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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SEYED RAHIM SHAFAGHIHA, Plaintiff and Appellant, v. MOHAMMAD ALI ALIKANI et al., Defendants and Respondents.	B236710 (Los Angeles County Super. Ct. No. BC400862)

APPEAL from a judgment of the Superior Court of Los Angeles County, David L. Minning, Judge. Affirmed.

Jance M. Weberman for Plaintiff and Appellant.

Jonathan L. Nielsen for Defendants and Respondents.

Plaintiff and appellant Seyed Rahim Shafaghiha (Plaintiff) appeals a judgment dismissing with prejudice his complaint against defendants and respondents Mohammad Ali Alikani (Alikani) and JPA Western Product Distribution Co., Inc. (JPA) (collectively, Defendants), following the grant of Defendants' motion for terminating sanctions.

After the trial court denied Plaintiff's disqualification motion (Code Civ. Proc., § 170.6)[1] as untimely, Plaintiff, through his counsel, Jance M. Weberman (Weberman), attempted to defraud the court by adding a sham defendant, Manoucher Yomtoubian (Yomtoubian), in order to assert a timely peremptory challenge to the trial judge. Given this egregious misconduct, the trial court properly exercised its inherent power to dismiss the action. The judgment of dismissal is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On October 29, 2008, Plaintiff filed the initial complaint, suing for breach of contract. The action arose out of Plaintiff's alleged investment of $650,000 in JPA at Alikani's behest. Plaintiff claims he was "quickly forced out of the corporation," he was defrauded, and that the corporation was "worthless."

On February 23, 2011, Plaintiff failed to appear for his deposition. The trial court issued an order to show cause re dismissal of the entire action, to be heard on March 25, 2011.

1. *Plaintiff's attempts to disqualify the trial judge.*

On March 11, 2011, two weeks before the scheduled hearing on the order to show cause, Plaintiff filed a motion to disqualify the trial judge, Judge David L. Minning, for cause. (§ 170.6.) The supporting declaration of Plaintiff's counsel, Weberman, stated: "That Judge David L. Minning before whom the case is assigned and is set for trial and I have appeared on several discovery motions, is

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[1] All further statutory references are to the Code of Civil Procedure.

[2] The facts are gleaned from the minimal record on appeal.

prejudiced against Plaintiff and this declarant, his attorney, so that this declarant cannot or believes that he cannot have a fair and impartial trial and or hearing before the judge."

On March 16, 2011, the trial court denied Plaintiff's disqualification motion as untimely.

After Plaintiff failed to disqualify Judge Minning, he made another attempt to do so, by introducing a new party into the litigation. Those events are the crux of this appeal.

On March 24, 2011, one day before the hearing on the order to show cause, three filings occurred in the action: (1) Plaintiff filed a Doe amendment, naming Yomtoubian as a defendant in the action; (2) Yomtoubian, in pro per, filed an answer, on the very same day he was named as a defendant; and (3) Yomtoubian simultaneously filed a peremptory challenge to Judge Minning.

On March 25, 2011, at the hearing on the order to show cause, Weberman stated to the trial court: "I've been informed that a new defendant has been added to the case. Manoucher [Yomtoubian]. We received an answer from him and a filing of a [section] 170.6."

The trial court rejected Yomtoubian's section 170.6 challenge as improperly filed, noting that Yomtoubian's affidavit incorrectly identified Yomtoubian as a *cross-defendant*, while Plaintiff's Doe amendment named Yomtoubian as a *defendant*.[3] As for the pending order to show cause re dismissal, the trial court vacated it, stating, "We are not going to do that."

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[3] The March 24, 2011 answer which Yomtoubian purportedly filed indicated it was an answer to a cross-complaint filed by Alikani and JPA. However, the Doe amendment by Plaintiff brought in Yomtoubian as a *defendant*, not a cross-defendant. At the hearing on the order to show cause, Weberman attributed the discrepancy to confusion on the part of Yomtoubian. Weberman stated to the trial court: "If the 170.6 identifies him as a cross-defendant, that is maybe his understanding of it, but I believe he is a defendant in this lawsuit."

On March 28, 2011, the trial court was presented with an amended section 170.6 challenge from "defendant" Yomtoubian.

On April 1, 2011, the defense moved for ex parte relief to stop the "sham" section 170.6 filing. The trial court ordered all parties and their counsel to appear for an evidentiary hearing on April 11, 2011.[4]

2. *Evidentiary hearing on Yomtoubian's role in the litigation*.

On April 11, 2011, the matter came on for an "evidentiary hearing on [defendants'] 4/01/11 ex parte application for orders (1) striking defendant Manoucher Yomtoubian's amended [section] 170.6 peremptory challenge as fraud/sham, (2) requiring said defendant and plaintiff's counsel be examined by the court re: defendant's affiliation/relationship with plaintiff's counsel, his involvement in this action, and re: the filing of the [section]170.6 challenge, and (3) setting an OSC re: dismissal of the entire action and/or sanctions due to the fraudulent [section] 170.6 filing and/or other sham pleadings." Yomtoubian was present and was represented by his own counsel.

Yomtoubian was sworn and questioned by the court. The court asked Yomtoubian whether he had previously seen exhibit 1 (Plaintiff's 3/24/11 Doe amendment). Yomtoubian stated: "I don't recall." The court asked Yomtoubian whether he had previously seen exhibit 2 (Yomtoubian's 3/24/11 peremptory challenge). Yomtoubian's counsel stated: "My client . . . is going to assert his 5th Amendment rights to avoid incriminating himself." Next, Yomtoubian declined to answer whether it was his signature which appeared on the bottom of exhibit 2. Finally, the trial court asked Yomtoubian whether he had previously seen exhibit 3 (Yomtoubian's 3/28/11 amended peremptory challenge), and whether it was his

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[4] On April 8, 2011, Plaintiff filed a petition for writ of mandate and emergency request to stay the proceedings. (No. B232185.) On April 11, 2011, this court summarily denied the request.

signature which appeared on the bottom of exhibit 3. Yomtoubian, through counsel, again asserted his Fifth Amendment right to those inquiries.

The trial court then ruled: "The sole purpose of my inquiry at this point in time is to determine if a party has made a [section] 170.6 filing and if it was made in a timely manner. I am unable to establish that a party has made such a filing. So therefore it is rejected."

With respect to the defense argument that a serious fraud had been committed, or attempted to be committed on the court, the trial court stated: "These are very serious matters that you are talking about. . . . I will not hear them on an ex parte basis. If you wish to continue in this vein, you may file a motion to that end."

3. *Plaintiff dismissed Yomtoubian from the action one day after Defendants propounded discovery to Yomtoubian*.

On May 9, 2011, Defendants served Yomtoubian with requests for admissions, asking Yomtoubian to admit that Weberman had drafted his answer, that the only reason he was added to the case was to help Plaintiff in his attempt to disqualify Judge Minning, and that prior to this litigation, Yomtoubian had no dealings with either Alikani or JPA.

On May 10, 2011, one day after Defendants served Yomtoubian with the request for admissions, Plaintiff dismissed Yomtoubian from the action with prejudice.

4. *Motion for terminating sanctions.*

On July 29, 2011, Defendants filed a motion for terminating sanctions, invoking the court's inherent discretionary power to dismiss a claim with prejudice for deliberate and egregious litigation misconduct. The moving papers set forth the efforts of Plaintiff, through his counsel, to defraud the court by adding a sham defendant, Yomtoubian, in order to effectuate a fraudulent section 170.6 challenge so as to have Judge Minning disqualified.

The moving papers asserted there could be no doubt that a fraud was being perpetrated on the court. For example, the front page of Yomtoubian's answer, filed March 24, 2011, *in pro per,* showed his address was 550 S. Hill Street in downtown Los Angeles. However, the proof of service which accompanied the answer indicated Yomtoubian's business address was "3700 Wilshire Boulevard, Suite 540, Los Angeles, California 90010." (See Clerk's Transcript, pp. 77, 81.) 3700 Wilshire Boulevard was, and is, *Weberman's* office address. The fact that Yomtoubian's papers contained Weberman's address on the proof of service showed that Yomtoubian's inclusion in the litigation was a sham.

Plaintiff's opposing papers were silent as to Yomtoubian's inclusion and then sudden dismissal from the litigation. There was no attempt to explain how Yomtoubian could have been served with the Doe amendment on March 24, 2011, and then file an answer and a peremptory challenge at the same time. Likewise, there was no explanation for why Weberman's office address appeared on the proof of service accompanying Yomtoubian's answer.

The opposition papers were supported by a one-page declaration by Weberman. The declaration was argumentative, not factual. Weberman stated he was "amazed" at the movants' failure to cite pertinent statutory authority, he asserted the motion for terminating sanctions "should be subject to Anti-Slapp statutes," and he requested $1,420 in sanctions.

After hearing the matter, the trial court granted Defendants' motion for terminating sanctions and entered judgment dismissing Plaintiff's complaint with prejudice. This appeal followed.

CONTENTIONS

Plaintiff contends: the trial court committed reversible error when it conducted a hearing pursuant to an ex parte motion which challenged the attorney-client relationship; the trial court lacked statutory authority to dismiss Plaintiff's complaint in that discretionary authority to dismiss is limited to a failure by a plaintiff to prosecute or where the complaint is shown to be fictitious or a sham;

the trial court lacked statutory authority to dismiss Plaintiff's case and committed prejudicial error mandating reversal of the judgment; terminating sanctions are only applied where there is deliberate egregious misconduct that makes a fair trial impossible; before issuing terminating sanctions, the court must provide a warning to Plaintiff; the choice of sanction cannot provide a windfall to the moving party; and dismissal of Plaintiff's complaint is far too drastic a sanction for the alleged harm, if any, committed by Plaintiff.

DISCUSSION

1. *Appealability.*

The trial court dismissed Plaintiff's complaint against Defendants, while Defendants' cross-complaint against Plaintiff remained extant. Because the September 19, 2011 judgment of dismissal did not adjudicate the issues raised by the cross-complaint, it is not a final judgment and therefore is not appealable. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 117, p. 180.)

However, because the issues have been fully briefed by the parties, we deem it proper to treat the purported appeal as a petition for writ of mandate, and proceed on that basis. As stated in *Green v. GTE California, Inc*. (1994) 29 Cal.App.4th 407 [purported appeal from discovery order], "we treat the attempted appeal as a writ petition. We hope to end this tasteless episode. [Citations.]" (*Id*. at p. 410.) No court "should have to review these facts again." (*Id*. at p. 408.)

2. *Trial court's inherent power to terminate litigation for deliberate and egregious misconduct.*

California courts "have inherent power to terminate litigation for deliberate and egregious misconduct when no other remedy can restore fairness." (*Stephen Slesinger, Inc. v. Walt Disney Co*. (2007) 155 Cal.App.4th 736, 761 (*Slesinger*).) " 'Courts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system.' " (*Id*. at p. 762.) When a plaintiff's "deliberate and

egregious misconduct in the course of the litigation renders any sanction short of dismissal inadequate to protect the fairness of the trial, California courts necessarily have the power to preserve their integrity by dismissing the action. Without such power, the court would sacrifice its essential role of determining, in accordance with the fair application of relevant law, who should prevail in the case or controversy presented." (*Ibid*.)

Further, "a court's exercise of inherent power to dismiss for misconduct need not be preceded by violation of a court order. The essential requirement is to calibrate the sanction to the wrong. Whether the misconduct violates a court order is relevant to the exercise of inherent power, but it does not define the boundary of the power. (See, e.g., *Cummings v. Wayne Co.*, *supra,* 533 N.W.2d at p. 14 [witness tampering]; *Aoude, supra,* 892 F.2d at pp. 1118–1119 [fabrication of evidence and other acts constituting a 'fraud on the court'].) The decision whether to exercise the inherent power to dismiss requires consideration of all relevant circumstances, including the nature of the misconduct (which must be deliberate and egregious, but may or may not violate a prior court order), the strong preference for adjudicating claims on the merits, the integrity of the court as an institution of justice, the effect of the misconduct on a fair resolution of the case, and the availability of other sanctions to cure the harm. [Citations.] . . . . [W]hen the plaintiff has engaged in misconduct during the course of the litigation that is deliberate, that is egregious, and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial, the trial court has the inherent power to dismiss the action. Such an exercise of inherent authority is essential for every California court to remain ' "a place where justice is judicially administered." ' [Citations.]" (*Slesinger, supra*, 155 Cal.App.4th at pp. 763-765, fns. omitted.)

3. *Trial court properly exercised its inherent power to impose a terminating sanction for egregious misconduct*.

a. *Standard of appellate review*.

Having determined the trial court possesses the inherent power to issue a terminating sanction for egregious misconduct, we now consider whether, in the present case, the trial court properly exercised that power. (*Slesinger*, *supra*, 155 Cal.App.4th at p. 765.) Our review is for an abuse of discretion. (*Ibid*.) We view the entire record in the light most favorable to the court's ruling, and draw all reasonable inferences in support of it. (*Ibid*.) We also defer to the trial court's credibility determinations. (*Ibid*.) The trial court's decision will be reversed only for manifest abuse exceeding the bounds of reason. (*Ibid*.)

b. *Record supports trial court's exercise of its inherent power to impose a terminating sanction.*

(1) *No due process violation.*

Plaintiff contends the trial court erred in conducting a hearing pursuant to an ex parte application which challenged the attorney/client relationship. The argument lacks merit. The record clearly shows Plaintiff had notice and had the opportunity to be heard.

As set forth above, on April 1, 2011, the defense moved for ex parte relief to stop Yomtoubian's "sham" section 170.6 filing. The trial court then ordered all parties and their counsel to appear for an evidentiary hearing on April 11, 2011.

On April 11, 2011 the matter came on for an "evidentiary hearing on [defendants'] 4/01/11 ex parte application for orders (1) striking defendant Manoucher Yomtoubian's amended [section] 170.6 peremptory challenge as fraud/sham, (2) requiring said defendant and plaintiff's counsel be examined by the court re: defendant's affiliation/relationship with plaintiff's counsel, his involvement in this action, and re: the filing of the [section] 170.6 challenge, and (3) setting an OSC re: dismissal of the entire action and/or sanctions due to the fraudulent [section] 170.6 filing and/or other sham pleadings."

Yomtoubian appeared at the April 11, 2011 evidentiary hearing for questioning by the trial court. Yomtoubian was represented at the hearing by his own counsel. Weberman also was present at the hearing, on behalf of Plaintiff. At said hearing, the trial court determined that Yomtoubian had not filed the section 170.6 challenge, and on that basis rejected the challenge.

Thereafter, Defendants filed a noticed motion for terminating sanctions, which resulted in the dismissal of Plaintiff's complaint with prejudice.

In sum, Plaintiff's contention the trial court improperly proceeded on an ex parte basis is without merit.

(2) *Record establishes Plaintiff/Weberman engaged in deliberate and egregious misconduct.*

To recount, on March 16, 2011, Judge Minning denied Plaintiff's disqualification motion (§ 170.6) as untimely. Plaintiff then sought to remove Judge Minning through indirect means. Plaintiff, through Weberman, his attorney, attempted to defraud the trial court by adding Yomtoubian as a sham defendant in order to assert a new peremptory challenge to Judge Minning.

On March 24, 2011, one day before the hearing on a pending order to show cause, three filings occurred in the action: (1) Plaintiff filed a Doe amendment, naming Yomtoubian as a defendant in the action; (2) Yomtoubian, in pro per, filed an answer, on the very same day he was named as a defendant; and (3) Yomtoubian concurrently filed a peremptory challenge to Judge Minning. Further, Yomtoubian's answer, which he purportedly filed in pro per, showed Weberman's office address on the proof of service as Yomtoubian's business address, instead of Yomtoubian's office address. The only reasonable inference to be drawn from these circumstances is that Yomtoubian's role in the litigation was orchestrated by Weberman, in a renewed attempt to remove Judge Minning from the matter.

Irrespective of the extent of Plaintiff's personal involvement in this scheme, Plaintiff is responsible for the acts of his attorney. Clients "must be held accountable for the acts and omissions of their attorneys." (*Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership* (1993) 507 U.S. 380, 396.) Plaintiff " 'voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." ' [Citation.]" (*Id*. at p. 397.)

Lastly, Plaintiff contends the trial court should have imposed a lesser sanction. The argument is unavailing. This is not simply a case of discovery abuse. Rather, this case involves misconduct of the most serious nature, in that Plaintiff/Weberman tried to perpetrate a fraud on the court. The "question before us is not whether the superior court should have imposed a lesser sanction but rather 'whether the trial court abused its discretion by imposing the sanction it chose.' " (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1546.) Plaintiff fails to explain how some lesser sanction, such as a monetary sanction, an evidence sanction, or an issue sanction, could remedy the harm caused by Plaintiff's egregious scheme to deceive the court and undermine the orderly administration of justice. On the record presented, the trial court properly determined that any sanction other than dismissal would be inadequate.

DISPOSITION

The September 19, 2011 judgment dismissing Plaintiff's complaint is affirmed. Defendants shall recover their costs on appeal. The clerk of this court is directed to forward a copy of this opinion to the State Bar of California (re Jance M. Weberman, State Bar No. 152723).

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.