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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CYRUS M. SANAI,

Plaintiff and Appellant,

v.

HARVEY SALTZ et al.,

Defendant and Respondent.

B174924

(Los Angeles County  
Super. Ct. No. BC235671)

CYRUS M. SANAI,

Plaintiff and Appellant,

v.

FIRST ADVANTAGE CORPORATION  
et al.,

Defendants and Appellants.

B170618

APPEALS from orders of the Superior Court of Los Angeles County, Elizabeth A. Grimes, Judge. Reversed and Remanded with directions.

Cyrus Sanai, in pro. per., for Plaintiff and Appellant.

Harvey A. Saltz, in pro. per.; Russell, Saltz & Finermann and Michael J. Saltz; Eneinstein, Russell & Saltz, Micahel J. Saltz, Jason M. Russell, Darren S. Eneinstein, Jeffrey R. Glassman and Keri R. Montrose, for First Advantage Corporation, The Irvine Company, Irvine Apartment Communities LLP and Irvine Apartment Communities, LP.

In *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180 (*Varian*) the Supreme Court held, by virtue of Code of Civil Procedure section 916,<sup>1</sup> the perfecting of an appeal from the denial of a special motion to strike pursuant to section 425.16 (an anti-SLAPP motion) automatically stays all further trial court proceedings on the merits as to those causes of action affected by the motion. (*Varian*, at p. 191.) The Court also held any subsequent trial court proceedings on matters “‘embraced’ in or ‘affected’ by” the appeal are void, not merely voidable: “[S]ection 916, as a matter of logic and policy, divests the trial court of jurisdiction over the subject matter on appeal -- i.e., jurisdiction in the fundamental sense.” (*Varian*, at p. 198.) Finally, because the trial court is temporarily deprived of jurisdiction in this most fundamental sense pending the appeal, the Court held automatic reversal is required, rejecting the Chief Justice’s argument that reversal of the trial court’s judgment or affected orders is proper only if there has been a showing of prejudice. (*Id.* at p. 199, fn. 10; see *id.* at pp. 201-207 (conc. & dis. opn. of George, C. J).)

In light of *Varian* we now must unravel the funeral pall woven for Cyrus Sanai’s lawsuit against The U.D. Registry, Inc. (UDR)<sup>2</sup> and its president Harvey A. Saltz by trial court orders made during the pendency of UDR and Mr. Saltz’s appeal from the denial of their anti-SLAPP motion directed to Mr. Sanai’s complaint, subsequent orders from the trial court that were based on or arose from the court’s earlier void rulings and our own

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<sup>1</sup> Code of Civil Procedure section 916, subdivision (a), provides, “Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.”

Statutory references are to the Code of Civil Procedure unless otherwise indicated.

<sup>2</sup> UDR was apparently acquired by First Advantage Corporation in April 2004. On April 21, 2005 we granted Mr. Sanai’s unopposed motions to substitute First Advantage Corporation for UDR as appellant/respondent in B170618 and as respondent in B174924. For consistency and to avoid confusion, however, we continue to refer to this party as “UDR.”

decision affirming the final judgment entered in the matter based on Mr. Sanai's default in a prior attempt to appeal trial court's rulings (*Sanai v. Saltz* (Jan. 20, 2004, B163221) [nonpub. opn.]). To do so, we reverse the trial court's order denying Mr. Sanai's motion pursuant to section 473, subdivision (d), to set aside void judgment and orders (the order on appeal in No. B174924), vacate the judgment entered against Mr. Sanai and reverse all postjudgment orders awarding and denying costs and attorney fees (the orders on appeal and cross-appeal in No. B170618). The matter is remanded to the trial court with directions to vacate all orders entered after January 16, 2001, the date on which UDR and Mr. Saltz filed notices of appeal from the denial of UDR's special motion to strike Mr. Sanai's complaint, and to conduct further proceedings based on the state of the pleadings on January 16, 2001.

In addition, to return the parties so far as practicable to the positions they occupied on January 16, 2001, the trial court is directed to consider Mr. Sanai's request for restitution and to order reimbursements to the extent appropriate. Finally, in the interests of justice, all further proceedings shall be heard before a trial judge other than the judge or judges whose orders are affected by this decision. (§ 170, subd. (c).)

### **FACTUAL BACKGROUND**

As we have observed in connection with the prior appellate proceedings in this case, the relevant facts are essentially undisputed: Mr. Sanai rented an apartment in a Newport Beach apartment complex known as Promontory Point from August 26, 1997 through January 1999. After the expiration of the original, six-month lease, Mr. Sanai continued to occupy the apartment on a month-to-month basis at a rent of \$2,165.<sup>3</sup> In September 1998 Mr. Sanai received a letter dated August 31, 1998 from a representative

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<sup>3</sup> Paragraph 29 of the August 26, 1997 lease agreement provides, "Upon the expiration of the Term of this Lease, but not upon the earlier termination hereof, this Lease shall continue as a tenancy from month to month unless either party has given written notice to the other prior to thirty (30) days before the expiration of the term of its election that such month to month tenancy shall not commence. . . . In the event this Lease shall continue as a tenancy from month to month, as provided above, each of the terms and conditions of the Lease shall apply with respect to such tenancy . . . ."

of the owner of the apartment complex stating a new monthly rent of \$1,435 was being established for his apartment and offering him “the option to renew a minimum of a 6-month up to a 12-month lease, at the monthly rent of \$1,410 effective October 1, 1998.” A second copy of this letter was taped to Mr. Sanai’s door a few days after he had received the original by mail. Mr. Sanai responded on October 1, 1998 with a letter of acceptance for a 12-month lease, enclosing a rent check of \$1,410 for October 1998.

Within a day of Mr. Sanai’s acceptance of the offer set forth in the August 31, 1998 letter, a representative of the owner informed Mr. Sanai the monthly rental amount was a misprint and advised him the offer was rescinded. Mr. Sanai (a transactional lawyer) responded that he had accepted the offer and the contract was binding.<sup>4</sup> Further discussions between Mr. Sanai and representatives of the owner did not resolve the dispute. In December 1998 a three-day notice to quit was posted on Mr. Sanai’s door. Mr. Sanai moved out of the Promontory Point apartment complex in January 1999.

From October 1, 1998 through the time he left his Newport Beach apartment, Mr. Sanai paid rent at the rate of \$1,410 per month. In February 1999, after Mr. Sanai had moved, a representative of the owner contacted Mr. Sanai and demanded he pay back rent in the amount of \$2,781; Mr. Sanai refused. Each party threatened the other with legal action.

The owner of the apartment complex filed no legal action to enforce its claim for unpaid rent against Mr. Sanai and apparently did not assign the debt to a collection agency. However, it did retain UDR and Mr. Saltz in April 1999 to inform consumer credit reporting agencies of the claim for unpaid rent against Mr. Sanai.

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<sup>4</sup> In papers filed in support of his motion for a preliminary injunction, Mr. Sanai acknowledged that he initially believed the August 31, 1998 letter contained a typographical error, but declared that, after he received the second letter taped to his apartment door and considered news reports regarding the worldwide financial crisis that was then occurring, he concluded the amounts of rent in the letters were correct and the apartment owners were seeking to retain their better tenants by unilaterally offering to lower the rent.

In January 2000 Mr. Sanai applied for and was denied a low-interest credit card from American Express due to information from a credit-reporting agency that a debt had been sent to collection. Citibank subsequently declined Mr. Sanai's request to increase his credit-line limit for the same reason. Mr. Sanai obtained a copy of his credit report, which listed an item from UDR stating a collection account was past due for unpaid rent at Promontory Point. Mr. Sanai then requested that UDR and Mr. Saltz insert in its reports additional information about Mr. Sanai's dispute with the owner of Promontory Point pursuant to Civil Code section 1785.16. Mr. Sanai has subsequently alleged UDR did not include in its reports sent to third parties the text he had requested.

### **PROCEDURAL HISTORY**

In September 2000 Mr. Sanai filed a complaint against UDR and Mr. Saltz alleging causes of action for slander, libel, intentional and negligent interference with prospective economic advantage, intentional and negligent infliction of emotional distress, violations of the Consumer Credit Reporting Agencies Act (Civ. Code, § 1785.1 et seq.) and violation of the federal Fair Credit Reporting Act (15 U.S.C. § 1681s-2). The complaint sought in excess of \$5 million in damages.

#### *1. UDR's Special Motion to Strike the Complaint*

After answering the complaint, UDR filed a special motion to strike under section 425.16, asserting Mr. Sanai's lawsuit was brought in retaliation for UDR's exercise of its constitutional right to petition or engage in speech related to a matter in litigation.<sup>5</sup> UDR argued that, because Mr. Sanai's debt was detailed in the three-day notice to pay rent or quit that had been served on him as a prerequisite to eviction proceedings, its actions in reporting that alleged debt to the major credit bureaus was speech made in connection

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<sup>5</sup> Although the record on appeal did not reflect any formal notice of joinder by Mr. Saltz in UDR's motion, Mr. Saltz did file a reply memorandum in support of UDR's motion in the trial court, as well as a separate notice of appeal from the trial court's denial of the motion. Because Mr. Sanai did not object to Mr. Saltz's standing to appeal the denial of the motion, we deemed him to have joined in UDR's motion in the trial court. (*Sanai v. The U.D. Registry, Inc.* (Mar. 21, 2002, B147392) [nonpub. opn.] (*Sanai I*), at p. 6, fn. 2.)

with an issue under consideration or review by a judicial body within the meaning of section 425.16, subdivision (e)(2). On December 5, 2000 the trial court denied the motion, concluding UDR had failed to make the required threshold showing that the challenged causes of action arose from protected activity within the meaning of section 425.16, subdivision (e).<sup>6</sup> At the same time the trial court denied Mr. Sanai's motion for preliminary injunction, which sought to enjoin UDR from threatening to make or making false statements about him to consumer credit reporting agencies, finding Mr. Sanai had not demonstrated he was likely to prevail on the merits of his lawsuit.

UDR and Mr. Saltz appealed the trial court's order denying the special motion to strike, filing notices of appeal on January 16, 2001 (§§ 425.16, subd. (j), 904.1, subd. (a)(13)); Mr. Sanai cross-appealed the trial court's denial of his motion for a preliminary injunction (§ 904.1, subd. (a)(6)). On February 2, 2001, two months after the trial court's ruling denying its special motion to strike, UDR also filed a petition for writ of mandate to vacate the trial court's order and requested this court immediately stay all trial court proceedings, arguing its right to appeal the trial court's order was not an adequate remedy.<sup>7</sup> Mr. Sanai opposed the writ petition, noting UDR had exercised its right to appeal from the trial court's denial of the special motion to strike and asserting that none of the public interest considerations the Legislature sought to protect through section 425.16's expedited procedures was implicated by this case.<sup>8</sup>

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<sup>6</sup> Although the trial court held UDR had failed to make the required showing that the challenged causes of action arose from protected activity, the court also expressed the view that Mr. Sanai had not demonstrated a probability of prevailing on his claims. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [once the defendant establishes § 425.16 applies, the burden shifts to the plaintiff to demonstrate a "reasonable probability" of success on the merits].)

<sup>7</sup> In its writ petition UDR asserted, "[B]ecause the appeal process is extraordinarily lengthy, and because the purpose of the statute is to arrest SLAPPs at the outset, there can be no meaningful remedy under the statute unless the Order is immediately reversed and the action is stayed."

<sup>8</sup> In fact, Mr. Sanai argued the issues raised by UDR's appeal were better considered "through the full deliberative process of an appeal, and not an expedited procedure that will curtail the ability of Sanai to argue his side."

We summarily denied the petition for writ of mandate and request for stay of proceedings on February 9, 2001. (*The U.D. Registry, Inc. v. Superior Court* (Feb. 9, 2002, B147603) [nonpub. opn.], review den. Apr. 25, 2001, S095491.) UDR did not seek a stay of the trial court proceedings by petition for a writ of supersedeas ancillary to its appeal, either before or after our summary denial of its petition for writ of mandate. (See *Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 455.)<sup>9</sup>

In an opinion filed March 21, 2002 we affirmed the trial court's denial of UDR's special motion to strike, holding that "for the official proceeding in section 425.16, subdivision (e), clauses (1) and (2), to be 'equated' with a public issue, there must be an actual official proceeding to which the conduct at issue can be connected. If there was no actual official proceeding, there was no public issue to which the conduct can be connected, and the conduct should not fall within the protection of section 425.16, subdivision (e), clauses (1) and (2)." (*Sanai I, supra*, B147392 at p. 19.) Mr. Sanai's cross-appeal from the denial of his motion for a preliminary injunction was dismissed as moot. (*Id.* at pp. 21-22.) The remittitur issued May 24, 2002.

## 2. Further Proceedings in the Trial Court

While *Sanai I* was pending in this court from January 16, 2001 to May 24, 2002, the litigation proceeded in the trial court, which issued a number of orders, at least at the outset without any formal objection by either party,<sup>10</sup> determining pleading issues and

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<sup>9</sup> Although UDR did not file a petition for writ of supersedeas to stay proceedings in the trial court pending resolution of its appeal from denial of the special motion to strike, on January 4, 2002, 11 months after cross-appealing from the trial court's denial of his motion for a preliminary injunction and after both the appeal and cross-appeal had been fully briefed, Mr. Sanai filed his own petition for writ of supersedeas and request for immediate temporary stay, arguing that on-going proceedings in the trial court could moot the issues raised by his cross-appeal. That petition was summarily denied on January 17, 2002.

<sup>10</sup> Indeed, Mr. Sanai moved to augment the record on appeal to include trial court orders made July 16, 2001 and September 28, 2001 reflecting that the owners of the Promontory Point apartment complex had been joined as parties, rendering moot UDR's argument that his request for injunctive relief was properly denied because of the absence of necessary parties. (See *Sanai I, supra*, B147392 at pp. 9-10, fns. 5, 6.)

discovery disputes (including orders for sanctions) and ultimately resolving against Mr. Sanai all of the substantive issues raised by his lawsuit.<sup>11</sup>

Initially, the trial court held Mr. Sanai's landlord was a necessary and indispensable party to the action. As a result, Mr. Sanai filed a first amended complaint and thereafter a second amended complaint adding Irvine Apartment Communities, L.P., Irvine Apartment Communities, LLC, and The Irvine Company (collectively "Irvine Entities"), the owners of the apartment Mr. Sanai had leased, as defendants and asserting a cause of action against Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC for breach of a written lease agreement (the purported agreement to lease the apartment for 12 months at a monthly rental of \$1,410 beginning October 1,

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<sup>11</sup> Mr. Sanai unsuccessfully attempted to appeal many of the trial court's rulings and orders. In *Sanai v. The U.D. Registry, Inc.* (Sept. 11, 2002, B152745) [nonpub. opn.] (*Sanai II*), we dismissed Mr. Sanai's appeal from three orders directing him to pay monetary sanctions because the orders were not appealable. Mr. Sanai's effort to cure this jurisdictional defect through a motion to augment the record was unsuccessful because the additional orders he provided -- a minute order reflecting a request for dismissal of the cross-complaint and an order granting a motion for judgment on the pleadings without leave to amend -- were similarly interlocutory and nonappealable.

Because of his default under California Rules of Court, rule 8(b), in *Sanai v. Saltz* (Dec. 17, 2002, B156672) [nonpub. opn.] (*Sanai III*), we dismissed Mr. Sanai's appeal from various orders adversely determining his claims against UDR and the Irvine Entities and imposing sanctions against him. After the notice of appeal had been filed in *Sanai III* but before we dismissed the appeal, Mr. Sanai successfully moved in the trial court for a final judgment to be entered against him on the basis of orders and dismissals at issue in the then-pending *Sanai III* appeal.

In *Sanai v. Saltz* (Jan. 20, 2004, B163221) [nonpub. opn.] (*Sanai IV*), we affirmed the final judgment entered at Mr. Sanai's request, holding our dismissal in *Sanai III* had affirmed the orders, rulings and findings at issue in that appeal, as well as the judgment entered during the pendency of the appeal based on those orders. Because our dismissal did not expressly provide it was made without prejudice to the right of Mr. Sanai to take another appeal, a further appeal again challenging the same judgment and orders was barred.

1998).<sup>12</sup> UDR, as assignee of the Irvine Entities, then filed a cross-complaint to collect the disputed unpaid rent.

On October 18, 2001 the trial court sustained UDR's demurrer to the first seven causes of action in the second amended complaint without leave to amend. The court ruled that the second amended complaint did not allege UDR had wrongfully reported a false debt; indeed, according to Mr. Sanai's allegations, UDR had fully complied with Civil Code section 1785.25, subdivision (c), which requires that, if a debt is subject to a continuing dispute, any information about that debt submitted to a credit reporting agency must include a notice that the information is disputed by the consumer. Judgment on the pleadings in favor of Mr. Saltz and the Irvine Entities on those same seven causes of action was granted by the trial court on December 21, 2001 based on the court's earlier ruling on UDR's demurrer to the second amended complaint.<sup>13</sup> A final judgment of dismissal was thereafter entered as to The Irvine Company and Mr. Saltz on March 8, 2002, shortly before we filed our opinion in *Sanai I, supra*, B147392.

The eighth cause of action in the second amended complaint, the only remaining claim against UDR, was resolved against Mr. Sanai on February 13, 2002 when the trial court granted UDR's motion for summary adjudication, concluding UDR had not published Mr. Sanai's consumer credit report during the time periods alleged in the second amended complaint, an element of the claim for violation of Civil Code section 1785.16. On March 26, 2002 the trial court granted the motion for judgment on the

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<sup>12</sup> Mr. Sanai's second amended complaint alleged nine causes of action for slander, libel, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, intentional infliction of emotional distress, negligent infliction of emotional distress, violation of Civil Code section 1785.1, et seq. (reports made *to* a consumer credit reporting agency), violation of Civil Code section 1785.16 (reports made *by* a consumer credit reporting agency) and breach of written contract. The first seven causes of action named UDR, Mr. Saltz and the Irvine Entities as defendants; only UDR was named as a defendant in the eighth cause of action; Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC were the only defendants named in the ninth cause of action for breach of written contract.

<sup>13</sup> It was after this ruling that Mr. Sanai belatedly filed a petition for writ of supersedeas seeking to stay further proceedings in the trial court. (See fn. 9, above.)

pleadings filed by Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC on the last claim in Mr. Sanai's lawsuit, the ninth cause of action for breach of contract. The trial court ruled Mr. Sanai's attempt to accept the offer for a one-year lease at \$1,410 was ineffective because the written offer (even assuming no mistake in the price term) required acceptance no later than September 30, 1998, while Mr. Sanai's letter of acceptance was dated October 1, 1998.<sup>14</sup> The trial court entered a final order of dismissal as to Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC on April 2, 2002. Mr. Sanai served a combined written notice of entry of final judgment and final orders of dismissal as to all the Irvine Entities and Mr. Saltz on April 13, 2002.

After all of the causes of action in Mr. Sanai's second amended complaint had been dismissed and a trial date set for UDR's cross-complaint to collect unpaid rent, Mr. Sanai made a statutory tender of the full amount sought by UDR (whether this offer was prompted by the trial court's statement it would entertain a motion for terminating sanctions as a result of Mr. Sanai's failure to comply with discovery orders or was independently prompted by tactical considerations is disputed by the parties). UDR accepted the offer and dismissed its cross-complaint on May 17, 2002 -- one week *prior* to issuance of the remittitur in *Sanai I, supra*, B147392.

Final judgment was entered in the case on September 17, 2002. Notice of entry of judgment was served on September 24, 2002.

3. *The Award of Costs and Attorney Fees and Our Original Decision in Appeal No. B170618*

UDR and the Irvine Entities filed both a joint memorandum of costs and a consolidated motion for attorney fees on November 25, 2002. Mr. Sanai moved to strike the costs memorandum as to all parties as untimely under California Rules of Court, rule

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<sup>14</sup> The trial court also ruled that Mr. Sanai was attempting only to enforce a one-year lease for the apartment at a monthly rent of \$1,410, not a month-to-month tenancy at \$1,435 per month. Mr. Sanai does not dispute that he paid only \$1,410 for each month he remained in the apartment after October 1, 1998.

870(a)(1);<sup>15</sup> he opposed the attorney fee motion on the merits and also argued as to the Irvine Entities the motion was untimely.

After hearing argument on January 30, 2003, the trial court granted UDR and the Irvine Entities' request for leave to file the costs memorandum late and awarded \$7,248.60 in costs. The court denied the request for attorney fees under the attorney fee provision in the lease agreement, but found UDR was entitled to attorney fees under Civil Code section 1785.31, subdivision (e), which authorizes the award of fees to a limited class of successful defendants in actions under the Consumer Credit Reporting Agencies Act (actions against "debt collectors" related to the collection of a debt) if the lawsuit was not brought in good faith. The court awarded UDR \$136,034 in fees, 25 percent of the total fees sought by all defendants in their consolidated attorney fee motion.

Mr. Sanai filed a timely notice of appeal challenging the award of costs and attorney fees on the merits and arguing, as he had in *Sanai III*, *supra*, B156672, and *Sanai IV*, *supra*, B163221, because predicated on orders and a judgment entered during the pendency of the appeal of the denial of UDR's special motion to strike, the postjudgment orders were void.<sup>16</sup> UDR and the Irvine Entities filed a timely cross-appeal from the order denying their request for fees pursuant to the attorney fee provision in the lease agreement.

On February 16, 2005 we filed our original decision in No. B170618, reversing the orders awarding costs to UDR and the Irvine Entities and attorney fees to UDR under the Consumer Credit Reporting Agencies Act and affirming the order denying attorney fees

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<sup>15</sup> California Rules of Court, rule 870(a)(1) provides, "A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment . . . ." Rule 870(b)(3) authorizes the court to extend the time for serving and filing the costs memorandum "for a period not to exceed 30 days."

<sup>16</sup> We dismissed *Sanai III*, *supra*, B156672, for Mr. Sanai's failure to comply with California Rules of Court, rule 8(b). We affirmed the judgment and orders on appeal in *Sanai IV*, *supra*, B163221, solely on the ground Mr. Sanai was impermissibly seeking a second appeal from the same orders that had been at issue in *Sanai III*. (See fn. 12, above.) In neither appeal did we reach the merits of Mr. Sanai's argument that the judgment was void.

to UDR and the Irvine Entities under the terms of the parties' lease agreement. With respect to Mr. Sanai's argument the postjudgment orders were void, we held that a stay of trial court proceedings during the pendency of an appeal of a special motion to strike, whether effected automatically or by special court order, does not deprive the trial court of jurisdiction in the fundamental sense and that actions by the trial court during the pendency of such a stay, while in excess of its jurisdiction and therefore "voidable," are not void, citing *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 27 (party may waive objection to trial court action during pendency of stay by appearing and arguing merits of motion).

On March 3, 2005, in light of the Supreme Court's decision earlier that day in *Varian, supra*, 35 Cal.4th 180, we ordered rehearing of No. B170618 on our own motion (Cal. Rules of Court, rule 25(a)) and requested supplemental briefing on the effect of *Varian* on the case.

#### 4. *The Motion to Set Aside the Judgment as Void (Appeal No. B174924)*

On February 4, 2004 Mr. Sanai moved to set aside void orders and judgment pursuant to section 473, subdivision (d), asserting the trial court lacked jurisdiction to make any orders denying him relief or granting relief to the defendants during the pendency of UDR and Mr. Saltz's appeal of the denial of the special motion to strike and arguing that all such orders were void. UDR and the other defendants filed a written opposition. On February 25, 2005 the trial court denied the motion, ruling that by virtue of this court's decision in *Sanai IV, supra*, B163221, affirming the final judgment entered at Mr. Sanai's request (see fn. 11, above), "[t]he court no longer has jurisdiction over this dispute and is without power to revive the litigation for any purpose." Mr. Sanai filed a timely notice of appeal from that ruling.

#### 5. *The Motions for Restitution Under Section 908 and Request for Sanctions*

Mr. Sanai has filed motions in both appeals requesting restitution under section 908 to restore him to the position he occupied on January 16, 2001, when the notices of

appeal from the trial court's denial of the special motion to strike were filed.<sup>17</sup> Specifically, Mr. Sanai has requested this court to order UDR to restore to Mr. Sanai all funds it has obtained from him directly or by execution or garnishment, plus interest at the legal rate, and to order the trial court to hold a hearing to determine the reasonable value of the time Mr. Sanai has spent in the litigation and award him the value of this "lost time," as well as recovery of all out-of-pocket costs and expenses. In addition, with his supplemental letter brief on the impact of *Varian* in No. B170616, Mr. Sanai requested imposition of sanctions against UDR and its counsel for filing a frivolous cross-appeal from the trial court's denial of attorney fees to the Irvine Entities. Finally, Mr. Sanai requests, pursuant to section 170.1, subdivision (c), the matter be reassigned to a different trial judge upon remand.

## **DISCUSSION**

### *1. All Trial Court Orders Subsequent to January 16, 2001 Must Be Vacated*

In *Varian, supra*, 35 Cal.4th 180, the defendants who had appealed the trial court's denial of their special motion to strike pursuant to section 425.16 also filed a petition for writ of supersedeas seeking to stay further trial court proceedings pending the determination of their appeal. (*Id.* at pp. 187-188.) The Court of Appeal summarily denied the petition. (*Id.* at p. 188.) The case then proceeded to trial, which the defendants lost, before the appellate court ruled on their appeal from the order denying the special motion to strike. (*Ibid.*) The Supreme Court agreed with the defendants their appeal of the denial of their special motion under section 425.16 automatically stayed all further trial court proceedings and the trial conducted while that appeal was pending and

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<sup>17</sup> Section 908 provides, "When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination."

the resulting judgment were void: “Because the court lacked subject matter jurisdiction over the matters on trial, the judgment in this case is ‘void on its face . . . .’ [Citation.] ‘When, as here, there is an appeal from a void judgment, the reviewing court’s jurisdiction is limited to reversing the trial court’s void acts.’ [Citation.]” (*Id.* at p. 200.)

In the case at bar, in contrast, Mr. Sanai was the prevailing party on the special motion to strike and the respondent on appeal from the trial court’s denial of the motion. Moreover, unlike the situation in *Varian*, neither side filed a petition for writ of supersedeas in connection with UDR’s appeal from the denial of the special motion to strike (although Mr. Sanai belatedly sought supersedeas in connection with his appeal from the denial of his motion for preliminary injunction); and, also unlike the defendants in *Varian*, Mr. Sanai never properly objected on this ground in the trial court. Although in many respects Mr. Sanai’s situation is thus fairly distinguishable from that of the aggrieved party-defendants in *Varian*, the Supreme Court left no doubt that the stay effected by section 916 divests the trial court of subject matter jurisdiction and all orders made during the pendency of the appeal are void: “Under section 916, ‘the trial court is divested of’ subject matter jurisdiction over any matter embraced in or affected by the appeal during the pendency of the appeal. [Citation.] ‘The effect of the appeal is to remove the subject matter of the order from the jurisdiction of the lower court . . . .’ [Citation; fn. omitted.] Thus, ‘that court is without power to proceed further as to any matter embraced therein until the appeal is determined.’ [Citations.]” (*Varian, supra*, 35 Cal.4th at pp. 196-197; see also *id.* at p. 199, fn. 10 [“the parties cannot invest a trial court with jurisdiction during the pendency of an appeal”], citing *In re Johannes* (1931) 213 Cal. 125, 131 [“But when we are dealing with the question of the jurisdiction of the subject matter of an offense, agreement of the parties or estoppel cannot confer it”].) Accordingly, all proceedings conducted and orders made by the trial court between January 16, 2001 and May 24, 2002 are void and must be vacated on remand.

Acknowledging under *Varian* all orders entered by the trial court between January 16, 2001 and May 24, 2002 are void, counsel for UDR and the Irvine Entities suggests the affected void orders of dismissal were nonetheless properly reinstated after

issuance of the remittitur by virtue of the trial court's entry, at Mr. Sanai's request, of a final judgment of dismissal on September 17, 2002. (See *Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, 523 [trial court has jurisdiction to reissue vacated void order once jurisdiction reattaches upon issuance of the remittitur].) However, there is no question Mr. Sanai's request was made solely to facilitate an immediate appeal from the underlying orders of dismissal and did not represent a concession on his part, or a finding by the trial court, that the fundamental lack of jurisdiction that voided those orders somehow had been cured. Thus, the judgment entered on September 17, 2002, which was predicated on the earlier void orders of dismissal, and all subsequent postjudgment orders, like the trial court orders actually issued between January 16, 2001 and May 24, 2002, must be vacated. (See *Varian, supra*, 35 Cal.4th at p. 197 [subsequent proceedings in trial court cannot cure defects in the judgment or order from which an appeal has been taken].)

## 2. *Issues of Restitution Are Properly Determined in the Trial Court*

Mr. Sanai has requested this Court exercise its discretionary power under section 908 to return him to the position he occupied in January 2001, when UDR and Mr. Saltz filed their notices of appeal from the denial of their anti-SLAPP motion, not only by reversing the judgment and directing that all void orders be vacated but also by awarding him full restitution for any sums he was required to pay pursuant to void court orders (net of any sums he received as a result of such orders) and for the lost value of his own services (acting in propria persona) "wasted in litigating a void proceeding, plus the multiple appellate proceeding[s] challenging the void proceeding."

Although the power of an appellate court to restore lost benefits after reversal of a judgment is recognized by statute, the trial court on remand has the inherent power to order restoration after reversal as well. (*Schubert v. Bates* (1947) 30 Cal.2d 785, 789 ["the power of a court whose order or judgment has been reversed to order restoration after reversal is inherent in that court"]; *Rogers v. Bill & Vince's, Inc.* (1963) 219 Cal.App.2d 322, 324-325.) Because an appropriate order of restitution requires proper findings based on an adequate record (see *Arden Group, Inc. v. Burk* (1996) 45

Cal.App.4th 1409, 1416), we decline to order restitution in the first instance on appeal. On remand the trial court is to consider Mr. Sanai's request for restitution and, if necessary, to conduct an accounting of all sums paid by any of the parties subsequent to January 16, 2001 as a result of sanctions orders, fee or costs awards (whether in the trial court or on appeal) or otherwise, to the extent those payments were based in part on orders entered after January 16, 2001, and to order reimbursement of those sums as appropriate.<sup>18</sup>

### 3. *Sanctions for a Frivolous Appeal Are Not Warranted*

The trial court denied the Irvine Entities' request for an award of attorney fees under the attorney fee provision of the Promontory Point lease agreement on the ground the lawsuit was not brought to enforce rights under that lease agreement. In our now-superseded initial opinion in appeal No. B170618, we did not reach this issue, but instead affirmed the trial court's ruling because the Irvine Entities' motion for attorney fees was not timely.<sup>19</sup> Mr. Sanai now seeks sanctions from the Irvine Entities' lawyers (who are also UDR's counsel), arguing their cross-appeal was objectively frivolous.

Because the trial court expressly rejected Mr. Sanai's argument the motion for attorney fees was untimely and the Irvine Entities' legal position they were entitled to attorney fees under the lease agreement was not "totally and completely devoid of merit," the request for sanctions is denied. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

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<sup>18</sup> We indicate no view on Mr. Sanai's request for reimbursement of the sums paid in connection with his statutory tender, accepted by UDR, to resolve UDR's cross-complaint or his effort to be compensated for the reasonable value of his time spent litigating this case.

<sup>19</sup> Although a motion for relief under section 473, subdivision (b), to permit the late filing of the memorandum of costs was presented to the trial court on behalf the Irvine Entities, no such relief was ever requested with respect to their motion for attorney fees.

*4. Further Proceedings Shall Be Heard by a Different Trial Judge*

The trial court awarded UDR \$136,034 in attorney fees under Civil Code section 1785.31, subdivision (e), which authorizes the award of fees to successful defendants in actions against “debt collectors” related to the collection of a debt if the lawsuit was not brought in good faith. In making its fee award the trial court commented, “Plaintiff has proliferated needless, baseless pleadings that now occupy about 15 volumes of Superior Court files, not to mention the numerous briefs submitted in the course of the forays into the Court of Appeal and attempts to get before the Supreme Court, and not one pleading appears to have had substantial merit. The genesis of this lawsuit, and the unwarranted grief and expense it has spawned, are an outrage.”

We agree in these circumstances the interests of justice are best served by having all further proceedings heard by a different trial judge. (§ 170, subd. (c).)

**DISPOSITION**

The trial court’s order denying Mr. Sanai’s motion to set aside void judgment and orders, the final judgment entered in this action against Mr. Sanai and all postjudgment orders awarding and denying costs and attorney fees are reversed. The matter is remanded to the trial court with directions to vacate all orders entered after January 16, 2001 and to conduct further proceedings based on the state of the pleadings as of January 16, 2001. The trial court is further directed to consider Mr. Sanai’s request for restitution and to order reimbursements to the extent appropriate. Finally, in the interests of justice, all further proceedings shall be heard before a trial judge other than the judge or judges whose orders are affected by this decision.

Mr. Sanai is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.