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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NOUSHIN KHOINY, M.D., Plaintiff and Respondent, v. DIGNITY HEALTH et al., Defendant and Appellant.	B280304 (Los Angeles County Super. Ct. No. BC575230)

APPEAL from the judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Conditionally reversed and remanded with directions.

The Cowan Law Firm, Jeffrey W. Cowan and Ilana Makovoz, for Plaintiff and Respondent.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt, Eric C. Schwettmann and Zareh A. Jaltorossian, for Defendant and Appellant.

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Code of Civil Procedure section 2023.010, subdivision (g),[1] allows the imposition of sanctions when a litigant disobeys a court order to provide discovery. The trial court found that the defendants, employing a variety of devices and excuses, failed to obey its order for pretrial discovery and imposed monetary sanctions.[2] The trial court also found that defendants had violated a second order related to a mental health examination of plaintiff. The trial court's order is unclear as to whether it awarded sanctions for one or both of these violations. Because defendants were not afforded an opportunity to be heard regarding the imposition of sanctions for violating the mental health examination order, the trial court's sanctions order of December 6, 2016, is conditionally reversed and remanded. If the trial court's order was intended to impose sanctions solely on the failure to produce documents, the trial court shall reinstate the sanctions order. If the trial court's order was intended to impose sanctions, in any respect, for the violation of its order for a mental health examination, the trial court shall vacate its order

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[1] Unless otherwise noted, all statutory references will be to the Code of Civil Procedure.

[2] Plaintiff contends that defendants have waived any right to appeal the trial court's order imposing evidentiary and instructional sanctions, in addition to the monetary sanctions at issue in this appeal. Because the trial court did not specify exactly what those sanctions would be and whether they would be imposed on other defendants in addition to Dignity Health, it would be premature to rule on them at this time. This opinion is limited to the *monetary* sanctions imposed on December 6, 2016. We express no opinion about the legality of the evidentiary and/or instructional sanctions proposed at that December 6, 2016 hearing.

and enter a new order based on sanctions for the failure to produce documents only, without prejudice to conducting a new hearing upon proper notice as to any violation of the court's order on the mental health examination issue.

BACKGROUND

On November 6, 2015, plaintiff Noushin Khoiny, M.D., (hereinafter "plaintiff") filed a second amended complaint containing eight causes of action related to her dismissal from a residency program at defendant St. Mary's Medical Center, a division of defendant Dignity Health, and several individual defendants (hereinafter "defendants"). The gravamen of the complaint was that plaintiff, a woman, was the subject of gender discrimination and was wrongfully discharged from the residency program, which caused her significant professional damage. The complaint included allegations that defendants retaliated against plaintiff for refusing to falsify time sheets that showed that defendants were in violation of Accreditation Council for Graduate Medical Education ("ACGME") guidelines for workload and that defendants' allegations that she improperly treated several patients were untrue.

The defendants collectively answered with a general denial accompanied by 36 affirmative defenses. The gravamen of the answer was that plaintiff was discharged for cause because she had provided substandard patient care.

The primary discovery controversies center around plaintiff's own personnel records and the disclosure of treatment records of patients, some of whom plaintiff had not treated. These records were sought, and ordered, to further determination as to whether plaintiff had been treated more harshly than other residents, especially male residents, who had made similar errors

to those allegedly made by plaintiff in the treatment of patients. Defendants have strenuously resisted these two categories of discovery in particular, primarily asserting privileges and that production of the requested documents would be too burdensome.

Plaintiff served her first set of document requests pursuant to section 2031 in November 2015. In January 2016, defendants responded with a series of objections. Additionally, defendants resisted plaintiff's interrogatories that were aimed at identifying other residents who may have been treated similarly to plaintiff. Several attempts to meet and confer about discovery issues were unproductive. Ultimately, plaintiff filed her first motion to compel discovery pursuant to section 2031.

A series of hearings regarding the discovery issues followed.

***June 29, 2016*:**

The first of these hearings took place on June 29, 2016. After argument regarding the defendants' assertion of privileges, the trial court ordered production of either the requested medical records or a privilege log "detailing what documents have been withheld, a factual basis for the assertion of a privilege and the specific privileges asserted. It should be pursuant to *Wellpoint Health Networks, Inc. v. Superior Court* [(1997) 59 Cal.App.4th 110], which sets it out exactly, and so does *Catalina* [*Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116] for that matter." The trial court told defense counsel, "[y]ou know what you need to do, and you haven't done it."

The following exchange occurred following this order:

> "[DEFENSE COUNSEL]: Your honor, I just want to make sure I understand the court's ruling so we don't have to come back again. You are basically overruling the shotgun objection?

"THE COURT: Absolutely.

"[DEFENSE COUNSEL]: You are limiting it to 2009 to 2014 despite the fact that's three years prior to the plaintiff being there?

"THE COURT: Correct.

"[DEFENSE COUNSEL]: Privilege log pursuant to *Wellpoint* and *Catalina*?

"THE COURT: Correct.

"[DEFENSE COUNSEL]: To the extent there's any medical records, you believe significant redaction pursuant to the *Snibbe*[3] case might be appropriate.

"THE COURT: I don't think there has to be significant redaction. I think all you have to do is take off the name and not have any photographs. That's my reading of the law.

"[DEFENSE COUNSEL]: That would include prior medical history, address, social security number, all sorts of things that are still protected.

"THE COURT: Address is not protected. That is not protected. The case law that is cited actually in the reply is exactly correct. That is what you need to produce. You need to do it within 20 days. That's it.

"[DEFENSE COUNSEL]: Okay."

At no time did defense counsel express any lack of understanding of the trial court's order or seek any further clarification. The matter was continued for compliance at the request of the defense.

July 27, 2016:

There had been no production of any of the ordered documents or the privilege log as of the July 27, 2016, hearing, which was beyond the 20 days ordered at the June 29, 2016, hearing. When the trial court asked what the problem was,

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3 *Snibbe v. Superior Court* (2014) 224 Cal.App.4th 184.

defense counsel acknowledged that the court had made five discovery orders, acknowledged understanding what the orders were, and admitted that he did not "know" what the problem was. Defense counsel indicated that he was prepared to comply that day. In following up on this, defendants provided one page of discovery from a patient medical record.

The trial court then reiterated its order, stating the following:

> "To the extent that plaintiff seeks medical records, they must be redacted with all personally identifiable information in order to overcome the balancing test. Although the defendant argues that redacting records will not do enough to protect patient's privacy interest, the Second District Court of Appeal has concluded otherwise. And by simply take [*sic*] out their names and identifying - - that identifying factor, their diagnosis and what happens and all of that is discoverable and it is clear that it's discoverable and you are ordered to produce it."

Defense counsel followed up:

> "[DEFENSE COUNSEL]: I have no dispute with that.
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> "THE COURT: Then why haven't you produced it?
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> "[DEFENSE COUNSEL]: Because they're claiming something that - - there's a dispute and there isn't. All that we said was we understood your order and we intended to comply with it and they said you said something different.
>
> "THE COURT: Well, it's been 20 days.
>
> "[DEFENSE COUNSEL]: Because they raised this issue. I'm ready to comply fully - -
>
> "THE COURT: Good.

"[DEFENSE COUNSEL]: - - Now that we've clarified whatever it is.

"THE COURT: Whatever comply today. Yes say.

"[DEFENSE COUNSEL]: That's fine."

Notwithstanding this, less than one month later, in August 2016, the defendants filed summary judgment and summary adjudication motions that were based on medical records that purported to show that plaintiff was terminated for poor performance but which had not been produced for plaintiff pursuant to the discovery orders.

October 5, 2016:

The issue of discovery of medical records was raised again during an October 5, 2016, hearing on the summary judgment and summary adjudication motions. Defendants' counsel told the court that the defendants did not "read [the court's] order or their request to include the actual medical records," "not to be the medical records." Although the matter was not before the trial court on any motion that day, the trial court noted that it had ordered the production of the medical records and informed the defendants, "[t]here is no reason for you not to have produced what I ordered." Ultimately, defendants' counsel told the trial court, "[w]e have a very, very serious disagreement with you on that. The hospital cannot release medical records."

Despite this statement, defendants' counsel told plaintiff's counsel in an e-mail dated October 26, 2016, "I will have the medical records that we will be producing to you tomorrow." According to the declaration of plaintiff's counsel, the records that were ultimately produced pertained to only a fraction of the necessary patients and were missing pages.

November 2, 2016:

On November 2, 2016, defendants sought an order to conduct a mental examination of plaintiff to determine the degree of her emotional injury if such an injury had occurred. The on-going discovery dispute was again discussed at the hearing on that motion.

After plaintiff's counsel complained that they had still not received the ordered patient records, defense counsel responded that, "[w]e complied with it [the court's order] fully." The trial court replied, "[n]o, you didn't."

Earlier, the trial court warned defense counsel that "terminating sanctions" could be available on a proper motion if defendants failed to comply with the discovery orders and suggested that plaintiff file such a motion.

Plaintiff's counsel sent defendants' counsel a "meet and confer" letter dated November 7, 2016, threatening to seek sanctions, up to and including terminating sanctions, on November 9, 2016, if the discovery issues could not be resolved by then.

November 9, 2016:

This *ex parte* motion was made on November 9, 2016, and a hearing was conducted that day. At the outset of that hearing, the trial court noted "[t]here's no dispute that defendants have agreed to produce a large amount of redacted patient records on or before November 15, 2016." Defense counsel informed the court that they were having problems identifying some of the relevant records. The court then went on to set briefing and trial schedules.

On November 14, 2016, plaintiff accepted the trial court's invitation and filed a motion for terminating sanctions based on

the allegation that the discovery that had been provided did not include records for 17 patients who were referred to in defendants' motions for summary judgment and that the patient records that had been produced were missing relevant documents. Defendants' response was that they had made efforts to find the missing documents but that the documents were, apparently, gone.

Two additional hearings on the sanctions motions were conducted, one on December 5, 2016, and one on December 6, 2016.

***December 5, 2016*:**

On December 5, 2016, the trial court gave a tentative ruling that it was inclined to impose terminating sanctions based on the defendants' violation of restrictions that it had imposed regarding the mental examination of the plaintiff and the defendants' failure to comply with the order to produce medical records. The trial court went on to find that defendants had violated at "least two" discovery orders: (1) the limitations imposed on the mental examination; and, (2) the June 29, 2016, order for production of medical records per *Snibbe v. Superior Court, supra,* 224 Cal.App.4th 184. Defendants' counsel objected to the reference to the violation of the mental examination order, saying that it was not part of the motion for sanctions.

The trial court noted that it had carefully explained the extent of the order compelling production of medical records and "[d]espite receiving clear instructions at the hearing, defendant's counsel continued to defy the order and misconstrued this court's ruling." Court recalled that it had reaffirmed and re-clarified its ruling on July 27, 2016. The court reminded defense counsel that he had stated that he understood the court's order and said that

he would comply but that the resulting document production was but a single page of medical records.

Going through the history of the discovery disputes, the trial court reminded the parties that the issue was again raised on October 5, 2016, at which time defense counsel argued that the June 29, 2016, order did not include medical records. The trial court reiterated that redacted medical records had been ordered to be produced during that hearing. The trial court went on to note that on October 28, 2016, plaintiff claimed to have received several hundred pages of documents on the eve of depositions. The trial court recalled that it was again informed of non-compliance at the November 2, 2016, hearing, despite the fact that defendants' counsel indicated that records had been produced. The trial court had invited the plaintiff to bring sanctions motions at that time and the defendants produced 3,000 pages of redacted discovery sometime after that hearing.

Following this history, the trial court observed:

> "Despite this production and most concerning to the court, defendants still have failed to produce responsive documentation directly relevant to the motions for summary judgment. Plaintiff identified no less than 16 material facts in the defendant's motions for summary judgment where defendants relied upon medical evidence concerning the plaintiff's standard of care if this documentation had either not been provided or incomplete records have been produced."
>
> "Despite the extensive efforts by this court to clarify this ruling, which I don't think needed clarification, and to resolve this issue without resort to formal sanctions, defendants still have not produced documentation that they have relied upon in preparation of their dispositive motions. While

> defendants may have disagreed with this court's ruling concerning production of the medical records at issue, defendants were free to seek relief through the appellate courts. Defendants were not free to disregard this court's orders, misrepresent their compliance, prejudice the plaintiff and their claims. *Sauer v. Superior Court* [(1987)] 195 Cal.App.3d 213."

In response to this, defendants' counsel explained that obtaining the medical records had been "very, very difficult." Defendants' counsel later expanded on this by stating that the records were very difficult to locate because of the hospital's record keeping. Defendants' counsel stated that the hospital had not "lost" the records in question but could not "identify them to find them."

Defendants' counsel related all of the efforts that had been put in to obtaining the records and admitted that it had "screwed up" by not producing certain pages of the documentation. Defendants' counsel reported that after the court's ruling in October, she went back and directed that entire charts be produced. She said that they had done that but could not identify five charts because of insufficient information.

Defendants' counsel also argued that the defense did not truly understand that the court intended that the entire charts be disclosed, thinking that it was just the part of the charts that reflected plaintiff's errors. She argued that the misunderstanding was not willful. The trial court rejected this argument, saying that it had clarified the order repeatedly and had always been clear.

Defendants then asserted a new argument that plaintiff had not been terminated from the program based on "standard of care" but because other employees said that she was

"unqualified." Defendants' counsel stated that the real grounds for termination was plaintiff's alleged refusal to accept responsibility for her errors, not any deficiency in treatment, and was "not based on review of the medical records," which made the records at issue irrelevant. Plaintiff's counsel responded by pointing out an argument in the motion for summary judgment where defendants argued that plaintiff had not made a prima facie showing that she was performing competently, which, he argued, could *only* be established by medical records.

At that point, the trial court ordered the parties to meet and confer in person and to return the next day.

***December 6, 2016*:**

The December 6, 2016, hearing began with another exchange in which defense counsel repeated that they had misunderstood the trial court's order to apply only to records of patients whom plaintiff had treated. The trial court rejected this, saying that the defense had argued this in the past and that this was their "interpretation."

It was also disclosed during this hearing that approximately 6,000 pages of new discovery were being copied at the time of the hearing. Plaintiff's counsel replied that the delays in proceeding with the case, which were caused by defendants' non-compliance, were prejudicing plaintiff through the increasing loss of witness memories and the increasing difficulty of "reviving" her medical career. Plaintiff's counsel asked the court to impose either terminating sanctions or, at a minimum, instructional sanctions.

When defendants argued that retrieving the medical records in issue had been difficult because plaintiff could not identify the relevant patients, the trial court reminded

defendants that the burden was on it, not plaintiff, to identify the patients in question.

After further discussions about the on-going efforts to find and retrieve the documents in question, the trial court issued monetary sanctions against defendant Dignity Health in the amount of $32,868, which included $268 in costs. In so doing, the trial court made the following observation: "[t]he fact that the hospital has bad recordkeeping or they don't know where it is, that's their problem. I'm not hearing any more arguments on that. I am done with hearing it. . . . Maybe this will cause them to be a better record-keeper. This is not okay to come back around and say, we can't find the records. No, not okay." There was no mention of sanctions for violation of the orders regarding the mental examination of plaintiff.

DISCUSSION

The issue is limited to the whether the trial court acted within its discretion in imposing monetary sanctions of $32,868 against defendant Dignity Health. We conclude that it did.[4]

1. Standard of Review

"We review the trial court's order [imposing discovery sanctions]under the abuse of discretion standard and resolve all evidentiary conflicts most favorably to the trial court's ruling. We will reverse only if the trial court's order was arbitrary, capricious, or whimsical. It is appellant's burden to affirmatively demonstrate error and where the evidence is in conflict, we will affirm the trial court's findings. [Citation.] We presume the trial

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[4] Plaintiff asserts a procedural defense that defendant Dignity Health is barred from relief because it failed to mention and address adverse facts. Since plaintiff prevails on the merits, we will not address that issue.

court's order was correct and indulge all presumptions and intendments in its favor on matters as to which it is silent." (*Padron v. Watchtower Bible and Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1260 (*Padron*) [quoting *Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1224].)

2. The Trial Court's Conclusion That Defendant Dignity Health Violated Its Order is Supported By Substantial Evidence

A trial court's factual findings are upheld if supported by substantial evidence. (*Padron, supra*, 16 Cal.App.5th at p. 1266.) We have no power to reweigh evidence, pass on the credibility of witnesses, resolve evidentiary conflicts, or draw inferences from the evidence contrary to those drawn by the trial court. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622-623.) The trial court found that: (1) Defendant Dignity Health understood the order that it was to produce both the complete redacted[5] medical records of relevant patients; (2) There was no misunderstanding of what had been ordered; (3) Defendant Dignity Health had or should have had those records under its control and the records should have been retrievable; (4) Defendants repeatedly violated clear orders to produce these records over a five-month period despite orders and warnings from the trial court; (5) Defendants had tendered varying and unconvincing excuses and explanations for the unjustified noncompliance; and, (6) Plaintiff was prejudiced by the delays caused by the repeated unjustified violations of the discovery orders.

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5 Per the procedure explained in *Snibbe v. Superior Court, supra*, 224 Cal.App.4th at pp. 192-194.

Each of these conclusions is supported by substantial evidence. Defendants were repeatedly told what was encompassed in the trial court's orders. Defendants' counsel repeatedly professed to understand those orders. Despite repeated promises that they would comply, defendants repeatedly failed to provide the ordered material. In one instance, they claimed to have complied completely when they provided only a single page of discovery. In reality, *actual* compliance resulted in thousands of pages of documents being released. Despite the fact that they acknowledged having been served with a litigation hold letter, defendants' final gambit in resisting compliance was a claim that they were unable to retrieve the documents in question. Plaintiff's counsel represented, and the trial court accepted, that plaintiff had suffered significant prejudice in that witness memories had faded and that her chances of "reviving" her medical career faded with each month that passed in response to defendants' delaying tactics.

Defendant Dignity Health's arguments on appeal are, essentially, that the trial court's conclusions were wrong, and it largely repeats the factual points that it made in the trial court and that the trial court rejected. As the Court of Appeal noted in *Padron*, "[p]ut differently, it [defendant] is asking us to reweigh the evidence. This we cannot do." (*Padron, supra,* 16 Cal.App.5th at p. 1266.) The order imposing monetary sanctions is affirmed.

3. Defendant Dignity Health May Have Been Denied Due Process of Law

On November 2, 2016, the defendants sought and were granted a mental examination of plaintiff pursuant to sections 2032.310 and 2032.320, and *Vinson v. Superior Court* (1987) 43

Cal.3d 833. The trial court placed significant limitations on the scope of what could be inquired into during this examination. During the December 5, 2016, hearing, the trial court found that defendants' examination of plaintiff violated this order by asking "at least" 32 improper questions. Defendant Dignity Health contends that this finding resulted in the imposition of sanctions and denied it due process of law because it was not noticed. While the record of this case certainly supports the awarding of substantial sanctions for the failure to produce documents, it is unclear whether the trial court's December 6, 2016, order was limited to failure to produce or included violations of the mental health examination order.

Defendant Dignity Health is correct that the imposition of discovery sanctions without notice constitutes a denial of due process. (§ 2023.030, subd. (a); *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 5-6.) Therefore, had the trial court imposed sanctions for that violation, defendants would be entitled to a new hearing with proper notice. However, that is not what happened.

Pursuant to the trial court's invitation during the November 9, 2016, discovery hearing, plaintiff filed a motion for sanctions. The proof of service shows that it was mailed to defendants on November 14, 2016. This motion sought sanctions in the amount of $44,368, broken down as "greater than" $18,500 for attorney Cowan, and "greater than" $25,600 for attorney Makovoz, plus $268 in costs. The only basis for sanctions set forth in the motion was defendants' failure to comply with the orders to produce records.

The sanctions hearing was commenced on December 5, 2016. The trial court gave an oral tentative ruling suggesting

that it was considering terminating sanctions and monetary sanctions for violations of its orders to produce the medical records before there was any mention of the violation of its orders regarding the mental examination.

Sanctions were actually imposed on December 6, 2016. The bulk of that hearing was consumed by discussion of defendants' problems in locating and producing the ordered documents. There was no discussion of the violations related to the mental examination and the sanctions order was clearly based on the failure to produce documents. The monetary sanctions awarded were $32,600 plus the $268 in costs, which was actually *less* than the amount requested in the initial sanctions motion, which was based only the failure to produce.[6]

However, the minute order of December 6, 2016, states that the trial court found that the defendant Dignity Health had violated both its mental health examination order and the order to produce records. It does not, however, directly award sanctions for that latter violation only. The record is thus unclear as to whether the sanctions order was limited to the failure to produce or whether it included sanctions for the violation of the mental examination order. Therefore, we will remand the matter to the trial court to clarify its December 6, 2016, order. If the order is based solely on the failure to produce, it is affirmed. If the order is based in part on the violation of the mental health examination order, the trial court should allow defendant Dignity Health an opportunity to be heard prior to the imposition of sanctions for that violation.

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6 Defendant Dignity Health does not appear to contest the propriety of the *amount* of the award.

DISPOSITION

The trial court's sanctions order of December 6, 2016, is conditionally reversed and remanded.

If the trial court's order was intended to impose sanctions solely on the failure to produce documents, the trial court shall reinstate the sanctions order. If the trial court's order was intended to impose sanctions, in any respect, for the violation of its order for a mental health examination, the trial court shall vacate its order and enter a new order based on sanctions for the failure to produce documents only, without prejudice to conducting a new hearing upon proper notice as to any violation of the court's order on the mental health examination.

Plaintiff to recover costs on appeal.

HALL, J.*

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.