Filed 6/21/12 Scholz v. Boston Herald Ca2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DONALD THOMAS SCHOLZ, Plaintiff, v. BOSTON HERALD, INC., Defendant and Respondent, MILLER, KAPLAN, ARASE & CO., Objector and Appellant.	B231944 (Los Angeles County Super. Ct. No. BS128973)

APPEAL from an order of the Superior Court of Los Angeles County. Ramona G. See, Judge. Reversed.

Robins, Kaplan, Miller & Ciresi, Mark D. Passin and Rex D. Glensy for Objector and Appellant.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, Harvey I. Saferstein, Nada I. Shamonki, and Joseph D. Lipchitz for Defendant and Respondent.

Miller, Kaplan, Arase & Co. (Miller Kaplan) appeals from a $4,500 sanctions order in a discovery dispute originating in Massachusetts, contending the trial court violated its due process rights by failing to inform it what conduct or circumstances justified the imposition of sanctions. It also contends the sanctions order was substantively unsupported by California law. We agree with the first contention, do not reach the second, and reverse the sanctions order.

BACKGROUND

In 2007, respondent Boston Herald published three articles discussing Donald Scholz, one of the founders of the rock band Boston, and his connection with the suicide of Brad Delp, another founding member of Boston. In 2010, Scholz filed a defamation lawsuit against the Herald in Massachusetts, claiming the 2007 articles caused him to suffer economic damages, including loss of anticipated income from album and concert sales. During discovery, the Herald sought financial documents from Scholz's accountants, Wolinsky, Becker & Hurewitz (Wolinsky).[1]

On June 23, 2010, the Massachusetts Superior Court issued a letter rogatory to enable the Herald to obtain documents and custodian testimony from Wolinsky accountants in California. In July 2010, the Herald served a deposition subpoena on Wolinsky pursuant to the Interstate and International Depositions and Discovery Act, Code of Civil Procedure section 2029.100 et seq., seeking documents, the deposition of Wolinsky's custodian of records, and the production of a privilege log describing any documents withheld pursuant to assertion of a privilege.[2]

Based on Wolinsky's agreement to produce records responsive to the subpoena, the Herald granted a six-week extension for the deposition. It later extended the

---

[1] During the pendency of this dispute Wolinsky was acquired by Miller Kaplan. Although Miller Kaplan is now the objector and appellant, for ease of reference and to harmonize our discussion with the briefs and the record below we will refer to it as Wolinsky.

[2] Undesignated statutory references are to the Code of Civil Procedure.

deposition date a second time based on Wolinsky's representation that it had over 30 boxes of documents plus emails to produce.

At the September 16, 2010 deposition, Wolinsky's custodian of records appeared with no documents but testified he had turned over 13 boxes of records to Wolinsky's attorney, along with CD's containing approximately 1,250 emails and 400 electronic files. The only records produced during the deposition were a single box produced by Wolinsky's attorney. Wolinsky refused to provide a privilege log describing the withheld items and grounds on which they were being withheld. Its attorney represented he was withholding four and one-half boxes of royalty statements and related material pending execution of a confidentiality agreement and protective order.

After meet-and-confer efforts failed to resolve the dispute, the Herald filed in Los Angeles County Superior Court a petition for an order compelling Wolinsky to produce all remaining responsive documents and, with respect to any withheld documents, a privilege log. It sought $9,955 in sanctions to cover the costs of preparing the petition.

After the Herald filed its petition, Wolinsky produced 100 pages of handwritten notes, four and one-half boxes of royalty statements, and 45 pages of emails, but no privilege log.

On December 20, 2010, the day before the hearing on the Herald's petition to compel, the trial court issued a seven-paragraph tentative ruling in which it granted the petition and ordered Wolinsky to pay $4,500 in sanctions. The portion of the tentative ruling pertaining to sanctions provided as follows: "The Request for Sanctions is granted in the amount of $4500 against Wolinsky. C.C.P. § 1987.2 provides that the court may, in its discretion, award the amount of the reasonable expenses incurred in making a motion to compel production under C.C.P. § 1987(c), if the court finds that the motion was opposed in bad faith or without substantial justification. Here, Wolinsky opposed this motion without substantial justification. Wolinsky was informed by the moving papers that the Massachusetts Superior Court had specifically approved the document requests, and yet argued extensively that it was not required to respond because the requests were overbroad and unduly burdensome. Moreover, Wolinsky refused to

comply with the Subpoena's explicit court-approved direction to explain its assertions of privilege. Wolinsky also unreasonably delayed in its production of documents by only completing its production on December 3, 2010 the day of a scheduled deposition which Defendant's counsel flew across the country to attend."

At the hearing on December 21, 2010, the trial court made no comment on its sanctions ruling.

On February 1, 2011, the court issued a final order granting the petition. Unlike the tentative ruling, the final order omitted the paragraph in which the court found Wolinsky opposed the motion without substantial justification, replacing it with the following: "The Court also finds that sanctions are warranted, however, the Court in its discretion, awards the reduced amount of $4,500.00 against Wolinsky. See C.C.P. § 1987.2."

Wolinsky thereafter produced a privilege log and paid the sanctions. It now appeals the sanctions award.

DISCUSSION

I. Appealability of the Sanctions Order

Preliminarily, we consider whether the order granting the Herald's request for sanctions is appealable. The Herald contends the order is not appealable because section 2029.650, subdivision (a), of the Interstate and International Depositions and Discovery Act, pursuant to which the instant discovery proceeded, provides that no order under the act is appealable, but may be reviewed only by petition for an extraordinary writ.[3]

We disagree. Here, the trial court imposed sanctions under section 1987.2, subdivision (a), not the Interstate and International Depositions and Discovery Act, which

---

[3] Subdivision (a) of section 2029.650 provides: "If a superior court issues an order granting, denying, or otherwise resolving a petition under Section 2029.600 or 2029.620, a person aggrieved by the order may petition the appropriate court of appeal for an extraordinary writ. No order or other action of a court under this article is appealable in this state."

contains no sanctions provision. The question is whether a sanctions order pursuant to section 1987.2 is appealable. We conclude it is.

Pursuant to the one judgment rule, an appeal may generally be taken only from a judgment. "'"The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case."' [Citation.] [¶] '"A necessary exception to the one final judgment rule is recognized where there is a final determination of some collateral matter distinct and severable from the general subject of the litigation. If, e.g., this determination requires the aggrieved party immediately to pay money or perform some other act, he is entitled to appeal even though litigation of the main issues continues. Such a determination is substantially the same as a final judgment in an independent proceeding. [Citations.]"' [Citation.]" (*Brun v. Bailey* (1994) 27 Cal.App.4th 641, 648, superseded by statute on other grounds as stated in *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc*. (2005) 127 Cal.App.4th 387, 396, fn. 7.) Final collateral orders that direct payment of money are appealable. (*Id*. at p. 649.)

Here, the sanctions issue is a collateral matter distinct and severable from the subject of the underlying litigation. Because Wolinsky's appeal from the order "can have no effect on the course of the underlying litigation," the order granting sanctions "finally determined the rights of the parties to that collateral matter, leaving no further judicial action to be performed." (*Brun v. Bailey*, *supra*, 27 Cal.App.4th at p. 650.) Accordingly, we hold the order granting sanctions is appealable.

II. Due Process

Wolinsky contends the sanctions final order violated its due process rights because it was unaccompanied by any statement of the basis for the sanctions. We agree.

"Fairness and effective appellate review require that where the court exercises its discretion to issue sanctions, it delineate the specific acts upon which the sanctions are awarded." (*First City Properties, Inc. v. MacAdam* (1996) 49 Cal.App.4th 507, 515.) "[T]he purpose of detailed findings 'is to fulfill the "rudiments" of due process required

for governmental imposition of a penalty upon an attorney or party—both for due-process' own, constitutional sake and to ensure that the power conferred by the statute will not be abused. [Citations.]' . . . '"[I]n some cases the court's recitation will be an invaluable aid to a reviewing court determining whether the trial court abused its discretion in awarding sanctions. [Citation.]" [Citation.]' [Citation.] . . . 'Just as with the issue of notice and opportunity to be heard, due process requires that any order giving rise to the imposition of sanctions state with particularity the basis for finding a violation of the rule. [Citation.]'" (*Id*. at p. 516.) These requirements pertain to sanctions imposed pursuant to section 1987.2. (*Ibid*.) "[W]hen an appeal is processed on a standard of abuse of discretion, the party aggrieved must be put on notice of the acts for which it was sanctioned in order to mount an effective review. Failure to delineate the grounds for exercise of discretion precludes meaningful review, a denial of due process." (*Ibid*.)

The trial court here gave no explanation for imposing sanctions, stating only that it found them to be warranted. The court thus failed to delineate the grounds for its exercise of discretion and precluded any meaningful review of the ruling. This was error requiring reversal.

The Herald argues written findings are not required for issuance of sanctions in routine discovery disputes. We do not disagree. But those routine disputes generally involve discovery statutes that mandate imposition of monetary sanctions against a party "who unsuccessfully makes or opposes a motion to compel an answer or production, unless . . . the one subject to the sanction acted with substantial justification or . . . other circumstances make the imposition of the sanction unjust." (§ 2025.480, subd. (f); see also § 2023.030, subd. (a).) These provisions create a presumption that sanctions shall be awarded against a losing party and give notice that unsuccessful, substantially unjustified opposition to a motion to compel discovery is itself sufficient grounds for sanctions.

The sanctions ordered here were imposed pursuant to section 1987.2, which contains neither a mandate for sanctions nor an explanation of the specific conduct that would constitute grounds for imposing them. Section 1987.2 provides only that the court

may in its discretion award sanctions against a party who unsuccessfully opposes a discovery motion in bad faith or without substantial justification. Unlike other discovery statutes, which by their language put the losing party on notice of the reason for imposition of sanctions, section 1987.2 gives no such explanation. (See *First City Properties v. MacAdam, supra*, 49 Cal.App.4th at p. 515 ["we cannot agree that treatment of sanctions pursuant to section 1987.2 falls within the same purview as issuance of discovery sanctions"].) When in addition to statutory silence the court is *also* silent as to the specific acts upon which the sanctions are based, the sanctioned party is left with no notice of the grounds for sanctions and no opportunity to mount an effective review.

The Herald argues that even if a statement of reasons is required for a discretionary award of sanctions, the court gave "more than adequate notice" in its tentative ruling. We disagree.

Although in its tentative ruling the court stated Wolinsky opposed the Herald's motion in bad faith or without substantial justification, giving examples, it conspicuously omitted that explanation in the final order. The omission was apparently deliberate, as the final order otherwise tracked the seven-paragraph tentative ruling almost verbatim. Given that in the final order the trial court adhered to its tentative ruling in all material respects except for the explanation of grounds for sanctions, which was abandoned, we cannot agree that the court intended to rely on its tentative rationale for imposing sanctions or that the final order provided adequate notice of the grounds for the sanctions award.

The Herald argues Wolinsky waived the lack of notice issue by failing to raise the issue at the hearing on its motion to compel. The argument is meritless. Wolinsky could hardly complain at a December 2010 hearing about deficiencies in an order issued without further hearing in February 2011.

In a situation such as this, where it is unclear why the court issued discretionary sanctions, due process has not been complied with. The sanctions order is therefore reversed. We need not reach Wolinsky's argument that the sanctions were substantively unwarranted.

DISPOSITION

The sanctions order is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.