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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

JAMYE SUE STEWART et al., Plaintiffs and Respondents, v. STEWART & O'KULA et al., Defendants and Appellants.	B276190 (Los Angeles County Super. Ct. No. BC464336)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Law Offices of William B. Hanley, William B. Hanley for Defendants and Appellants.

Jacobson, Russell, Saltz, Nassim & DeLaTorre, Michael J. Saltz and Colby A. Petersen for Plaintiff and Respondent.

Defendants and appellants Stewart & O'Kula, A.P.C.; Donald O'Kula; Kathryn O'Kula, a.k.a. Kathryn Baracao (Baracao); and the Johnson Trust (collectively defendants) appeal from a default judgment entered against them as a discovery sanction. They contend that terminating sanctions were improper because they eventually produced all of the documents that were the subject of the motion for sanctions and did not otherwise engage in egregious conduct. The appellate record does not shed any light on the bases for the trial court's discretionary decision, which a minute order notes the trial court felt "compelled" to render after the hearing on the sanctions motion. We accordingly presume the trial court properly exercised its discretion by ordering terminating sanctions and affirm. Respondents' informal request for appellate sanctions is denied.

BACKGROUND

Plaintiffs and respondents Jamye Sue Stewart and Ollie Bland Stewart inherited intellectual property from science fiction writer Andre Norton upon her death in 2005. They also served as executors of Norton's estate.

Plaintiffs, who reside in Tennessee, retained California attorney O'Kula and his law firm, Stewart & O'Kula, A.P.C., to act as their literary agent and promote the Norton intellectual property across various media. The relationship eventually soured and in 2011 plaintiffs, "jointly as executors of the Andre Norton Estate," filed suit against defendants. After several rounds of demurrers and amended complaints, three of plaintiffs' causes of action moved forward—intentional misrepresentation/fraud against O'Kula and his law firm; conspiracy to commit fraud against O'Kula, his ex-wife Baracao, and a trust for which he acted as trustee, the Johnson Trust; and

usury in violation of the California Constitution against the Johnson Trust.

Discovery was contested from the outset. In March 2012, the court granted eight motions by plaintiffs to compel defendants to respond to interrogatories, requests for admission, and requests for production of documents. O'Kula thus was ordered to produce, among other things, "Any and all DOCUMENTS evidencing any agreements entered into between YOU and PLAINTIFFS, at any time for any reason." The trial court also found all defendants jointly and severally liable to plaintiffs for $1,240 in discovery-related costs and fees.

Plaintiffs subsequently filed motions to compel the depositions of O'Kula, Baracao, and the persons most knowledgeable at both Stewart & O'Kula and the Johnson Trust. The trial court granted all four of those motions and awarded plaintiffs an additional $3,160 in monetary sanctions.

Over the next three years, plaintiffs filed three motions for issue and terminating sanctions. The first, which the trial court heard in June 2012, was based on defendants' allegedly inadequate compliance with the discovery requests that were the subject of plaintiffs' eight initial motions to compel. In its order on the motion, the trial court observed that "[e]very aspect of Defendants' engagement in the discovery process appears to have been problematic." The court nevertheless concluded that defendants had not been "so noncompliant as to merit such drastic sanctions at this time." It also observed that "several of the discovery issues are duplicative, in that they sought the same information from multiple defendants, so that the numbers of problems is not quite so high as it appears." The court accordingly denied plaintiffs' request for issue and terminating

sanctions, but awarded them $3,640 in monetary sanctions, bringing the total monetary sanctions awarded to just over $8,000.

The trial court heard plaintiffs' second motion for issue and terminating sanctions in April 2013. In this motion, plaintiffs alleged, inter alia, that defendants O'Kula and his firm had not produced their client files and "documents related to and/or evidenced by an inadvertently disclosed e-mail between O'Kula and an attorney named Robert Kehr," O'Kula's former counsel. The trial court concluded there was no evidence, such as a declaration, showing that the client files had not been produced. It further observed that plaintiffs had not moved to compel the documents alluded to in the Kehr email, that it was "unclear what, if any, other communications are still in defendant's [*sic*] possession," and that plaintiffs "could have brought a timely motion to compel further responses, specifically requesting these communications." The trial court denied plaintiffs' request for sanctions in its entirety. In doing so, the trial court relied heavily on plaintiffs' months-long delay in seeking sanctions, and observed that "[s]uch conduct will not be [rewarded] by this court."

The trial court heard plaintiffs' third motion for issue and terminating sanctions in April 2015. In advance of the hearing, defendants' attorney filed a declaration representing that defendants had fully complied with all prior orders issued by the court. According to a declaration filed by plaintiffs' counsel, defendants' attorney orally confirmed that representation at the motion hearing, stating "that all compliant documents had been handed over to Plaintiffs and additional communications between Mr. Kehr and O'Kula or documents evidencing agreements

between Plaintiffs and Defendants do not exist." Defense counsel characterized the hearing differently. According to his later-filed declaration, "the Court's inquiry was whether the Defendants had produced documents. I stated my understanding was that they had produced in excess of 4220 pages. I did not state additional unproduced emails did or do not exist that were attorney-client communications with Mr. Kehr." There is no reporter's transcript of the hearing in the record.

The record also does not contain the trial court's ruling on the third motion; it contains only the trial court's tentative decision indicating an intent to deny the motion. There is no dispute, however, that the motion was denied.

Plaintiffs scheduled Kehr's deposition in June 2015. Prior to the deposition, plaintiffs issued a subpoena duces tecum asking that Kehr produce five categories of documents: "Any and all COMMUNICATIONS between YOU and DEFENDANTS," "Any and all COMMUNICATIONS between YOU and DEFENDANTS relating to and/or referencing PLAINTIFFS," "Any and all COMMUNICATIONS between YOU and DEFENDANTS relating to and/or referencing agreements entered into between DEFENDANTS and PLAINTIFFS," "Any and all DOCUMENTS evidencing COMMUNICATIONS between YOU and DEFENDANTS relating to and/or referencing PLAINTIFFS," and "Any and all DOCUMENTS evidencing any agreements entered into between PLAINTIFFS and DEFENDANTS."

At the deposition, Kehr testified that he did not bring any of the subpoenaed documents because he sent his "entire file" to defendants' attorney and left "it to him to produce or object as he thinks appropriate, because he is the current attorney for my

former client, Mr. O'Kula." Kehr further stated that he gave the documents to defense counsel prior to receiving the subpoena duces tecum. He recalled that his former secretary sent the file sometime prior to retiring on March 13, 2015. Thus, the documents were sent at least one month prior to defense counsel's alleged representations to the court that all existing responsive documents had been turned over to plaintiffs. Kehr informed plaintiffs that the file included approximately 15 emails, an "engagement agreement," "at least one draft agreement that existed before I became involved," "an employment agreement," and "a gift-transfer document." After a break in the deposition, Kehr told plaintiffs' counsel that defense counsel "spoke with his client [presumably O'Kula] during the break and was authorized to hand them over." Kehr then gave plaintiffs' counsel a collection of documents; the transcript indicates that 25 documents were marked as exhibits.

In August 2015, plaintiffs sought terminating sanctions for a fourth time, based on defendants' withholding of the documents produced at Kehr's deposition and defense counsel's written and oral representations to the court that all such documents had been given to plaintiffs. They asserted that the impropriety of defendants' conduct "is beyond question," and requested the court "put an end to Defendants' egregious behavior in the form of terminating sanctions."

In opposition, defendants argued that they produced the "previously unproduced" documents at Kehr's deposition, and gave plaintiffs' counsel "full opportunity to question Mr. Kehr" about them. Defendants also argued that they could not be punished again for past conduct already addressed in previous sanctions motions. Defense counsel submitted a supporting

declaration in which he acknowledged that the "unproduced emails were provided to me by Mr. Kehr prior to March 15, 2015," but explained he did not produce them because he believed they "were attorney-client privilege [*sic*]."

Prior to the hearing on the motion, the trial court issued a tentative decision indicating an inclination to deny plaintiffs' request for terminating sanctions. However, it also stated, "The Court has imposed over $8,000 in discovery sanctions against defendant[s]. This is the fourth motion for terminating sanctions brought by plaintiffs. The Court believes that defendants[']actions are wilful [*sic*], and is particularly concerned that defense counsel made an outright misrepresentation to the Court at the hearing on plaintiff[s'] previous motion for sanctions. [¶] The Court believes that sanctions are warranted. The Court will hear argument from both counsel as to whether the Court should impose terminating sanctions or some lessor [*sic*] sanctions."

The court called the motion for hearing on September 17, 2015. The minute order documenting the hearing notes that the court "signed and filed" an order "Appointing Court Approved Reporter as Official Reporter Pro Tempore," and further indicates the presence of a reporter pro tempore. Nevertheless, the record does not contain a reporter's transcript of the hearing. We are thus limited to the following ruling in the minute order: "The Court issues a written tentative ruling DENYING the motion. [¶] The tentative ruling is argued. [¶] After consideration of the argument, the Court is compelled to amend its ruling. [¶] The Motion for Terminating Sanctions is granted. [¶] The Court orders the Answers of all defendants stricken. [¶] Plaintiff[s] may seek entry of default and default judgment."

Plaintiffs subsequently sought and obtained entry of default and default judgment. The trial court entered a default judgment in plaintiffs' favor on May 10, 2016. It stated that defendants had been regularly served with process, appeared, had their answers stricken, and default "duly entered" against them. It further ordered that "there be a rescission of all agreements attempting or purporting to transfer from plaintiffs to Defendants" certain Norton intellectual property, and that "Plaintiffs recover restitution of all ownership interest in and to" that property. The order also invalidated a loan agreement between plaintiffs and the Johnson Trust, and awarded costs to plaintiffs. Plaintiffs served defendants with notice of entry of the judgment on May 18, 2016, and defendants timely appealed.

STANDARD OF REVIEW

Code of Civil Procedure section 2023.030, subdivisions (d)(1) and (d)(4), allows the trial court (after notice and a hearing) to impose a terminating sanction in the form of an order striking pleadings or rendering a judgment by default, on a party misusing the discovery process. Trial courts also possess inherent power to issue a terminating sanction for "pervasive misconduct." (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 758-759, 765.) Terminating sanctions—"the ultimate sanction"—are justified when the discovery violation "is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules." (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.)

"We accept the trial court's factual determinations concerning misconduct if they are supported by substantial evidence. [Citation.] We review the order to issue a terminating

sanction based on those factual findings for abuse of discretion. (*Slesinger, Inc. v. Walt Disney Co.*, *supra*, 155 Cal.App.4th at p. 765.)" (*Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 51.) We examine the entire record in the light most favorable to the court's ruling, drawing all reasonable inferences in support of it, and reverse only for manifest abuse beyond the bounds of reason. (*Slesinger, Inc. v. Walt Disney Co.*, *supra*, 155 Cal.App.4th at p. 765.) "The question before us "'is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose.'" [Citations.]" (*Liberty Mut. Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1105 (*Liberty Mutual*).)

Our ability to consider this question is hampered by the limited state of the record. "'[I]t is appellant's burden to provide a reporter's transcript if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court . . ." (Cal. Rules of Court, rule 8.120(b)), and it is the appellant who in the first instance may elect to proceed without a reporter's transcript (Cal. Rules of Court, rule 8.130(a)(4)). . . .' [Citation.]" (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.) In many cases where the standard of review is substantial evidence or abuse of discretion, such as this one, a reporter's transcript or an agreed or settled statement documenting a crucial hearing "will be indispensible." (*Ibid.*) Nevertheless, "[w]e proceed to consider the issues on appeal, cognizant of appellants' obligation to provide an adequate record to demonstrate error as well as our obligation to presume that the decision of the trial court is correct absent a showing of error on the record." (*Ibid.*)

DISCUSSION

Plaintiffs contend that the absence of a transcript documenting the hearing on their final motion for sanctions renders the record inadequate and requires this court to presume the court's order was correct. Defendants assert this argument "has no merit" because "[t]he ruling is set forth in Minute Order . . . and other orders sufficient to decide the legal issue. We agree with plaintiffs.

The trial court indicated in its tentative ruling that it was inclined to deny plaintiffs' fourth motion for terminating sanctions. After holding a hearing, however, the court stated that it was "compelled to amend its ruling" and impose terminating sanctions on defendants. The record does not indicate what prompted the trial court to change its mind. We do not know what arguments or concessions were made at the hearing, whether matters that do not appear in the tentative decision were raised and determined, what evidence the trial court considered and relied on, or whether the trial court manifestly abused its discretion. We accordingly are compelled to conclude that any factual determinations the trial court may have made—such as concluding that defendants' conduct was willful, or that defense counsel misrepresented the extent of defendants' compliance with prior discovery orders—were supported by substantial evidence, and that the trial court exercised its discretion properly when it determined that terminating sanctions were warranted.

Defendants' additional arguments do not persuade us otherwise. First, they assert there was "no willful failure to comply with any prior court order," because they produced "the complete set of previously unproduced emails" at Kehr's

deposition. Defendants do not dispute that the documents were relevant and responsive to the original discovery requests, nor do they cite any authority for the proposition that the belated production of responsive documents excuses persistent "problematic" discovery conduct. The case they cite, *Liberty Mutual*, *supra*, 163 Cal.App.4th at p. 1102, *rejects* an argument that a defendant was not "evasive" because it gave the plaintiff "all the evidence which it possessed and did not 'conceal' anything." The *Liberty Mutual* court expressly disagreed with the argument and observed that the defendant "repeatedly ignored meet and confer letters, continued to parrot the same answers after two orders compelling it to give further responses, and propounded no discovery of its own until faced with a motion for terminating sanctions." The defendant's belated compliance with discovery requests thus did not undermine the trial court's findings that it evaded and willfully violated discovery orders. We reach the same conclusion here.

Defendants next argue that the terminating sanctions were overly punitive, and suggest they improperly rested upon conduct previously considered and sanctioned by the court. "The trial court cannot impose sanctions for misuse of the discovery process as punishment." (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992.) The sanctions imposed should be appropriate to the violation and not exceed that necessary to protect the interests of the party denied discovery; the statutes "evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination." (*Ibid.*) Here, the record reveals that the court imposed monetary sanctions three separate times, escalating the amount each time, and carefully considered and denied plaintiffs'

earlier requests for more severe sanctions. The record does not reveal why the court concluded terminating sanctions rather than issue or other lesser sanctions were appropriate, but we must presume its decision was a proper exercise of its wide discretion.

We also presume the trial court rested its sanctions on appropriately sanctionable conduct. The cases defendants cite for the proposition that they cannot be sanctioned twice for the same conduct—*Andrus v. Estrada* (1995) 39 Cal.App.4th 1030, 1043 (*Andrus*), and *Liberty Mutual*, *supra*, 163 Cal.App.4th at p. 1106—do not support that conclusion. In *Andrus*, the court discussed *Sabado v. Moraga* (1987) 189 Cal.App.3d 1, 10-11, which held, "'We agree that if an attorney continues to engage in dilatory tactics to prevent legitimate discovery a court should be able to consider past conduct in considering the attorney's bad faith on the subsequent occasions. Where, however, subsequent conduct is not the type that warrants the imposition of sanctions, past conduct which has already been considered by a court cannot justify the imposition of additional sanctions; otherwise an attorney might be punished twice for the very same conduct.' [Citation.]" (*Andrus*, *supra*, 39 Cal.App.4th at p. 1043.) In other words, the trial court may consider past conduct in considering bad faith, but may not rely upon past, sanctionable conduct to impose additional sanctions for unsanctionable conduct. On the record before us, we presume the court properly considered defendants' prior discovery malfeasance.

In *Liberty Mutual*, *supra*, the court rejected as having "no merit" the defendant's argument that "the only issue before the trial court was the severity of LCL's *current* transgressions; past discovery abuses have no place in deciding whether to impose

terminating sanctions." (163 Cal.App.4th at p. 1106.) The court emphasized the history and willfulness of the defendant's misconduct, noting that the defendant's "months-long lack of cooperation in providing straightforward information, witnesses, and documents" supported the trial court's conclusion that terminating sanctions were appropriate. (*Ibid.*) *Liberty Mutual* thus adds little to defendants' argument.

Defendants also contend that defense counsel did not misrepresent the extent of their compliance with discovery requests or orders. We reiterate that the record does not contain a transcript of the hearing at which the alleged misrepresentation was made, and does not reveal the bases for the trial court's evident findings of willful misconduct or misrepresentation. We therefore presume any such findings were properly supported by substantial evidence. (*Southern California Gas Co. v. Flannery*, *supra*, 5 Cal.App.5th at p. 483.) Defendants' reliance on remarks contained in the trial court's tentative decision denying plaintiffs' third motion for sanctions is not helpful. Tentative decisions merely indicate the way the court is inclined to rule prior to a hearing and are not binding on the court, and the record does not contain the ruling referred to or indicate that the trial court accepted the tentative as its final decision. (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 633.)

Defendants' final contention is that "[e]gregious circumstances warranting terminating sanctions are not present in this case." They assert that "[t]he following points" "reveal that the ultimate sanction was not proper": "[a]ppellants [*sic*] compliance with all prior discovery orders," "[t]hree prior efforts at terminating sanctions were denied," "[p]roduction at the

deposition of Mr. Kehr, all documents and a waiver of attorney-client privilege communication," and "[t]rial court's prior findings that there was no blatant waiver of privilege and that Respondents never made any effort to compel the communication."[1] We disagree.

Again, the record does not reveal the bases for the trial court's decision; in its absence we must presume any findings it may have made regarding egregious circumstances were properly supported by substantial evidence. Terminating sanctions are proper when a discovery violation "is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules." (*Mileikowsky v. Tenet Healthsystem*, *supra*, 128 Cal.App.4th at pp. 279-280.) Two of these three factors are evident even from the limited record before us. The trial court previously observed that "[e]very aspect of Defendants' engagement in the discovery process appears to have been problematic"—i.e., a history of abuse. The trial court also imposed increasing monetary sanctions of $1,240, $3,160, and $3,640, which it presumably concluded did not sufficiently curtail the discovery issues. We are not convinced that the trial court erred in imposing harsher sanctions.

In their response brief, plaintiffs request that we sanction defendants further for filing a frivolous appeal. Sanctions cannot be requested in a response brief. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919.) Under California Rules of Court, rule

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[1] One of the "findings" referred to here was contained in the court's tentative decision regarding plaintiffs' third motion for issue and terminating sanctions. As noted above, the record does not contain the court's final ruling on that motion.

8.276(b)(1), a party requesting appellate sanctions must file a separate motion, accompanied by a declaration. Plaintiffs did not follow this procedure. We accordingly deny their request. We also are not inclined to impose sanctions on our own motion. (Cal. Rules of Court, rule 8.276(a).)

DISPOSITION

The judgment is affirmed. Plaintiffs are to recover their costs on appeal.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.