposes of a cause of action for abuse of process, meaning an act "which is not proper in the regular conduct of the proceeding." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466.)

With these authorities in mind, the cause of action for abuse of process does not appear to us to have been frivolous, at least before our Supreme Court issued its decision in *Rusheen*. The complaint alleged that defendants, in an action described by the bankruptcy court as " 'legal legerdemain,' " obtained a default judgment against "Andrew Musaelian, doing business as Attorney's Legal Research," and later obtained a judgment against Musaelian as an individual. This allegation appears to be based on the

[21] In reaching this decision, the Supreme Court reversed the decision the Court of Appeal had reached in an unpublished decision. (*Rusheen*, *supra*, 37 Cal.4th at pp. 1048, 1052, 1054.)

fact that in his moving papers seeking reinstatement of the default judgment, Reiter asked for reinstatement *only* as to "Defendant Attorney's Legal Research," making *no mention* (except in the caption and in a reference to the original judgment) of "Andrew Musaelian, doing business as Attorney's Legal Research." The order the trial court signed, however—which was apparently prepared by Adams, Reiter's counsel—reinstated the judgment not against "Defendant Attorney's Legal Research," but against "Andrew Musaelian, doing business as Attorney's Legal Research." Based on this judgment, defendants obtained an order of sale of the Musaelians' house and the levying officer arranged to have the house sold.[22] Plaintiff also argued below that Adams stated falsely in a declaration in support of the motion to reinstate the default that ALR had been personally served with the complaint in the *Reiter* action, when in fact the proof of service of the complaint showed service only upon Musaelian individually and doing business as ALR. Under the law as it existed at the time, there was a nonfrivolous argument the default judgment was obtained through willfully false filings and that defendants' actions to levy on the house and collect the judgment were wrongful and were not protected by the litigation privilege. We conclude the trial court abused its discretion by finding otherwise.[23]

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[22] Section 700.015, subdivision (a) requires the levying officer to record with the county recorder a copy of the writ of execution and a notice of levy stating that the judgment debtor's interest in the property has been levied upon. Plaintiff's unfiled amended complaint alleged that defendants recorded a notice of levy under the writ of sale. This law and these allegations dispose of defendants' contention that, because the house was never actually *sold* (as a result of the Musaelians' filing for bankruptcy protection), this case does not fall within the rule of *Drum*, which requires the property to be taken or levied upon. (*Drum*, *supra*, 107 Cal.App.4th at p. 1026.) We presume that the levying officer recorded the writ of execution and notice of levy as required. (Evid. Code, § 664 [presumption that official duty was regularly performed].) Moreover, plaintiff alleged that the judgment lien made it impossible for her to refinance her home. Whatever result a court might ultimately have reached, we think plaintiff could have taken in good faith the position that under the law as it existed at the time, she was deprived of her property and defendants' actions fell on the "conduct" side of the line.

[23] In their brief and at oral argument defendants pointed to certain statements by the trial court as further evidence that plaintiffs' complaint lacked merit. In denying plaintiffs' motion for reconsideration of the ruling that Reiter had been the prevailing

Defendants suggest that because *Rusheen* was pending at the time plaintiff brought this action, she and Warner should have waited until the Supreme Court had issued its decision before filing the complaint. They offer no authority that a party is required to delay filing a complaint while the Supreme Court resolves a conflict in the law, and we reject their suggestion.

Defendants also contend the causes of action for intentional infliction of emotional distress and invasion of privacy were frivolous because they were barred by the litigation privilege. As we have discussed, at the relevant time period, there was legal support for the contention that defendants' actions were not protected by the litigation privilege.

2. The Entire Award Must Be Reversed

Defendants argue that, even if we find some of the causes of action not frivolous, sanctions are still appropriate if a significant and material part of the complaint is frivolous. It is true that California courts have concluded sanctions may be awarded when some but not all causes of action are frivolous. (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 875-876 [sanctions under section 128.5]; see also *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1432-1433 [sanctions awarded on appeal where contentions concerning three of four causes of action lacked all

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party as against Mary Musaelian, the court stated that the Musaelians could not have been a prevailing party in the first action because the "ALR lien was never removed," and he had not "seen anything voiding any judgment against the Musaelians." But, as we have noted, two years earlier the court issued findings effectively voiding the default judgment improperly entered against Andrew Musaelian doing business as ALR (rather than against ALR only), and ruling that it could not serve as the basis for a secured lien against the Musaelians' property. Based upon these findings, the bankruptcy court declared as void the lien, the 1999 abstract of judgment, and the November 2001 writ of execution against the Musaelians' property. On these facts, plaintiff Mary Musaelian could reasonably allege that the default judgment had been wrongfully entered, and the levy wrongfully procured, irrespective of whether she was declared the prevailing party in the first action. We note also that the court's statement in connection with the motion for reconsideration was made after the demurrer to plaintiffs' complaint had been sustained without leave to amend. Accordingly, the statement cannot be relied upon as a basis for claiming that the complaint—which had already been dismissed—was frivolous.

merit]; *Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1010 [sanctions for partially frivolous appeal where frivolous claims are significant and material part of appeal].)

Here, the trial court relied primarily on its conclusion that Reiter had prevailed in the *Reiter* action to conclude that this action was "utterly without merit."[24] Its finding that the action was filed primarily for an improper purpose appears to be based on its conclusion that no reasonable attorney or party could have believed that the lawsuit had merit. As we have discussed, however, there was a good faith argument that plaintiff had achieved her goals in *Reiter*, and that Reiter was therefore not the prevailing party as against her. There was also a good faith argument that, under the law as it existed at the time, the complaint was not barred by the litigation privilege. Moreover, although the complaint pled different legal theories, all of the claims arose from the same set of operative facts. Even the malicious prosecution cause of action was based on the theory that defendants knew they had no right to sell plaintiff's house to satisfy ALR's debts, an allegation closely connected to the abuse of process cause of action. Under the circumstances, we conclude the entire award of sanctions must be reversed.

Finally, we reject defendants' invitation to uphold the award of sanctions under section 425.16, the anti-SLAPP statute. Defendants did not raise the applicability of section 425.16 below; nor have they explained why they did not bring a special motion to strike—complying with the statute's procedural requirements—in the trial court.

Because we conclude the sanction awards must be reversed in their entirety, we do not reach the other points raised by Warner.

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[24] Although the trial court did not rely for its result on this rule, it appears that the cause of action for malicious prosecution was fatally flawed—at least to the extent it relied on defendants' actions in the state case—because an application for a writ of sale is a subsidiary proceeding that cannot be the basis for a malicious prosecution cause of action. (See *Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 61-63; see also *Zamos v. Stroud* (2004) 32 Cal.4th 958, 969, fn. 8.)

III. DISPOSITION

The judgment is reversed.

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RIVERA, J.

We concur:

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REARDON, Acting P. J.

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SEPULVEDA, J.

Trial Court:	Sonoma County Superior Court
Trial Judge:	Honorable Dean A. Beaupré
Attorney for Plaintiff:	No appearance for Plaintiff
Attorney for Defendants and Respondents:	Mark T. Clausen
Attorneys for Objector and Appellant:	John G. Warner, Rita K. Johnson