Asset Recovery Co.

2003 | Cited 0 times | California Court of Appeal | May 2, 2003

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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Plaintiff Asset Recovery Co., LLC, a New Jersey limited liability company ("plaintiff") appeals from (1) an order that sustained, without leave to amend, a demurrer to plaintiff's complaint, and (2) "any judgment of dismissal entered pursuant thereto." [1] Defendant, Smith-Hemion Production, Inc. ("Smith-Hemion") cross-appeals from the order that denied its motion for Code of Civil Procedure section 128.7 sanctions against plaintiff. [2]

The case stems from an attempt by plaintiff's predecessor in interest to create a security interest in personal property offered as collateral for loans made by the predecessor in interest. After that attempt was made, defendant Smith-Hemion obtained a default judgment and order of assignment against the recipient of the loans, and the judgment and assignment impacted those collateral assets. Claiming a prior right, plaintiff has now sued Smith-Hemion, seeking to vacate the default judgment and assignment order, and to quiet title to the personal property assets that allegedly constituted the collateral securing the repayment of plaintiff's loans.

The trial court sustained the Smith-Hemion demurrer to the causes of action in plaintiff's complaint on several grounds, including statutes of limitations, the doctrine of res judicata, failure to timely seek vacation of the judgment, and the fact of another action pending seeking damages arising from the same set of circumstances. Our review of the matter shows that we need not address all of these grounds as the trial court's decision to sustain the demurrer without leave to amend can be affirmed on the fact that plaintiff lacks standing to bring this suit. Moreover, even if plaintiff had standing, the suit was not timely brought.

As for the court's denial of section 128.7 sanctions, we find the court made the right decision. Plaintiff was not afforded a full 30 days safe harbor period, and plaintiff was foreclosed from withdrawing its complaint when the court sustained the demurrer without leave to amend within such period.

BACKGROUND OF THE CASE

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1. Nature of this Action

According to plaintiff's complaint, this case has its beginnings in two December 1993 loans made by a Joseph Iny ("Iny") to a company known as Jackson Communications, Inc. ("JCI"). In January 1994, Iny filed a UCC-1 with the New Jersey Secretary of State, seeking to secure those loans with JCI's intangible assets. A security agreement between Iny and JCI, based on those assets, was executed the month before. Included in those assets were any viable claims that JCI had against the entertainer Michael Jackson ("Jackson") for Jackson's refusal to participate in a television event scheduled for December 1993, which refusal necessitated having to reschedule the event. Jackson had agreed, via a written contract with JCI, to make such appearance.

In the instant case, plaintiff alleges in its complaint that it eventually came to be the successor in interest of the JCI intangible assets, including JCI's claims against Jackson, when plaintiff, through its sole member Steven Ezon, "purchased all of Iny's secured collateral . . . at a publicly held Sheriff's sale on June 17, 1997 . . . in . . . New Jersey." Thus, among the JCI claims to which plaintiff alleges it succeeded are those for breach of contract for Jackson's failure to appear in the first scheduled television show.

Defendant Smith-Hemion also claims a right to those same JCI's intangibles. That claim is based on a default judgment that Smith- Hemion obtained against JCI on April 15, 1996, in Los Angeles Superior Court (case number BC101742), and on the subsequent order of assignment on May 16, 1996, by which JCI's claims against Jackson were assigned to Smith-Hemion up to the amount necessary to satisfy Smith-Hemion's default judgment. As of April 15, 1996, that default judgment amounted to $1,931,285.60. Smith-Hemion contends that its assignment order affects or impairs Iny's, and thus plaintiff's, rights and interest in JCI's intangibles because such judicial order makes Smith-Hemion the lawful owner of those intangibles.

Plaintiff disputes Smith-Hemion's ability to claim a right to JCI's assets. Plaintiff contends that Smith-Hemion's default judgment and order of assignment are void ab initio for lack of personal jurisdiction over JCI in case BC101742. Plaintiff asserts that JCI lacked sufficient contacts with California to subject JCI to this state's jurisdiction and require it to defend an action here or to have its personal intangibles subjected to an assignment order. Moreover, contends plaintiff, the intangible items addressed in the assignment order that Smith-Hemion obtained in its lawsuit against JCI were actually, at the time the assignment order was issued, Iny's collateral and were encumbered by Iny's first priority, perfected security interest and lien, such security interest having attached in Iny's favor in December 1993 and been perfected on January 14, 1994 by a New Jersey UCC-1 filing. Thus, plaintiff's argument goes, since JCI's intangibles were already encumbered in Iny's favor at the time the court assigned them to Smith-Hemion, the assignment was not lawful under Commercial Code section 9-306(2). Or, if it was lawful, Smith-Hemion's interest in the JCI intangibles is subordinate and subject to Iny's pre-existing lien, and since neither Iny nor plaintiff were ever made parties to Smith-Hemion's suit against JCI and Smith- Hemion's subsequent suit

against Jackson (Los Angeles Superior Court case number BC150600), then under Code of Civil Procedure section 1908, Iny's and plaintiff's rights and interest in the JCI intangibles, including JCI's rights against Jackson, were not affected or impaired by the order of assignment or by Smith-Hemion's enforcement of the assignment order in its suit against Michael Jackson.

Plaintiff's complaint alleges causes of action for declaratory relief, vacation of the default judgment and order of assignment in case BC101742, and for quiet title to personal property. Specifically, plaintiff seeks orders (1) vacating the default judgment and order of assignment that Smith-Hemion obtained against JCI in case number BC101742, (2) adjudicating that such judgment and order are void for lack of jurisdiction over JCI, (3) determining that plaintiff's rights to JCI's intangibles, which plaintiff derived from Iny's priority security interest, are free of claims and liens and were not adjudicated in Smith-Hemion's suit against Michael Jackson, (4) determining that plaintiff is the exclusive owner of JCI's assets as a bona fide purchaser of Iny's secured interest in such assets on June 4, 1997, (5) determining that Smith-Hemion's interest, if any, in JCI's intangibles was extinguished, as a matter of law, by the sheriff's sale on June 4, 1997, (6) determining that plaintiff's rights against Michael Jackson were not adjudicated in any prior action and not barred by the doctrine of res judicata or a statute of limitations, (7) determining that plaintiff is not in privity with Smith-Hemion with respect to JCI's intangibles, (8) quieting title in plaintiff to JCI's intangible assets as of January 14, 1994, the date Iny's first priority security interest was allegedly perfected, and (9) awarding plaintiff damages against Smith-Hemion.

2. Defendant's Demurrer and Motion for Sanctions

Smith-Hemion's demurrer was based on (1) statutes of limitation that it contends bar both plaintiff's various causes of action and plaintiff's attempt to seek vacation of the default judgment, and (2) the doctrine of res judicata. Smith-Hemion sought judicial notice of various papers in other court actions, including California cases, federal cases and New Jersey suits, that involve the parties, as well as excerpts of a deposition transcript of one Robert Petrallia (JCI's chairman), that was taken in one of those lawsuits.

Hearing on the demurrer was had on August 16, 2001, at which time, the court sustained the demurrer without leave to amend. [3] On that same day, Smith-Hemion filed a Code of Civil Procedure section 128.7 motion for sanctions on the ground that this suit is frivolous and was filed to harass defendant. The motion was denied. The court ruled that while plaintiff's suit is frivolous and lacks merit, the demurrer had disposed of the suit and therefore granting sanctions "would undermine the intent and purpose of the safe harbor provisions of . . . section 128.7."

Thereafter, plaintiff and Smith-Hemion each filed appeals, with plaintiff challenging the order sustaining the demurrer without leave to amend and Smith-Hemion challenging the denial of sanctions.

DISCUSSION

1. The Demurrer

a. Standard of Review

A demurrer tests the sufficiency of the allegations in a complaint as a matter of law. (Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community (1986) 178 Cal.App.3d 1147, 1151.) We review the sufficiency of the challenged complaint de novo. (Coopers & Lybrand v. Superior Court (1989) 212 Cal.App.3d 524, 529.) We accept as true the properly pleaded allegations of fact in the complaint, but not the contentions, deductions or conclusions of fact or law. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) We also accept as true facts which may be inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher (1995) 37 Cal.App.4th 1397, 1403.) We consider matters which may be judicially noticed, and we "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (Blank v. Kirwan, supra, 39 Cal.3d at p. 318.) We do not concern ourselves with whether plaintiff will be able to prove the facts which it alleges in its complaint. (Parsons v. Tickner (1995) 31 Cal.App.4th 1513, 1521.) The judgment or order of dismissal must be affirmed if any of the grounds for demurrer raised by the defendant is well taken and disposes of the complaint. (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 967.) It is error to sustain a general demurrer if the complaint states a cause of action under any possible legal theory. (Ibid.) It is an abuse of the trial court's discretion to sustain a demurrer without leave to amend if there is a reasonable possibility the plaintiff can amend the complaint to allege any cause of action. (Ibid.) To prove abuse of discretion, the plaintiff must demonstrate how the complaint can be amended. Such a showing can first be made to the reviewing court. (Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1386.)

b. Validity of the Trial Court's Ruling

One issue raised in this appeal is the timeliness of this suit to vacate the default judgment and order of assignment in case BC101742. As noted, plaintiff asserts that for want of minimum contacts with California, the trial court never acquired personal jurisdiction over JCI in that case and therefore, the judgment was void from the moment it was made and the assignment of JCI's assets to Smith-Hemion was also thus void. Addressing that contention, the trial court ruled that Code of Civil Procedure section 473.5's two-year provisions for vacating judgments barred it from vacating the default judgment.

Section 473.5 provides a defendant with relief when service of the summons did not result in actual notice to him in time for him to defend the suit. Thus, on appeal, plaintiff argues that section 473.5 is not applicable to this case since it is the alleged absence of minimum contacts upon which plaintiff relies to obtain relief from the default judgment. Plaintiff asserts that there is no time limitation on its challenge to the default judgment.

There are two ways to decide the timeliness issue. First, we can ask whether we really need to address it at all. The default judgment was against JCI, not against plaintiff, and in the instant case, it is not JCI that is contesting the default judgment and its resultant assignment of JCI's claims against Jackson. Rather, plaintiff is contesting it, and plaintiff's asserted standing here is based on its status as purchaser of Iny's position as an alleged secured creditor of JCI. However, New Jersey courts have already ruled, in a case in which Iny was the plaintiff-appellant and JCI was one of the defendant- respondents, that Iny was not a secured creditor of JCI. Therefore, plaintiff is not a secured creditor of JCI, having purchased at the sheriff's sale only those rights and interests of Iny that Iny actually had.

Plaintiff's complaint alleges it purchased Iny's secured collateral at a sheriff's sale held June 17, 1997. The record shows that by then, the New Jersey trial court had already determined in its June 1996 decision that the "$271,000 allegedly secured transaction" was not in fact secured. (Quoting from page 15 of the New Jersey trial court's decision in Docket No. MON-L-3359-94.) The court found that "the secured transaction which allegedly took place between Iny and JCI did not comply with all of the requirements of N.J.S.A. 12A:9-203." (Quoting from page 17 of the New Jersey trial court's decision.) The court found that "[t]he security agreement . . . [is] not protected by the filing of the UCC-1." (Quoting from page 22 of the New Jersey trial court's decision.) Although the trial court's decision was on appeal at the time plaintiff purchased Iny's rights at the sheriff's sale, that decision was affirmed by the appellate division of the Superior Court of New Jersey in an opinion filed October 17, 1997. [4]

Thus, because plaintiff is not a secured creditor of JCI, plaintiff has no standing to challenge the default judgment and assignment since plaintiff cannot validly assert that the default judgment and assignment of assets improperly impact rights it has in JCI's assets. (Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal.App.4th 1, 15-16.)

Further, even if plaintiff has standing to challenge the default judgment and assignment order, plaintiff has not addressed the question whether JCI itself has ever made a personal jurisdiction challenge, either in case BC101742 (by a motion to quash service of summons coupled with a motion to set aside the default judgment, or by an appeal in that case), or by a collateral action such as the instant one. If JCI did challenge personal jurisdiction, the issue has already been decided.

Moreover, if the issue of minimum contacts has not already been decided, then the timeliness of the instant collateral proceeding is limited at least by the requirement of due diligence. The record reflects that JCI was served with a proposed default judgment in case BC101742 in June 1994, at both its headquarters and at the office of its agent for service of process. The record also reflects that Steven Ezon himself (whom plaintiff describes as its sole member), was served with the assignment order on May 16, 1996. The instant suit was not filed until December 4, 2000. We thus cannot say that this suit was brought with due diligence (Plaza Hollister Ltd. Partnership v. County of San Benito, supra, 72 Cal.App.4th at p. 19), and while plaintiff contends that the default judgment was void on its

face and therefore can be attacked at any time (ibid), plaintiff does not demonstrate that the face of the record shows that the judgment is void. Therefore, the trial court was correct in ruling that plaintiff's attempt to set aside the default judgment is untimely.

Based on our analysis, it is clear that a corrective amendment of the complaint is not possible and thus, sustaining the demurrer without leave to amend was not an abuse of discretion.

2. The Request for Section 128.7 Sanctions Against Plaintiff

Code of Civil Procedure section 128.7 provides that by presenting the court with a pleading, such as plaintiff's complaint, "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," its presentation of such pleading is not primarily for an improper purpose, the claims and other legal contentions made in it "are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and the allegations and the other factual contentions in the pleading have evidentiary support or are likely to have such support after a reasonable opportunity for investigation or discovery. (Id., subd. (b).)

When a court finds that these requirements of section 128.7 have been violated, the court may appropriately sanction the persons violating them. (§ 128.7, subd. (c).)

Section 128.7 sets out specific procedures for seeking such sanctions. Included in those procedures are the requirement that the person moving for sanctions must serve notice of the motion but must not file it with the court, or present it to the court, unless within a specified statutory number of days after service of the motion, "the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." This statutory period of time is commonly referred to as a "safe harbor" period. At the time Smith- Hemion made its section 128.7 motion, the period of time for withdrawing or correcting an offending paper, claim, defense, etc. was 30 days. (The statute was amended in 2002 and the current period is 21 days.) [5]

In the instant case, Smith-Hemion served its motion for section 128.7 sanctions on July 12, 2001. Service of these papers, which total 18 pages, was by personal delivery to the law offices of plaintiff's attorney, Jacob Segura. As of that point in time, plaintiff had up to and including August 11, 2001 as a safe harbor period in which to withdraw its complaint to avoid having Smith-Hemion file the section 128.7 motion papers. However, when those papers were personally served on Mr. Segura, a letter from Smith-Hemion's attorney to Segura was also personally served. It states that Smith-Hemion would be mailing additional papers to Segura.

On July 17, 2001, five days after Smith-Hemion personally served plaintiff with section 128.7 papers, Smith-Hemion served plaintiff with papers entitled "notice of lodgment of portions of deposition transcripts, relevant court records, pleadings and other exhibits." These papers consist of over 190

pages. The proof of service states they were served by mail, on attorney Jacob Segura. There is also a third segment of moving papers from Smith-Hemion for its sanctions motion. It consists of a declaration from Smith-Hemion's attorney, William Briggs, together with exhibits consisting of several letters from Briggs to Segura. It is not clear when this declaration and its exhibits were served because the proof of service attached to it is for a "memorandum of points and authorities in support of Smith-Hemion's demurrer to plaintiff's complaint" (italics added.) However, Briggs' declaration is dated July 16, 2001 and so we reasonably presume it was not served on plaintiff prior to that date. These additional pages from Smith-Hemion are mentioned in the points and authorities that Smith-Hemion personally served on July 12.

Plaintiff obviously did not withdraw its complaint since, on August 16, 2001, the court heard and sustained the demurrer to that pleading. On that same day, August 16, Smith-Hemion's section 128.7 papers were filed with the court-both the papers personally served on July 12, and those served later.

Plaintiff raised substantive and procedural points in its opposition to the sanctions motion. The latter included plaintiff's contention that it was not afforded the safe harbor period since Smith-Hemion served plaintiff, by mail, with papers on July 17, and filed those same papers on August 16, even though the 35th day after July 17 was August 21. Plaintiff argued that Smith-Hemion's papers should not have been filed until August 22 and therefore the motion for sanctions was not validly made. Plaintiff also argued that since the demurrer to its complaint was sustained without leave to amend prior to the expiration of the 35-day period following the July 17 mail service of lodged papers, the sanctions motion was moot since there was no action that plaintiff could take as a means of withdrawing its complaint prior to the expiration of that 35-day period. Plaintiff argued that with the decision on the demurrer, Smith-Hemion had precluded it from utilizing the safe harbor period.

The hearing on Smith-Hemion's motion was held on September 17, 2001. The court denied the motion for sanctions, saying that while it agreed that the instant suit is frivolous and without merit, awarding sanctions to Smith-Hemion would undermine the intent and purpose of the safe harbor provision since the court had already disposed of the complaint by sustaining the demurrer without leave to amend.

On appeal, Smith-Hemion argues that the sustaining of its demurrer without leave to amend did not bar the trial court from awarding sanctions since that ruling had not yet been reduced to an order or judgment of dismissal when Smith-Hemion served and filed its sanctions motion. It is true that in Banks v. Hathaway, Perrett, Webster, Powers & Chrisman (2002) 97 Cal.App.4th 949, division six of this appellate district held that "an order sustaining a demurrer without leave to amend does not bar a motion for section 128.7 sanctions unless the order is reduced to a judgment before the sanctions motion is served and filed (id. at p. 954), but the court also observed that the purpose of section 128.7's safe harbor period is to give a party the opportunity to withdraw or correct a pleading during that period and thereby avoid sanctions, while also saving the court and the parties the time and money needed to litigate the pleading and the motion for sanctions (id. at p. 953).

In the instant case, the totality of Smith-Hemion's moving papers was not served until July 17. Assuming arguendo Smith-Hemion is correct and the section 1013 five-day extension for service by mail does not apply to section 128.7 motions, plaintiff nevertheless had until the close of court business on the 30th day after July 17 to withdraw its complaint. Such 30th day was August 16, and therefore, Smith-Hemion's moving papers should not have been filed until at least August 17. However, Smith-Hemion filed its moving papers on August 16. By not giving plaintiff the full safe harbor period prior to filing its sanctions motion, Smith-Hemion failed to comply with section 128.7. (Cromwell v. Cummings (1998) 65 Cal.App.4th Supp. 10, 15 ["[T]he papers to be served on the opposing party are the same papers which are to be filed with the court no less than 30 days later."].)

We reject the notion that Smith-Hemion's service of the lodged papers and the declaration of Mr. Briggs, which occurred subsequent to its initial service of moving papers, is of no consequence and should not delay the start of the 30-day safe harbor period. Section 128.7 provides for a 30-day safe harbor in which the responding party may review and consider the motion for sanctions and determine whether it has merit. If the subsequently served papers were inconsequential to Smith-Hemion's motion for sanctions, they should not have been served; if they were consequential, then plaintiff was entitled to the full 30 days to review them vis-à-vis the earlier served points and authorities, and to make its decision whether to withdraw its complaint or proceed ahead with its suit.

Smith-Hemion asserts that plaintiff "dare not argue that it was prejudiced by Smith-Hemion's [subsequent] service of the lodged materials and declaration" because Smith-Hemion had previously sent plaintiff letters explaining why plaintiff should withdraw the complaint, and plaintiff was already in possession of the lodged documents. This assertion is made without any persuasive citation of authority on section 128.7. The Cromwell court rejected the notion that earlier-sent letters constituted substantial compliance with the 30-day requirement of section 128.7 (Cromwell v. Cummings, supra, 65 Cal.App.4th Supp. 14-15), and contrary to Smith-Hemion's assertion, Barnes v. Department of Corrections (1999) 74 Cal.App.4th 126, 135-136 also rejected such a notion. The Barnes court simply observed that the Legislature contemplated the giving of informal notice of an intent to seek section 128.7 sanctions prior to serving a formal noticed motion. (Ibid.) Nor are we impressed with Smith-Hemion's contention that plaintiff had already seen the lodged documents prior to their being served on July 17 since the documents relate to prior lawsuit.

Moreover, since the demurrer to plaintiff's complaint was sustained without leave to amend on August 16, prior to the expiration of its 30- day safe harbor period, the section 128.7 motion was moot since plaintiff could no longer effectively withdraw its complaint prior to the expiration of that period. In effect, Smith-Hemion precluded plaintiff from utilizing the safe harbor period to withdraw the complaint prior to having a court declare the demurrer sustainable without leave to amend. "In order to effectuate the safe harbor provisions, a party may not bring a motion for sanctions unless there is some action the offending party may take to withdraw the improper pleading. [Citation.] A sanctions motion may not be brought after the conclusion of the case or a dispositive ruling on the

improper pleading. [Citation.] Thus, a sanctions motion challenging a complaint may not be brought following the sustaining of a demurrer without leave to amend. [Citation.] Nor may a sanctions motion challenging an amendment to a complaint to name Doe defendants be brought following the dismissal with prejudice of the fictitiously named defendants. [Citation.] Neither may a motion for sanctions for filing a bad faith or frivolous complaint be brought following the granting of a defendant's motion for summary judgment. `. . . [A] motion for sanctions under [section 128.7] must be served on the offending party for a period of "safe harbor" at least [30] days prior to the entry of final judgment or judicial rejection of the offending contention. . . . ' [Citation.]" (Malovec v. Hamrell (1999) 70 Cal.App.4th 434, 441-442, fn. omitted.) Accord, Cromwell v. Cummings, supra, 65 Cal.App.4th Supp. 10, where trial court sustained a demurrer to the complaint without leave to amend on April 25, the defendant served her section 128.7 motion a week later (May 2) and filed the motion on May 5, and the court granted the motion on May 23, three days after a judgment was entered.

In reversing the granting of sanctions, the reviewing court said:

"Defendant's motion for sanctions was served 21 days prior to the hearing, and it was filed only 3 days later. In the absence of an order shortening time, this was a clear violation of the `safe harbor' provision. Furthermore, even if the motion had been properly served 30 days prior to filing, the request for sanctions was rendered moot by the court's ruling of April 25, which sustained defendant's demurrer without leave to amend." (Id. at p. 13.)

DISPOSITION

The judgment of dismissal is affirmed. The order denying the section 128.7 motion for sanctions is affirmed. The parties will bear their own costs on appeal.

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We Concur:

KITCHING, J.

ALDRICH, J.

1. An order sustaining a demurrer to a complaint, with or without leave to amend, is not an appealable order. However, the order sustaining the demurrer is reviewable when an appeal is taken from a judgment or order of dismissal that is entered after the demurrer is sustained. (Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal.App.3d 873, 878; Code Civ. Proc., § 472c.)

2. At the time the appeal and cross- appeal were filed in this case, there was no judgment or order of dismissal. Therefore,

the parties' respective appeals were premature. (Cal. Rules of Court, rule 2 (d).) We directed Smith- Hemion to obtain such a judgment or order of dismissal since it is the party seeking to end this litigation, and thus it needed to tie up the loose end. A judgment dismissing this suit was signed and filed on April 4, 2003

3. On August 10, 2001, plaintiff filed an ex parte application seeking to continue hearing on the demurrer and for leave to thereby file timely opposition to the demurrer. Plaintiff asserted that its attorney did not realize until the previous day that the demurrer papers served on him were demurrer papers. Rather, the attorney believed they were a duplicate set of other papers that had been served earlier. The trial court did not grant a continuance. Asked by plaintiff's counsel if it would consider opposition papers to the demurrer since they had not yet been filed and the hearing on the demurrer was only six days away, the court indicated that the matter of untimely papers had not yet been raised by Smith- Hemion. The court stated that if plaintiff had something to say about the demurrer, plaintiff should "put it in writing" and file it, and the court would address the issue of timeliness if and when it was raised. Plaintiff served its opposition papers on August 13 and filed them the next day. On appeal, plaintiff contends the trial court should have granted the ex parte application for leave to file late opposition because there was good cause for the opposition's not having been timely filed. Plaintiff contends there is no indication in the record that the court ever read the opposition and therefore it has been prejudiced by its attorney's honest mistake and therefore on those grounds alone, the judgment of dismissal should be reversed. However, given our analysis of this case as set out below, we have no need to consider whether the court abused its discretion when it did not grant plaintiff leave to file untimely opposition papers. Moreover, we cannot agree with the implied assertion that because the record does not expressly reflect that the court considered the opposition papers, the court must not have considered them. Indeed, at the hearing on the demurrer, the court indicated it was aware that plaintiff had cited case law on the issues raised by the demurrer.

4. At oral argument in this appeal, plaintiff disputed that the issue of the effectiveness of Iny's security agreement and UCC- 1 filing had ever been adjudicated in New Jersey courts.

5. The parties dispute whether the additional time provide for in Code of Civil Procedure section 1013 for service by mail, express mail, overnight delivery or facsimile transmission is applicable to section 128.7 motions. As discussed infra, that question is moot since plaintiff was not given even the full 30 days to withdraw its complaint.