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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LINDA RUTTLEN, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B223345 (Los Angeles County Super. Ct. No. BC382897)

APPEAL from a judgment of the Superior Court of Los Angeles County, John S. Wiley, Jr., Judge. Affirmed.

Rogers & Harris and Michael Harris for Plaintiff and Appellant.

Law Offices of David J. Weiss, David J. Weiss, Peter M. Bollinger, Benjamin Minkow; Greines, Martin, Stein & Richland, Martin Stein, Alison M. Turner and Carolyn Oill for Defendants and Respondents.

INTRODUCTION

After defendants and respondents County of Los Angeles, John R. Cochran and Bruce Chernof, M.D. prevailed on motions to strike pursuant to the anti-SLAPP statute, Code of Civil Procedure section 425.16 (Section 425.16), the trial court granted defendants' motion for attorney fees and entered judgment in favor of defendants. Plaintiff and appellant Linda Ruttlen appeals the judgment on the ground that under *Noerr-Pennington* doctrine,[1] the trial court was barred from awarding defendants attorney fees. Specifically, plaintiff argues: "That part of Section 415.16 which dictates in a non-sham suit the mandatory imposition of attorneys' fees to be paid by a losing plaintiff to a defendant government entity or its officers, constitutes a penalty upon a litigant for petitioning that government which is expressly prohibited under *Noerr-Pennington*."

We reject plaintiff's argument on both procedural and substantive grounds. Because plaintiff did not raise her *Noerr-Pennington* argument until after defendants filed their reply brief in support of their motion for attorney fees, the trial court declined to consider the argument. This was not an abuse of discretion. Having failed to properly raise the argument below, plaintiff has forfeited it on appeal.

Even assuming the argument has not been forfeited, we reject it on the merits. The *Noerr-Pennington* doctrine immunizes a party who files a lawsuit from civil liability unless the lawsuit is a sham. Where, as here, a court awards attorney fees pursuant to a fee-shifting statute, it is not imposing civil liability for purposes of the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine thus does not bar defendants from obtaining an award of attorney fees pursuant to the anti-SLAPP statute. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action in December 2007. Before trial, defendants filed special motions to strike pursuant to Section 425.16. After the trial court denied the

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[1] This doctrine arose from *Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127 (*Noerr*) and *Mine Workers v. Pennington* (1965) 381 U.S. 657 (*Pennington*).

motions, defendants appealed. In an unpublished opinion dated July 1, 2009, we reversed the orders denying defendants' motions to strike. We held that pursuant to Section 425.16, subdivision (c)(1), defendants "are entitled to an award of reasonable attorney's fees and costs."[2]

On November 17, 2009, defendants filed a motion for attorney fees. Plaintiff filed an opposition to that motion on November 20, 2009. In her opposition, plaintiff did not raise any arguments related to the *Noerr-Pennington* doctrine.

On November 25, 2009, defendants filed a reply brief. On December 17, 2009, plaintiff filed a brief entitled, "Further Points and Authorities and Reply to Opposition in Further Opposition to Motion for Attorneys' Fees." In this brief, plaintiff raised her *Noerr-Pennington* argument for the first time.

On January 27, 2010, the trial court held a hearing on defendants' motion for attorney fees. At the hearing the court stated that it disregarded plaintiff's brief dated December 17, 2009, which it referred to as a "surreply," because it was procedurally improper. The court then granted defendants' motion for attorney fees and entered judgment in favor of defendants for costs and attorney fees in the amount of $125,491.81.

This appeal followed.

ISSUES

There are two main issues:

1. Did plaintiff forfeit her *Noerr-Pennington* argument by failing to timely raise it in the trial court?

2. Does the *Noerr-Pennington* doctrine bar defendants from recovering attorney fees from plaintiff pursuant to Section 425.16, subdivision (c)(1)?

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[2] Section 425.16, subdivision (c)(1) provides: "[I]n any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." In our previous opinion dated July 1, 2009, we held that plaintiff's defamation cause of action was subject to Section 425.16, subdivision (b), and that defendants were entitled to prevail with respect to their special motions to strike that cause of action.

DISCUSSION

1. *Plaintiff Forfeited Her Noerr-Pennington Argument*

"It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.) In other words, issues and theories not properly raised in the trial court are forfeited on appeal. (*Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1086 [By failing to make a timely objection or offer of proof, defendant forfeited claim of error].)

Here, defendants filed a motion for attorney fees pursuant to Section 425.16, subdivision (c)(1). This motion was a proceeding under the Code of Civil Procedure within the meaning of Code of Civil Procedure section 1005, subdivision (a)(13).[3] Accordingly, the notice and filing requirements of Code of Civil Procedure section 1005, subdivisions (b) and (c) apply. These provisions refer to "moving papers," "papers opposing a motion," and "reply papers," and set certain deadlines for filing and serving such papers. (Code Civ. Proc., § 1005, subds. (b) & (c).) There is no statutory authority for filing and serving papers after the moving party's reply papers have been filed and served, that is, there is no provision for surreply papers.

The trial court, of course, has the inherent authority and discretion to permit the parties to file additional briefs if the trial court deems that additional briefing would be helpful. But there is nothing in the Code of Civil Procedure that gives the parties the right to file papers of any kind regarding a motion after the reply papers have been filed.

In this case, the trial court correctly noted that plaintiff's December 17, 2009, surreply was procedurally improper because it was filed after defendants' reply brief. The trial court stated: ". . . I don't know that there's a provision [in the Code of Civil

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[3] Code of Civil Procedure section 1005, subdivision (a) provides: "Written notice shall be given, as prescribed in subdivisions (b) and (c), for the following motions: [¶] . . . [¶] (13) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge."

Procedure] for a surreply. There was no leave of court sought for this briefing, and I think the procedurally correct way to deal with a brief for which there's no provision in the rules and no leave of court, sadly, is to disregard it."

Although the trial court had the discretion to consider plaintiff's surreply, it certainly did not abuse its discretion in declining to do so. This is unfortunate for plaintiff because in the absence of the surreply, plaintiff failed to properly and in a timely manner raise her *Noerr-Pennington* argument in the trial court. Consequently, plaintiff has forfeited the argument on appeal.

2. *The Noerr-Pennington Doctrine Does Not Bar Defendants From Recovering Attorney Fees*

Even assuming plaintiff did not forfeit her *Noerr-Pennington* argument, we reject it on the merits. "The *Noerr-Pennington* doctrine derives from the First Amendment's guarantee of 'the right of the people . . . to petition the Government for a redress of grievances.' "[4] (*Sosa v. DirectTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 929 (*Sosa*).) "Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." (*Sosa*, at p. 929.)

The doctrine arose in the antitrust context. (*Sosa*, *supra*, 437 F.3d at p. 929.) *Noerr* and *Pennington* were cases involving alleged violations of the antitrust statutes. In *Noerr*, the United States Supreme Court held that a cause of action for violation of an antitrust statute could not be predicated upon attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement because this would violate the right to petition guaranteed by the First Amendment. (*Noerr*, *supra*, 365 U.S. at pp. 137-138; *California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 510

[4] " 'The right to petition for redress of grievances is [protected by both] the [California] and [Unisted States] Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 3.)' " (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 964, fn. 8 (*Gallegos*).)

(*California Transport*) [interpreting *Noerr*].) The Supreme Court followed that view in *Pennington*. (*Pennington*, *supra*, 381 U.S. at pp. 669-670.) In *California Motor Transport*, another antitrust case, the court held that *Noerr-Pennington* immunity extended to lawsuits brought in state or federal court because such suits constituted an exercise of a party's constitutional right to petition. (*California Transport*, at p. 510.)

"Recognizing the constitutional foundation of the doctrine, the Supreme Court has applied *Noerr-Pennington* principles outside the antitrust field." (*Sosa*, *supra*, 437 F.3d at p. 930.) Indeed, "[t]he *Noerr-Pennington* doctrine has been extended to preclude virtually all civil liability for a defendant's petitioning activities before not just courts, but also before administrative and other governmental agencies." (*Gallegos*, *supra*, 158 Cal.App.4th at p. 964.) "In effect, the doctrine immunizes conduct encompassed by the petition clause—i.e., legitimate efforts to influence a branch of government—from virtually all forms of civil liability." (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1065 (*Tichinin*).) If a party's efforts to influence the government, however, are a "sham," the party does not enjoy the protection of *Noerr-Pennington* immunity. (*Gallegos*, at p. 965.) In the antitrust context, "[a] sham petition is one that is 'ostensibly directed toward influencing governmental action' but that 'is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor . . . .' " (*Tichinin*, at p. 1065, fn. 8, quoting *Noerr*, *supra*, 365 U.S. at p. 144.)

In this case, plaintiff contends that by filing a lawsuit against defendant County of Los Angeles, and its two employees, defendants Chochran and Chernof, she was exercising her right to petition. She further contends that because the lawsuit was not a "sham," under *Noerr-Pennington* the trial court was barred from awarding attorney fees against her for exercising her right to petition. Plaintiff argues that, to the extent Section 425.16, subdivision (c)(1) authorizes an award of attorney fees under these circumstances, it is unconstitutional.

The fatal flaw in plaintiff's argument is that the *Noerr-Pennington* doctrine only immunizes parties from "civil liability." (*Gallegos*, *supra*, 158 Cal.App.4th at p. 964; *Tichinin*, *supra*, 177 Cal.App.4th at p. 1065.) Section 425.16, subdivision (c), however, is a fee-shifting statute, which requires a plaintiff to reimburse a defendant prevailing on an anti-SLAPP motion for the reasonable attorney fees he or she incurred in bringing the motion. Imposing an award under a fee-shifting statute is not the same thing as imposing civil liability. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 62-63 (*Equilon*); *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 361 (*Bernardo*); *Premier Elec. Constr. Co. v. N.E.C.A., Inc.* (7th Cir. 1987) 814 F.2d 358, 373 (*Premier*).) The *Noerr-Pennington* doctrine does not apply to fee-shifting provisions such as Section 425.16, subdivision (c)(1). (*Equilon*, at pp. 62-63; *Bernardo*, at p. 362; *Premier*, at p. 373.)

In *Equilon*, the California Supreme Court did not expressly discuss the *Noerr-Pennington* doctrine, but it did discuss *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993) 508 U.S. 49 (*Professional Real Estate Investors*), which is a *Noerr-Pennington* case. The plaintiff, Equilon, argued that its suit could not be dismissed pursuant to Section 425.16 unless it was brought with intent to chill the defendant's exercise of constitutional speech or petition rights. Citing *Professional Real Estate Investors*, Equilon asserted that "the First Amendment generally bars liability for filing lawsuits, the only exception being for 'sham' lawsuits." (*Equilon*, *supra*, 29 Cal.4th at p. 62.) More particularly, Equilon argued that "by contemplating the award of attorney fees without assessing intent to chill (§ 425.16, subd. (c)), the anti-SLAPP statute treads in a constitutional 'minefield.' " (*Equilon*, at p. 62.)

The California Supreme Court rejected this argument. It stated: "Equilon fails to demonstrate that its proffered construction of section 425.16 is constitutionally compelled. Hundreds of California statutes provide for an award of attorney fees to the prevailing party. [Citations.] Fee shifting simply requires the party that creates the costs to bear them. [Citation.] It does not make a party 'liable' for filing a lawsuit. This

distinguishes *Professional Real Estate Investors, supra,* 508 U.S. 49, Equilon's central authority, which concerns not fee shifting but the scope of antitrust liability for engaging in litigation." (*Equilon*, *supra*, 29 Cal.4th at p. 62.)

In *Bernardo*, the plaintiff asserted an argument virtually identical to the argument plaintiff asserts here. The plaintiff contended that Section 425.16, subdivision (c)(1) was unconstitutional because it violated her right to petition the government for redress of grievances. (*Bernardo, supra,* 115 Cal.App.4th at p. 360.) Relying in part on *Equilon*, the Court of Appeal rejected this argument and held that the trial court's award of attorney fees pursuant to Section 426.16, subdivision (c)(1) did not violate the plaintiff's constitutional right to petition the government for redress of grievances. (*Bernardo*, at pp. 361-362.)

In *Premier*, a federal district court held that the *Noerr-Pennington* doctrine precluded the plaintiff from recovering the costs of defending a related lawsuit. (*Premier, supra*, 814 F.2d at p. 361.) The United States Court of Appeals for the Seventh Circuit reversed. In rejecting the district court's holding the court rejected the premise of plaintiff's argument here—that an award under a fee-shifting statute is precluded by the *Noerr-Pennington* doctrine unless the litigation is a sham. (*Premier*, at p. 373.)

The *Premier* court stated: "The proposition that the first amendment precludes the award of the costs of litigation as damages implies the startling result that fee-shifting rules are unconstitutional. Fee-shifting statutes have become common, and the Sherman Act contains one of the first. They require the loser to pay the winner's fees. Loser-pay-winner statutes discourage litigation with a low chance of success. [Citation.] . . . The district court apparently would deem fee-shifting statutes unconstitutional unless the loser's position was a 'sham' within the meaning of the *Noerr-Pennington* doctrine. Pro-plaintiff statutes would be even more suspect, because they greatly increase the risks defendants bear in exercising their constitutional right to obtain the court's decision—they can lose but not win. Other statutes and rules affecting costs in litigation also greatly affect the incentive to present one's case in court. [Citation.]

"Yet for all this, the proposition that the first amendment, or any other part of the Constitution, prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis. Fee shifting requires the party that creates the costs to bear them. [Citations.] This is no more a violation of the first amendment than is a requirement that a person who wants to publish a newspaper pay for the ink, the paper, and the press. Similarly, whoever wants to read the *New York Times* must buy a copy. The exercise of rights may be costly, and the first amendment does not prevent the government from requiring a person to pay the costs incurred in exercising a right." (*Premier, supra*, 314 F.2d at p. 373, fns. omitted.)

We agree with the analysis in *Bernardo* and *Premier* and are bound to follow *Equilon*. Under *Equilon*, *Bernardo*, and *Premier*, the *Noerr-Pennington* doctrine does not bar defendants from obtaining an award of attorney fees pursuant to Section 425.16, subdivision (c)(1). We thus reject plaintiff's argument on the merits.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.