

A150816
(Alameda County Superior Court Case No. HG12615549)

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
Division 5**

**RWW PROPERTIES, LLC,
Petitioner,**

vs.

**SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
COUNTY OF ALAMEDA,
Respondent,**

**MEGAN E. ZAVIEH,
Real Party in Interest**

**REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE
AND/OR PROHIBITION AND OTHER EXTRAORDINARY
RELIEF**

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INTRODUCTION

RWW did not set the time in which to file costs and fees following denial of ZAVIEH's writ petition to maintain its lis pendens. The Judicial Council set those deadlines. Try as she might, she cannot avoid Rule 8.493(b): Under Rule 8.493(b), Rule 8.278(b)-(d) governs the procedures for recovery of costs and fees and set the accrual mechanism for seeking fees for 40 days after issuance of remittitur. ZAVIEH lost at trial (and eventually on appeal) on all remaining grounds for her real property claim. The complicating factor here? This Court summarily denied ZAVIEH's writ petition contesting post-trial expungement. Remittiturs are generally not issued in such circumstances and this was no exception.

A literal reading of the Rules might lead one to conclude that without the lis pendens writ petition having been previously decided with the issuance of an alternative writ or order to show cause that there could be no award of fees to RWW as a prevailing party. However, CCP § 405.38 expressly provides for the award of reasonable attorney's fees in such motions unless there is a finding that the losing party acted with substantial justification. There was no such finding here. Rules of Court that conflict with a statute cannot override the statute.

The question remains: In a situation like this, in which the plaintiff

recorded a lis pendens based on her real property claims, but lost on those claims after trial, the prevailing party successfully moved to expunge lis pendens after trial, the plaintiff appealed from the judgment and filed a writ petition under CCP § 405.39 from the post-judgment expungement of lis pendens, the appellate court summarily denied the plaintiff's writ petition, and the appellate court affirmed the judgment on appeal and issued a remittitur awarding costs, when did the time begin to run for the successful party who obtained post-trial expungement and protected their expungement in the reviewing court to seek their CCP § 405.38 fees in the trial court? 40 days after issuance of remittitur pursuant reflects the plain language of Rules of Court 8.493(b), 8.278(c), and 3.1702. Forty days after issuance of remittitur also reflects the history of Rule 3.1702 and the objective its predecessor sought: the outer time limits of when to seek fees. RWW did not create this procedural mechanism, the Judicial Council did.

ZAVIEH tries to separate the her post-judgment appeal from her post-judgment writ petition. She cannot. The probable validity of the appeal determines the outcome of the writ petition. *Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003,, 1016-1017. There would be no basis for a writ petition without her appeal in this context. That is why issuance of remittitur for the accompanying appeal is a conceptually sound

accruing event.

DISCUSSION

A. RWW's writ petition was timely filed.

ZAVIEH utterly ignores the language of CCP § 1013, which expressly provides an extension of time in which to perform an act when notice is provided by service. CCP § 405.39 specifically triggers the 20 days notice by service of the order. As a result, since service was by mail within the State of California, CCP § 1013(a) provided a 5-day extension in which to file the writ petition. ZAVIEH tries to make much of the absence of specific authority applying 1013's extension to 405.39. However, the language of both statutes makes 1013's extension applicable to 405.39 and RWW provided several examples of other statutory writs with similar or identical language to 405.39 in which the court held that the 1013 extension applied. Nor was a writ petition under CCP § 405.39 one of the specific examples listed in CCP § 1013(a) in which the five-day extension for mailing service within the State of California did not apply. RWW's writ petition was timely filed.

B. There is no basis for using immediate finality of decision of the writ petition on expungement as the triggering event for filing a fee motion under CCP § 405.38 and Rule of Court 3.1702.

ZAVIEH cites Rule 8.490(b)(1) for the proposition that in the

absence of issuance of remittitur, the time in which to file a memorandum of costs or motion for fees begins to run on the date the order is final. That is not what Rule 8.490(b)(1) states. Instead, it merely states that:

(1) Except as otherwise ordered by the court, the following decisions regarding petitions for writs within the court's original jurisdiction are final in the issuing court when filed:

(A) An order denying or dismissing such a petition without issuance of an alternative writ, order to show cause, or writ of review; and

(B) An order denying or dismissing such a petition as moot after issuance of an alternative writ, order to show cause, or writ of review. Rule 8.490(b)(1).

Nothing in Rule 8.490(b)(1) sets a time limit for filing a fee motion or a memorandum of costs.

The whole thrust of ZAVIEH's argument is to tie the deadline for moving for fees to the immediate finality to a writ petition when a remittitur is not issued. However, the history of Rule 3.1702 as described in *Carpenter*, shows that the *objective for the rule was to set forth an outer limit for seeking recovery of fees*. *Carpenter*, 151 Cal.App.4th at 466-468. Linking that time limit to immediate finality as a possible deadline simply did not seem to be a concern. In fact, the idea was to avoid multiple motions based on multiple appealable orders. Rather the idea was to *await an outer time limit set forth by the conclusion of the litigation in which to*

seek fees. Carpenter, 151 Cal.App.4th at 468.

ZAVIEH refers to this Court’s March 15, 2016 order summarily denying ZAVIEH’s writ petition and how that order did not order that RWW would receive costs or fees but instead referred to its concerns from December 2015 about RWW’s violation of CCP § 405.35 in recording the order expunging lis pendens too early.¹ We do not know if that was an omission or not. It makes no difference. “A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]” *Carpenter*, 151 Cal.App.4th at 461. Moreover, CCP § 405.38 requires the fee award unless the opposing party acted with substantial justification or other circumstances justified making no award. The portion of the March 15, 2016 order addressing ZAVIEH’s emergency application did neither. It proceeded to deny any further relief to ZAVIEH for its emergency application beyond serving RWW’s former counsel Bornstein with a copy of the order (2 EXH. 325). Nowhere in that order was there any justification given for ZAVIEH’s writ petition, nor discussion of

¹

However, as this Court also recognized, CCP § 405.35 also provided its own remedy for any premature recording of an order expunging lis pendens by making such an order ineffective until the writ proceedings are concluded (1 EXH 216-217).

circumstances that specifically justified not awarding RWW fees (2 EXH 325).

C. An appeal by the unsuccessful real estate litigant will always accompany a post-judgment writ petition contesting expungement of lis pendens following final judgment in the underlying real estate dispute.

ZAVIEH questions why what it calls an “independent appeal” would have any bearing on time limits for the motion to expunge (Opp. At p. 8).

As the Court in *Amalgamated Bank v. Superior Court* (2007) 149

Cal.App.4th 1003 explains, in order to determine whether or not there is any basis for keeping the lis pendens in place after judgment, “in deciding a writ petition under section 405.39 after judgment and pending appeal, an appellate court must assess whether the underlying real property claim has ‘probable validity’ as that term is used in section 405.3, i.e., whether it is more likely than not the real property claim will prevail at the end of the appellate process.” *Amalgamated Bank*, 149 Cal.App.4th at 1016-1017. In so holding the Court in *Amalgamated Bank* resolved the issue it faced: “By what standard should an appellate court decide whether to issue a writ of mandate relieving the losing real property claimant from the effect of an expungement order while his appeal is pending?” *Amalgamated Bank*, 149 Cal.App.4th at 1015.

The appeal is far from independent from the writ petition. Without the post-judgment appeal there is no basis for even seeking post-judgment writ relief under CCP § 405.39. The merits of the appeal tell the reviewing court whether to grant writ relief pending the outcome of the appeal.

Amalgamated Bank, 149 Cal.App.4th at 1016-1017. ZAVIEH talks of how “nonsensical” or “disruptive” RWW’s rule would be, since most writ petitions do not have accompanying appeals and most writ petitions are summarily denied (ZAVIEH Opp. At p. 9). However, it is ZAVIEH who seeks to use a *different* accrual point for fees, i.e immediate finality on summary denial, rather than 40 days from issuance of remittitur, as already provided for in Rules of Court 3.1702(c)(1) and 8.278(c)(1), as RWW calls for. Moreover, the remittitur trigger language pertaining to lis pendens expungement is far more consistent with CCP § 405.38's language mandating recovery of fees, except in specified, justified instances, than the rule of court language which gives way to conflicting statutory language.

D. ZAVIEH’s jurisdictional argument based on *Moulin Rouge* is ill-founded.

ZAVIEH argues that RWW’s missing the 40-day deadline jurisdictionally bars the fee motion under *Moulin Electric Corp. v. Roach* (1981) 120 Cal.App.3d 1067. First, *Moulin Electric* says nothing about

failing to file a cost bill as a jurisdictional impediment to recovering fees under CCP § 405.38 and Rule 3.1702. *Moulin Electric*, 120 Cal.App.3d at 1070. Second, more recent authority that also takes into account Rule 3.1702 holds that while seeking fees under CCP § 1033.5 requires a noticed motion, neither CCP §§ 1033.5, nor 1034 require that a party also file a memorandum of costs to seek such fees. *Kaufman v. Diskeeper Corp.* (2014) 229 Cal.App.4th 1, 7. As *Kaufman* explains:

Neither subdivision (b) nor subdivision (c) of rule 3.1702 mentions a memorandum of costs. The sole express reference to a memorandum of costs in rule 3.1702 appears in subdivision (e), addressing "Attorney's fees fixed by formula": "If a party is entitled to statutory or contractual attorney's fees that are fixed without the necessity of a court determination, the fees must be claimed in the memorandum of costs." *Kaufman*, 229 Cal.App.4th at 8.

As *Kaufman* points out: "Under rule 3.1702, a memorandum of costs is required only when a fee motion is not required, that is, when "contractual attorney's fees ... are fixed without the necessity of a court determination ..." (Rule 3.1702(e).) *Kaufman*, 229 Cal.App.4th at 9.

ZAVIEH refers to Rule 8.278(c)(1) for the jurisdictional deadline for filing a cost bill. However, as shown above, filing a cost bill here is unnecessary. *Kaufman*. Rule 3.1702(c)(1) provides the correct deadline,

borrowing from the same time period in Rule 8.278(c)(1) as that used for serving and filing a memorandum of costs.

E. ZAVIEH opposed RWW’S motion on the merits, did not seek a continuance of the hearing on this motion, and thus waived any defect in service that she asserts.

ZAVIEH argues that she was improperly served, in that she was not served the same day that RWW’s motion was filed. However, even assuming *arguendo* that Rule 3.1702(c)(1) required serving and filing a fees motion on the same day, denial of this motion is unwarranted. Under *Carlton v. Quint* (2000) 77 Cal.App.4th 690, a party who argues defective notice, yet files an opposition on the merits and does not seek a continuance of the matter, waives any purported service defect. *Carlton*, 77 Cal.App.4th at 697. In *Carlton* the plaintiff argued, just as ZAVIEH argues here, that they were not served within the statutorily mandated time period—CCP § 437c(a) in *Carlton*, Rule of Court 3.1702(c)(1) in this case. As in *Carlton*, ZAVIEH filed an extensive opposition on the merits, and in her opposition never sought a continuance of the motion (2 EXH 512:1-513:24). In so opposing, ZAVIEH shows that the notice has achieved its desired effect.

*Carlton, supra.*²

²

ZAVIEH tries to make the same argument by reference to oral argument on the fee motion, but there RWW pointed out that there is a difference

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In ZAVIEH's 2015 fees proceedings following its successful writ petition, ZAVIEH provided RWW with 25 days' notice of hearing. By contrast, even assuming *arguendo* that ZAVIEH was improperly served on December 5, 2016 rather than November 14, 2016, ZAVIEH still received 43 days' notice of the January 17, 2017 hearing in this matter. If she was prejudiced by service on December 5, 2016, she could have sought a continuance of the hearing. *Carlton, supra*. ZAVIEH's opposition to RWW'S motion contains no such request for a continuance. ZAVIEH has waived any purported defect in service.

F. ZAVIEH's waiver argument is simply inapposite, as RWW simply follows the filing deadline set forth in Rule 3.1702.

ZAVIEH's argument that RWW cannot waive noncompliance with Rule 3.1702's filing deadline is nonsensical. RWW has not waived any filing deadline. It is governed by Rule 3.1702(c)(1). By contrast, ZAVIEH is the party asserting a deadline unmentioned in Rule 3.1702, nor in 8.278, immediate finality of a writ petition.

G. While *Crespin* holds that there is no time limit to filing for attorneys' fees for post-judgment motions aside from laches, the intent behind promulgation of the former Rule 870.2 (current Rule 3.1702) was to set an outer time limit in which to seek fees, and one can interpret Rule 3.1702(c)(1) consistent with Rule

between service and filing (2 EXH 677:14-16). See *Carlton, supra*.

3.1702(b)(1) and *Carpenter* while the matter was in the appellate court.

ZAVIEH tries to portray RWW as having abandoned its position that the correct accrual trigger for filing RWW's fee's motion is 40 days from issuance of remittitur by pointing to RWW's citation of *Crespin v. Shewry* (2004) 125 Cal.App.4th 259. In *Crespin* Division One of this Court examined the same history of former Rule 870.2 (current rule 3.1702) examined in *Carpenter* and concluded that the only applicable time limit for seeking private attorney general fees for post-judgment fees was laches, and that the time limits set forth in Rule of Court 3.1702 did not apply to such fees. *Crespin*, 125 Cal.App.4th at 265-266, 267-269, 271. The Court in *Crespin* concluded that those involved in the development and promulgation of former Rule 870.2 were more concerned with the more common issue of prejudgment motions than with post-judgment motions regarding fees. *Crespin*, 125 Cal.App.4th at 268.

In accusing RWW of changing its position regarding an accrual trigger for filing its fee motion ZAVIEH cited a portion of the oral argument on RWW's fee motion (ZAVIEH's writ opposition at p. 15 (citing 3 EXH at 673)). A review of that portion of the transcript shows that RWW did no such thing. Instead, counsel for RWW described the scenarios under

both *Carpenter* and *Crespin* (3 EXH 672:23-673:16). Throughout the fee motion process RWW has maintained that it understood its trigger to file for fees to be 40 days following issuance of remittitur.

While RWW could hardly reject a result in its favor under *Crespin*, its position has been consistent. In its Petition RWW proposed an interpretation of Rule 3.1702(c)(1) consistent with the goal of promulgating Rule 3.1702 (setting an outer time limit in which to file for fees) that also dovetails with the unique characteristics of contesting post-judgment expungement of lis pendens: a concurrent appeal of the judgment and writ petition contesting post-judgment expungement, which of necessity relies on the merits of the appeal itself. *Amalgamated Bank*, 149 Cal.App.4th at 1016-1017.

RWW's proposal is as follows: RWW's successful expungement motion occurred after entry of judgment in October 2015 (1 EXH. 73-74, 92-93, 140-147). Rule 3.1702(c)(1) pertains to notice of motions "to claim attorney's fees on appeal-other than the attorney's fees on appeal claimed under (b)." While, under *Crespin*, one could argue that fees for post-judgment activity would seem not to fall within the definition of Rule 3.1702(c)(1), if read consistently with the *Carpenter* Court's interpretation of Rule 3.1702(b)(1) and the goal of avoiding piecemeal fee litigation,

RWW's October 2015 expungement motion would fall within the definition of Rule 3.1702(c)(1).

If Rule 3.1702(b)(1) under *Carpenter* included pretrial trips to the appellate courts before the underlying matter reached judgment, so as to allow one motion for attorney fees that included all services up to rendition of judgment, including pretrial appeals, then an analogous reading of Rule 3.1702(c)(1) would allow for one comprehensive motion to include any services rendered in the trial court and appellate court while the underlying matter was on appeal. ZAVIEH filed her appeal in First District Case No. A145977 in August 2015 and the remittitur issued in October 2016 (2 EXH. 328-340). The matter was on appeal while RWW moved to expunge the lis pendens in October 2015 and when ZAVIEH filed for writ relief in First District Case No. A146809 (1 EXH. 140-147, 148-170).

Such an interpretation is also consistent with the standard of review for writ petitions contesting expungement following judgment while the judgment is on appeal. Under *Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003, this Court necessarily had to consider the merits of the pending appeal in determining its probable validity in determining whether to reverse expungement while the underlying appeal was pending. *Amalgamated Bank*, 149 Cal.App.4th at 1016-1017 (2 EXH 324-325).

Accordingly, the fee motion would be timely under Rule 3.1702(c)(1) under *Carpenter*, and would achieve an outer time limit for moving for fees.

H. RWW agrees that if this Court should issue a writ in RWW's favor, the issue of determining RWW's reasonable attorneys' fees would remain for the Trial Court.

RWW agrees that if this Court issues the writ, the issue still remains for the Trial Court to determine what reasonable fees RWW is entitled to recover under CCP § 405.38. See also *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 697. When on October 30, 2015 the Trial Court granted its order expunging ZAVIEH's lis pendens, RWW achieved its litigation objective in filing its motion to expunge of "removing the cloud on the title and allowing the property's transfer (1 EXH 140-147)." *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1021, 1022.³

ZAVIEH devotes several pages in an apparent preview of what her arguments will be like on remand. RWW will save its argument for the remand and will have plenty to say about the topic if and when this case reaches that point.

CONCLUSION

RWW lacks an adequate remedy at law. RWW' attorney fee motion

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In compliance, of course, with CCP § 405.35.

was timely filed pursuant to Rule of Court 3.1702(c)(1). Accordingly, this Court must issue a peremptory writ directing the Trial Court to vacate its February 21, 2017 order denying RWW's CCP § 405.38 fee motion and issue a new order for further hearing to determine the amount of fees RWW should be awarded in this matter.

Dated: May 4, 2017

Respectfully submitted,

LAW OFFICES OF
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By /s/ John T. Schreiber
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LLC

CERTIFICATE OF WORD COUNT

The text of this brief contains 3,267 words as counted by the Corel WordPerfect version X7 word-processing software program used to generate this brief. CRC 8.204(c)(1), 8.486(a)(6).

Dated: May 4, 2017

s/ John T. Schreiber
John T. Schreiber