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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILLIAM DUNLAP, Plaintiff and Appellant, v. THE WALT DISNEY COMPANY, Defendant and Respondent.	B261779 (Los Angeles County Super. Ct. No. BC524409)

APPEAL from an order of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Reversed.

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William Dunlap, in pro. per., for Plaintiff and Appellant.

Latham & Watkins, Kirk A. Wilkinson, and Garrett L. Jansma for Defendant and Respondent.

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Plaintiff William Dunlop appeals from an order imposing monetary sanctions against him personally in favor of defendant The Walt Disney Company (Disney). Dunlop contends that the award of monetary sanctions is improper. We agree. Because the court's order is based upon a violation of Code of Civil Procedure section 128.7, subdivision (b)(2),[1] the award of monetary sanctions against Dunlop, then a represented party, is not permitted. We therefore reverse.

FACTUAL AND PROCEDURAL SUMMARY

In June 2009, a corporation affiliated with Dunlop sued Disney asserting causes of action arising from Disney's alleged discharge of contaminated water.[2] In April 2012, the plaintiff dismissed the 2009 Action with prejudice.

In September 2012, another entity affiliated with Dunlop sued Disney based upon the same facts alleged in the 2009 Action (the 2012 Action).[3] Two of the causes of action in the 2012 Action were based upon alleged violations of the California Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65. (Health & Saf. Code, §§ 25249.5, 25249.6) Disney demurred to those causes of action based on res judicata as a result of the dismissal of the 2009 Action. Although the court determined that Disney established each element of res judicata, it overruled the demurrer on the ground that the plaintiff had adequately alleged facts to support an "injustice" or "public interest" exception to the application of res judicata.[4] At a subsequent bench trial in the case, the court granted Disney's motion for judgment after plaintiff rested.

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

[2] The 2009 Action was filed in Los Angeles County Superior Court as case No. BC414964 and titled *Environmental World Watch, Inc. v. Disney*.

[3] The 2012 Action was filed in Los Angeles County Superior Court as case No. BC492473 and titled *Environmental World Watch LLC v. Disney*.

[4] The court relied on *Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, which stated that, even when the "threshold requirements are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]' [Citation.]"

Dunlop does not dispute that he was, at the relevant times, in privity with the plaintiffs in the 2009 Action and the 2012 Action for purposes of res judicata.[5]

In October 2013, Marty Greenberg commenced the action underlying this appeal. In March 2014, the first amended complaint added Dunlop and two others as plaintiffs.[6] In May 2014, the plaintiffs filed a second amended complaint. The second amended complaint alleged four causes of action: (1) unlawful discharge of certain chemicals in violation of Proposition 65; (2) failure to warn the public about the discharge in violation of Proposition 65; (3) unfair business practices based upon the same violations of Proposition 65; and (4) fraudulent concealment of the unlawful discharge.

Disney demurred to the second amended complaint on the ground that each cause of action was barred by res judicata based upon the dismissal with prejudice of the 2009 Action and the judgment in favor of Disney in the 2012 Action. Disney also moved for sanctions under section 128.7.

The court sustained the demurrer with leave to amend. It noted that the plaintiffs did not dispute that Disney had established all the elements of res judicata. It also rejected the application of the "extremely narrow" injustice or public interest exception to res judicata. That exception, the court explained, "is applied in exceptional circumstances," and the plaintiffs failed to allege "sufficiently exceptional [facts] as to why justice or the public interest require that relitigation not be foreclosed" when they had been "given the opportunity to prove these claims in the 2012 Action and failed to establish a prima facie case."

The court justified granting leave to amend on the ground that "the [demurrer was the] first challenge to the pleadings . . . in this case." The court added "that this is likely

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(*Id.* at p. 1065; see also *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 686.)

[5] Disney asserts that Dunlop-affiliated plaintiffs have filed 13 lawsuits against Disney since 2007. To support its res judicata arguments, however, Disney relied only on the 2009 Action and 2012 Action.

[6] The additional plaintiffs named in the second amended complaint are Dennis Weisenbaugh and RBC Four Co. LLC.

the only opportunity for leave to amend that will be granted in light of the extensive litigation history between the parties on related matters." The court denied Disney's motion for sanctions.

The plaintiffs' third amended complaint was substantially identical to the second amended complaint except for the addition of allegations under the heading, "New Evidence Discovered in 2014." In this new section, the plaintiffs alleged: (1) Disney had altered certain soil samples to hide contamination; (2) Disney had continued to discharge toxic chemicals; (3) Disney discharged contaminated water into drinking water systems in June 2014; and (4) The United States Environmental Protection Agency had recently released a 2000 consent decree requiring Disney and others to remove "Prop. 65 chemicals" from sources of drinking water, and Disney had been violating this consent decree.

Disney demurred to the third amended complaint and moved for sanctions under section 128.7 against plaintiffs Marty Greenberg, Dunlop, Dennis Weisenbaugh, and RBC Four Co. LLC., and their counsel, Daniel N. Greenbaum, alleging violations of the certification requirements in section 128.7, subdivisions (b)(1) and (b)(2). In support of the demurrer, Disney argued that res judicata applied because the plaintiffs presented, or could have presented, "new" evidence during the trial of the 2012 Action. The trial court agreed, and sustained the demurrer without leave to amend.

The court granted Disney's motion for sanctions in the amount of $12,800, stating: "[Disney] argues that the [third amended complaint] is presented primarily for an improper purpose ([Code Civ. Proc.,] § 128.7(b)(1)) and is not warranted by existing law or nonfrivolous argument ([Code Civ. Proc.,] § 128.7 (b)(2)) because the new facts alleged therein do not constitute exceptional facts to support the extremely narrow exception to the res judicata bar. [¶] At issue is whether the [third amended complaint] is legally frivolous which is defined as 'not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law' [citation]. [Section] 128.7 'requires only that the conduct be "objectively unreasonable"[']' [citation]. The Court notes that it previously denied a similar motion which was directed

to the [second amended complaint] based on the Court's previous ruling on the demurrers in the 2012 Action where the Court applie[d] the exception to res judicata and the Court permitt[ed] Plaintiffs an opportunity to allege sufficiently exceptional facts in the [third amended complaint]. [¶] As more fully explained in the Court's ruling on the demurrer, [Disney] has established that the [third amended complaint] failed to allege sufficiently exceptional facts to support the extremely narrow exception to the res judicata bar. . . . [¶] [Disney] has raised the issue of res judicata repeatedly in this [case] and the 2012 Action, and the Court has made several rulings thereon. Additionally, [Disney] has previously raised the issue that it may seek sanctions arising out of the issue of res judicata. Under these circumstances, the Court concludes that Plaintiffs' purported new and exceptional facts in the [third amended complaint] were presented primarily for the improper purpose to attempt to defeat a clearly applicable res judicata bar by allegations that were not warranted by existing law or nonfrivolous argument."

Dunlop appealed from the order awarding monetary sanctions.[7]

[7] Neither Dunlop nor any other party appealed from the judgment of dismissal entered on March 18, 2015, and the time for filing a notice of appeal has expired. Although Dunlop asserts arguments challenging the court's reasons and conclusion in sustaining the demurrer to the [third amended complaint], these arguments are made solely to support his appeal of the sanctions award. He argues, in short, that the court erred in sustaining the demurrer and, therefore, "[a]bsent the erroneous demurrer ruling there is no grounds for sanctions as the complaint, taken [as] a whole, has meritorious allegations." Although we agree with Dunlop that the sanctions award must be reversed, we express no view as to the correctness of the order sustaining the demurrer or the sufficiency of the plaintiff's allegations.

DISCUSSION

Dunlop contends that the court imposed the monetary sanctions under section 128.7, subdivision (b)(2) and, because he was represented by counsel, the sanction cannot be imposed on him. We agree.

Under section 128.7, subdivision (b), every attorney or unrepresented party who presents a pleading to the court certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that the conditions specified in paragraphs (1) through (4) of that subdivision have been met. Only paragraphs (1) and (2) of subdivision (b) are relevant here.

Paragraph (1) of subdivision (b) provides that the pleading "is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Paragraph (2) of subdivision (b) provides: "The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

A court may "impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." (§ 128.7, subd. (c).) This authority, however, is limited by section 128.7, subdivision (d)(1), which provides that "[m]onetary sanctions may not be awarded against a represented party for a violation of paragraph (2) of subdivision (b)." A monetary sanction may thus be awarded against a represented party for filing a pleading for an "improper purpose"—such as to harass, delay unnecessarily, or increase litigation costs—but not for asserting a legally frivolous claim or contention. (§ 128.7, subds. (b), (c) & (d)(1); *LaBorde v. Aronson* (2001) 92 Cal.App.4th 459, 466, disapproved on another point in *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 9:1230, p. 9(III)-51.) The distinction reflects a legislative determination that "'[m]onetary responsibility for [asserting frivolous legal contentions] is more properly placed solely on the party's attorneys.' [Citation.]" (*Cromwell v. Cummings* (1998) 65 Cal.App.4th Supp. 10, 13 fn. 4.)

When a court imposes sanctions under section 128.7, it must describe the conduct that violated that section "and explain the basis for the sanction imposed." (§ 128.7, subd. (e).) Here, the trial court's sanction order begins by noting that Disney based its motion on section 128.7, subdivisions (b)(1) and (b)(2). The court then stated that the "issue is whether the [third amended complaint] is legally frivolous which is defined as 'not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law' [citation]." The court thus framed its analysis in section 128.7, subdivision (b)(2) terms. That analysis, in essence, condemned the plaintiffs' attempt to avoid the res judicata bar by asserting the "new" allegations as unwarranted under existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Although a legally frivolous contention may be asserted for an improper purpose within the meaning of section 128.7, subdivision (b)(1), additional facts supporting such a purpose are required. To hold otherwise would render section 128.7, subdivision (d)(1) superfluous. Here, the court did not find, or even mention, that Dunlop filed the third amended complaint primarily to harass Disney, cause unnecessary delay, or needlessly increase Disney's cost of litigation. Because the court based its order on section 128.7, subdivision (b)(2), the sanctions cannot be imposed on Dunlop personally.

Dunlop requests that, in addition to reversing the award of sanctions against him, we also direct the trial court vacate the sanctions against the other plaintiffs and his attorney. Because none of these other parties appealed, they are not entitled to any relief from this court. (See *Lake v. Superior Court* (1921) 187 Cal. 116, 119; *John Brickell Co. v. Sutro* (1909) 11 Cal.App. 460, 464.) We therefore decline Dunlop's request.

DISPOSITION

The order made on December 22, 2014, imposing a monetary sanction is reversed as to Dunlop only. Dunlop shall recover his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.