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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LAURIE A. SAIDINER,

Appellant,

v.

NINA JACOBS-JAKUBOWICZ,

Respondent;

LISA F. ROSENTHAL,

Objector and Appellant.

B275860

(Los Angeles County  
Super. Ct. No. BD589554)

APPEAL from an order of the Superior Court of Los Angeles County, Patrick A. Cathcart, Judge. Reversed.

Law Offices of Rosenthal & Associates and Lisa F. Rosenthal for Objector and Appellant.

No appearance for Appellant.

No appearance for Respondent.

## INTRODUCTION

Attorney Lisa F. Rosenthal appeals from an order requiring her and her client Laurie A. Saidiner to pay sanctions in the amount of \$5,000 to Nina Jacobs-Jakubowicz's counsel pursuant to Code of Civil Procedure section 128.7 (section 128.7) and Family Code section 271 (section 271). Rosenthal contends that the trial court's order denied her the full 21-day safe harbor period required by section 128.7. She also contends that section 271 does not authorize sanctions against an attorney. We agree, and reverse the trial court's order as to Rosenthal.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Stipulated Judgment and Award of Attorney's Fees*

On February 25, 2016 Saidiner, Jacobs-Jakubowicz and their respective counsel, Rosenthal and Tina Schuchman, executed a partial stipulated settlement of this dissolution action, reserving the issue of attorney's fees, among other issues, for further litigation. The partial stipulated settlement included a \$30,000 payment from Saidiner to Jacobs-Jakubowicz "[t]o equalize the division of the community property assets and obligations," and awarded the parties' Sherman Oaks home to Saidiner.

On March 25, 2016, following a trial on the reserved issues, the trial court determined the only source of funds to pay the attorney's fees for Jacobs-Jakubowicz's counsel was the community property equity in the house, and ordered that "an amount of \$50,000 be taken out of the equity in the house

through loan or otherwise” for payment of Jacobs-Jakubowicz’s attorney’s fees. Rosenthal responded at the hearing that Saidiner was taking out a loan to pay Jacobs-Jakubowicz \$30,000 as her equity share in the house, so “there is not going to be anything left from the community share. The total share is \$50,000. The total community interest in the house is \$50,000, so—” The trial court interrupted, “It is what it is.”

On April 11, 2016<sup>1</sup> Saidiner lodged a proposed judgment with the court that stated under the heading, “Community Interest Payment on Home”: “The [c]ourt find[s] that the community interest in the home . . . is \$50,000. From that interest [Saidiner] is ordered to pay to [Jacobs-Jakubowicz] as an equalization payment for the home \$30,000 . . . to be initially credited to [Jacobs-Jakubowicz] as her share of the community interest in the family home.” The attorney’s fees provision provided: “The [c]ourt finds that the community property interest in the home is the only source to pay for attorney’s fees for [Jacob-Jakubowicz’s] counsel. Therefore, the above orders notwithstanding, from the community interest in the home \$50,000 shall be paid to Tina Schuchman as for the parties’ contribution to attorney[’s] fees and costs.”

B. *Jacobs-Jakubowicz’s Ex Parte Request for Judgment and Sanctions*

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<sup>1</sup> Jacobs-Jakubowicz asserts that Saidiner submitted the proposed judgment to the court on April 12, 2016. However, the proposed judgment is undated; we therefore use the date provided by Saidiner as to when her attorney submitted the proposed judgment to the court.

On May 6, 2016 Jacobs-Jakubowicz filed an ex parte request for orders entering judgment on reserved issues (Code Civ. Proc., §§ 664, 664.6) and awarding sanctions against Saidiner and Rosenthal (§ 271; Code Civ. Proc., §§ 128.5, 128.7) or, in the alternative, for an order shortening time. In the ex parte application, Jacobs-Jakubowicz argued that the proposed judgment submitted to the court by Saidiner did not reflect the court's order because it provided for the \$50,000 payment for attorney's fees to come from the community property equity in the house, and thus would be borne half by Saidiner and half by Jacobs-Jakubowicz. Instead, Jacobs-Jakubowicz proposed that the judgment read that Saidiner pay Jacobs-Jakubowicz \$50,000 to be "taken out of the equity in the former family residence through loan or otherwise and used for the attorney's fees for [Jacobs-Jakubowicz]."

Jacobs-Jakubowicz's attorney Chelsea M. Norris stated in her declaration filed with the ex parte application that Rosenthal was aware of Norris's objections to the proposed judgment, but submitted it to the court without prior notice to Jacobs-Jakubowicz. Norris stated that she first learned that Saidiner had submitted her proposed judgment to the court on May 4, when Norris gave notice of the ex parte application. According to the declaration of co-counsel Schuchman, there were exigent circumstances for ex parte entry of judgment or an expedited hearing because the \$50,000 payment for attorney's fees to Jacobs-Jakubowicz was due on May 25, 2016.

Saidiner opposed the request, arguing her proposed judgment accurately reflected the trial court's March 25 order. Saidiner requested the court instead enter the proposed judgment she had submitted on April 11, 2016.

The trial court on May 6, 2016 set the matter for a hearing on May 20, 2016 “to give any legal reason why the orders requested should not be granted,” and set an order to show cause re sanctions “for failure to present a judgment conforming to the [c]ourt’s order.” The court ordered further: “Parties to meet and confer to resolve the difference between the two judgments prior to May 20, 2016.”

C. *Supplemental Briefing on the Ex Parte Request*

On May 19, 2016 Norris filed a supplemental declaration, informing the court that the parties met and conferred, and on May 16, 2016 “the parties both executed the final Stipulated Judgment on Reserved Issues,” which was attached to the declaration.<sup>2</sup> The attorney’s fees provision in the signed judgment states: “For attorney fees and costs, [Jacobs-Jakubowicz’s] counsel of record . . . shall receive \$50,000 from the community property portion of the equity in the former family residence within 90 days of February 25, 2016, through loan or otherwise.”

According to Norris’s declaration, the parties’ disagreement was “not with the language of the [c]ourt’s order or the Judgment language, but with the practical impact of the order.” Norris calculated the community property equity at \$646,480, and concluded: “With the waiver of all reimbursement claims for this purpose, there is obviously well more than enough funds available from which [Saidiner] can pay and should pay to us the

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<sup>2</sup> The record before the court contains a judgment with duplicate copies of the attorneys’ May 17, 2016 signatures, but not the parties’ signatures. The court assumes the document submitted to the trial court also contained the parties’ signatures.

sum of \$50,000.” Norris added: “Due to [Saidiner’s] refusal to comply with the terms of the [c]ourt’s March 25, 2016 [ruling] and [Saidiner’s] flagrant pre-emptive breach of the parties’ Stipulated Judgment, [Jacobs-Jakubowicz] must reiterate her request for sanctions against [Saidiner] and her counsel of record pursuant to Family Code [section] 271 and Code of Civil Procedure [sections] 128.5 and 128.7.”

Rosenthal filed a responsive declaration on May 20, 2016, stating the trial court had “specifically endorsed” Saidiner’s proposed language, and the parties had signed the judgment incorporating that language so that no appearance should have been necessary and no sanctions were warranted. Rosenthal urged the court instead to award sanctions against Jacobs-Jakubowicz.

D. *May 20, 2016 Sanctions Hearing*

At the May 20 hearing, the trial court asked: “Why haven’t we signed a judgment?” Schuchman responded: “Your honor, you do have a judgment there, but . . . there is still the issue rearing its ugly head which either we deal with it now or the court’s going to be dealing with it on May 25th”—“that is the issue of the \$50,000 order for my attorney’s fees. And so that is why I’m here.” The trial court directed counsel to meet and confer and “try to avoid sanctions.”

Upon returning to the courtroom, Rosenthal argued that she had agreed to the final judgment language proposed by Schuchman, and she and Saidiner signed the judgment on

May 17, 2016.<sup>3</sup> Schuchman responded, “the fact that they ended up signing our judgment indicates that in fact we were right. . . . [A]t this point the sanctions issue is not the big thing for us.” The issue “is getting my \$50,000 by May 25th. Assuming that[’s] the court’s order, . . . then I’m fine. I don’t want to have to go through all this. If I have to make another motion, then I will ask for sanctions. But, you know, my understanding is the sanction issue came up by the court because of the whole judgment thing. In fact, that’s been resolved.”

The trial court noted that the parties and counsel had signed the judgment, and stated: “I’m not sure what the dispute is because I’m entering that judgment.” “I’m finding it was unnecessary to come here and for the reasons stated in the papers that have been presented to me today on both sides, and in particular Ms. Norris’[s] declaration, I’m going to assess sanctions for having to come here today in the amount of \$5,000 payable directly to the Schuchman Law Firm.” The court’s Findings and Order After Hearing filed June 2, 2016 states: “[Saidiner] and her counsel, Lisa F. Rosenthal, jointly and severally, are ordered to pay sanctions directly to [Jacobs-Jakubowicz’s] counsel . . . pursuant to [section] 128.7 and [section] 271, in the amount of \$5,000 within fourteen (14) days of May 20, 2016.”

Rosenthal appeals the award of sanctions.<sup>4</sup>

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<sup>3</sup> Rosenthal argued that she and Saidiner signed the judgment on March 17, 2016, but this appears to be an inadvertent misstatement given that the document reflects a May 17, 2016 signature.

<sup>4</sup> After the trial court signed the stipulated judgment on May 20, 2016, Saidiner and Rosenthal filed a timely notice of

## DISCUSSION

Rosenthal contends neither section 128.7 nor section 271 supports the trial court's order directing her to pay sanctions in the amount of \$5,000 to Jacobs-Jakubowicz's counsel. We agree.

### A. *The Trial Court Erred in Ordering Sanctions Under*

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appeal. (See Code Civ. Proc., § 904.1, subd. (b) [authorizing attorney to appeal from sanctions order of \$5,000 or less following entry of judgment]; *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 260, fn. 1.) However, appellant's brief was filed on behalf of Rosenthal only. We requested additional briefing pursuant to Government Code section 68081 regarding whether Rosenthal served Saidiner with the notice of appeal and Rosenthal's opening brief, and whether the notice of appeal was properly filed on behalf of Saidiner. On March 15, 2018 Rosenthal filed a letter brief, including correspondence among Rosenthal, Saidiner's subsequent attorney Avi Levy, and Jacobs-Jakubowicz's attorney. The correspondence shows that Rosenthal filed the notice of appeal without Saidiner's authorization. Although Levy requested that Rosenthal dismiss the appeal so that Levy could finalize a release with counsel for Jacobs-Jakubowicz to protect Saidiner's interests, Rosenthal failed to dismiss the appeal. Because Rosenthal did not have authority to file the notice of appeal on behalf of Saidiner, we dismissed the appeal as to Saidiner (see *In re Steven H.* (2001) 86 Cal.App.4th 1023, 1029), and only address the sanctions award against Rosenthal. We note that while the argument that the sanctions award violated the 21-day safe harbor provision in section 128.7 applies equally to Saidiner and Rosenthal, Rosenthal's argument that Family Code section 271 does not authorize sanctions against an attorney does not apply to Saidiner.



*Section 128.7*

1. *Governing law*

Section 128.7, subdivision (b), requires parties and their attorneys to “certify that pleadings or other written matters presented to the courts have merit, ‘to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.’ Subdivision (c) authorizes sanctions for a violation of subdivision (b).” (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 516.)

Subdivision (c)(1) of section 128.7 contains a safe harbor provision.<sup>5</sup> As this court has found, “the party seeking sanctions must serve the motion on the opposing party without filing or presenting it to the court. Service of the motion initiates a 21-day . . . hold or safe harbor period.” (*Nutrition Distribution, LLC v. Southern SARMSs, Inc.* (2018) 20 Cal.App.5th 117, 124 (*Nutrition Distribution*); accord, *Li v. Majestic Industrial Hills LLC* (2009) 177 Cal.App.4th 585, 590-591 (*Li*).)

During the 21-day safe harbor period, a party may correct or withdraw the challenged document without penalty, in which case the motion for sanctions may not be filed. (*Nutrition Distribution, supra*, 20 Cal.App.5th at p. 124; *Li, supra*, 177

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<sup>5</sup> Section 128.7, subdivision (c)(1), provides: “A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. . . .”

Cal.App.4th at p. 591.) “[T]he central principle to be distilled from section 128.7’s language and remedial purpose, as well as from appellate opinions interpreting section 128.7 and rule 11,<sup>[6]</sup> is that the safe harbor period is mandatory and the full 21 days must be provided absent a court order shortening that time if sanctions are to be awarded.’ [Citation.]” (*Nutrition Distribution, supra*, at p. 125; accord, *Li, supra*, at p. 595; see § 128.7, subd. (c)(1).)

“By mandating a 21-day safe harbor period to allow correction or withdrawal of an offending document, section 128.7 is designed to be remedial, not punitive,” saving the court and parties time and money litigating the pleading and the sanctions request. (*Li, supra*, 177 Cal.App.4th at p. 591; accord, *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 699 (*Martorana*).)

“The availability of sanctions under section 128.7 in connection with undisputed facts is a question of law subject to de novo review.” (*Li, supra*, 177 Cal.App.4th at p. 591; accord, *Optimal Markets, Inc. v. Salant* (2013) 221 Cal.App.4th 912, 922.)

2. *The simultaneous serving and filing of the ex parte request for sanctions denied Rosenthal the full 21-day safe harbor period.*

Here, instead of providing Rosenthal 21 days advance notice of her request for sanctions under section 128.7, Jacobs-Jakubowicz both filed and served her request for sanctions on

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<sup>6</sup> Section 128.7 was modeled on rule 11 of the Federal Rules of Civil Procedure. (See *Musaelian v. Adams, supra*, 45 Cal.4th at p. 518, fn. 2; *Nutrition Distribution, supra*, 20 Cal.App.5th at p. 124, fn. 4.)

May 6, 2016, as part of her ex parte request for order entering judgment on reserved issues and sanctions.<sup>7</sup> By giving simultaneous notice, Jacobs-Jakubowicz denied Rosenthal 21 days in which to decide whether to withdraw the proposed judgment, effectively eliminating the safe harbor period. (See § 128.7, subd. (c)(1) [motion for sanctions “shall be served . . . , but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper . . . is not withdrawn or appropriately corrected”].)

Section 128.7 authorizes the trial court to shorten the 21-day safe harbor period (§ 128.7, subd. (c)(1)), but in this case no such order was entered. Jacobs-Jakubowicz requested “in the alternative” an order shortening time for hearing if the trial court did not grant her ex parte request, but she did not specifically request that the 21-day safe harbor period be shortened, only that the hearing take place before May 25, 2016—the due date for the \$50,000 attorney’s fee payment. (See Cal. Rules of Court, rule 3.1201(1) [request for ex parte relief must state the relief requested].)

Moreover, the trial court in its May 6, 2016 order setting the hearing on Jacobs-Jakubowicz’s ex parte request ordered: “Parties to meet and confer to resolve the difference between the two judgments prior to May 20, 2016.” Even if this order could be

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<sup>7</sup> Schuchman’s May 4, 2016 letter giving notice that she would be seeking sanctions as part of her ex parte application did not constitute proper notice. (*Martorana, supra*, 175 Cal.App.4th at p. 700 [“A party does not comply with the notice provisions of [§] 128.7 simply by sending a letter of its intent to seek sanctions to the offending party”].)

construed as shortening the safe harbor period, this gave Rosenthal until May 20, 2016 in which to withdraw or correct the proposed judgment. Yet, as of May 17, 2016, the parties and their counsel had signed a final stipulated judgment, resolving the attorney's fees question. The court at the May 20, 2016 hearing made clear its intent to sign the judgment. As this court found in *Martorana*, “[d]uring the safe harbor period, the offending party may withdraw the improper pleading and thereby avoid sanctions.” (*Martorana, supra*, 175 Cal.App.4th at p. 698.)

Thus, imposition of sanctions by the court “for having to come [to the May 20, 2016 hearing]” was not only in error because it denied Rosenthal the full 21-day safe harbor period, but also because Saidiner and Rosenthal had signed the final stipulated judgment three days before the hearing, thereby curing the challenged pleading. Given the mandatory nature of the safe harbor provision, the trial court's award of sanctions was in error. (See *Nutrition Distribution, supra*, 20 Cal.App.5th at p. 124; *Martorana, supra*, 175 Cal.App.4th at p. 700.)

B. *Section 271 Only Authorizes a Sanctions Award Against a Party*

Rosenthal contends section 271 does not support the trial court's order for her to pay sanctions because she is not a party to this action. Rosenthal's challenge involves the interpretation of section 271, and thus presents a question of law subject to de novo review. (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 177 [challenge to § 271 sanctions]; accord, *Optimal Markets, Inc. v. Salant, supra*, 221 Cal.App.4th at p. 921 [challenge to § 128.7 sanctions].)

Section 271 provides that “the court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney’s fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning *the parties’* incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on *the party* against whom the sanction is imposed. . . .” (§ 271, subd. (a), italics added.) Section 271, subdivision (b), provides that “[a]n award of attorney’s fees and costs as a sanction pursuant to this section shall be imposed only after notice to the *party* against whom the sanction is proposed to be imposed and opportunity for that *party* to be heard.” (Italics added.)<sup>8</sup>

The court in *Webb v. Webb* (2017) 12 Cal.App.5th 876 (*Webb*) addressed the question now before this court—whether section 271 authorizes a court to award sanctions against an attorney. In finding that it does not, the court relied on the holding in *In re Marriage of Daniels* (1993) 19 Cal.App.4th 1102 (*Daniels*) interpreting the predecessor statute, Civil Code former

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<sup>8</sup> Section 271, subdivision (c), similarly provides that “[a]n award of attorney’s fees and costs as a sanction pursuant to this section is payable only from the property or income of the *party* against whom the sanction is imposed, except that the award may be against the sanctioned *party’s* share of the community property.” (Italics added.)

section 4370.6, which contained almost identical language.<sup>9</sup> (*Webb, supra*, at p. 883). The court in *Webb* concluded that “sanctions could not be awarded *against* a party’s attorney under section 271 because the statute ‘shift[s] the legal costs of a dissolution from one party to another.’ [Citation.]”<sup>10</sup> (*Ibid.*) The court held, “based on the same reasoning, that sanctions may not be awarded under section 271 to a party’s attorney when it is that attorney who is requesting the sanctions for the sole benefit of the attorney.” (*Ibid.*)

The court cited to the reasoning in *Daniels*: “[T]his section remains a *fee-shifting device* . . . . [T]he Legislature never deviated from its requirement that this fee shifting should occur as between the *parties* to the litigation . . . . [¶] In short, [Civil Code former] section 4370.6 simply vested family law courts with an additional goad with which to enforce this state’s public policy of promoting settlement of family law litigation, while reducing its costs through mutual cooperation of clients and their counsel. Thus, a party who individually, or by counsel, engages in conduct frustrating or obstructing the public policy is thereby exposed to liability *for the adverse party’s* costs and attorney fees such conduct generates.’ [Citation.]” (*Webb, supra*, 12 Cal.App.5th at p. 883; see *Daniels, supra*, 19 Cal.App.4th at pp. 1109-1110.)

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<sup>9</sup> “Family Code section 271 continued Civil Code former section 4370.6 with only one substantive change: the statute was broadened to apply to all proceedings under the Family Code.” (*Webb, supra*, 12 Cal.App.5th at p. 884.)

<sup>10</sup> While the court in *Daniels* analyzed the question under Civil Code former section 4370.6, the court in *Webb* treated the opinion in *Daniels* as one under section 271. (See *Webb, supra*, 12 Cal.App.5th at p. 883.)

The courts have made clear that section 271 and its predecessor statute are designed to impose fees on the party for the conduct of the party and the attorney. “[W]hile [section] 271 impose[s] duties upon *counsel* as well as counsel’s client to cooperate in seeking to resolve the litigation [citation], those duties are enforced under the statute by means of a fees and costs award *against the party, not counsel*—even when the sanctionable conduct lies solely with a party’s counsel. [Section] 271 “explicitly makes parties liable for the obstreperous actions of their counsel . . .” . . .’ [Citation.]” (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1536, fn. 17 [affirming § 271 sanctions against party based on unprofessional and disrespectful conduct by party’s attorney against opposing counsel].)

Because Rosenthal is not a party, section 271 does not support the trial court’s order of sanctions against her.<sup>11</sup>

## DISPOSITION

The order for sanctions as to Rosenthal is reversed.  
Rosenthal is to bear her own costs on appeal.

FEUER, J.\*

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<sup>11</sup> The trial court’s order further violated section 271 because the court ordered Rosenthal to pay the \$5,000 sanctions award to Jacobs-Jakubowicz’s counsel, not a party. (*Webb, supra*, 12 Cal.App.5th at p. 878.)

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

We concur:

ZELON, Acting P. J.

SEGAL, J.