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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

JUVENAL G. GARCIA, Plaintiff and Appellant, v. VP PARTNERS, INC., et al. Defendants and Respondents.	B272339 (Los Angeles County Super. Ct. No. BC593793)

APPEAL from order and judgment of the Superior Court of Los Angeles County, Frederick Carl Shaller, Judge. Affirmed.

Law Offices of Vincent W. Davis & Associates, Vincent W. Davis and Stephanie M. Davis, for Plaintiff and Appellant.

Thompson Coe & O'Meara, Frances M. O'Meara, Stephen M. Caine, and Kenny C. Brooks, for Defendants and Respondents.

Plaintiff and appellant Juvenal G. Garcia, represented by his now-deceased attorney Patrick L. Swanstrom, filed a five-count complaint against various defendants, including respondents VP Partners, Inc., John Parenti, and Julio Samayo (collectively respondents), relating to a real estate transaction in which Garcia lost title to his property. The trial court granted respondents' unopposed motion for sanctions against Garcia and Swanstrom for filing a frivolous complaint pursuant to Code of Civil Procedure section 128.7.[1] After the sanctions order was granted, the court deemed respondents' pending demurrers moot and ordered Garcia's complaint dismissed with prejudice.

Garcia appeals from the sanctions order and dismissal, arguing that: (1) the trial court's finding that VP Partners complied with the mandatory 21-day safe harbor provision of section 128.7 is not supported by the evidence; (2) the proof of service dated November 12, 2015, reflects the service of several documents but not service of the motion for sanctions; (3) the notice of amended proof of service was insufficient to establish that the motion for sanctions was served by mail on November 12, 2015; and (4) because the

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[1] Statutory references are to the Code of Civil Procedure unless otherwise stated.

sanctions motion was defective, the joinder by Samayo and Parenti in the motion was also defective, and the dismissal as to Samayo and Parenti must also be reversed.[2] We affirm.

PROCEDURAL HISTORY

Swanstrom, as counsel for Garcia, filed a complaint alleging five causes of action against various defendants, including respondents Samayo, Parenti, and VP Partners, Inc. (erroneously named as Partners Real Estate), relating to the failed refinancing and foreclosure of property Garcia owned. The details of the complaint are not relevant to this appeal, as Garcia makes no argument relating to the adequacy of the complaint.

Two demurrers were filed by VP Partners. The first was filed on October 26, 2015, by VP Partners. The second demurrer was filed on November 4, 2015, by VP Partners dba Back Bay Funding.

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[2] In a conclusory argument, unsupported by authority and not listed in a separate heading or subheading, Garcia argues that dismissal as to defendants other than respondents was improper. We disregard the argument as not being properly set forth in the briefs or supported by authority or argument. (Cal. Rules of Court, rule 8.204(a)(1)(B) [a brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority].)

VP Partners was represented by attorney J. Scott Souders. On October 26, 2015, Souders wrote a letter to Swanstrom, explaining that VP Partners dba Back Bay intended to demur to Garcia's complaint. Souders's letter set forth in detail why the complaint failed to allege sufficient facts against Back Bay. He demanded that the complaint be withdrawn. Souders wrote that the complaint was without legal and/or factual justification, and VP Partners would seek sanctions under section 128.7 if the complaint was not immediately dismissed.

No action was taken by Swanstrom or Garcia to dismiss the complaint as to VP Partners. VP Partners served Swanstrom on November 12, 2015, with a notice of motion and motion for sanctions under section 128.7 against Swanstrom and Garcia in the amount of $9,247.50. Documents relating to a demurrer were served at the same time. A proof of service by mail was dated November 12, 2015. The proof of service *did not* list the section 128.7 sanctions motion as one of the documents being served on Swanstrom. The proof of service indicated the documents served by mail were the notice of demurrer and demurrer to the complaint, memorandum of points and authorities, and declaration of Souders in support thereof pursuant to section 430.41. A footer at the bottom of the proof of service bore the title, "NOTICE OF MOTION AND MOTION FOR SANCTIONS AND DISMISSAL WITH PREJUDICE."

VP Partners filed a motion for sanctions pursuant to section 128.7 on December 8, 2015. On January 8, 2016, VP

Partners filed an "amended proof of service re: notice of motion and motion for sanctions pursuant to C.C.P. § 128.7 . . . [and] memorandum of points and authorities and declarations in support thereof." The body of the amended proof of service indicated that the sanctions motion had been served on November 12, 2015.

On February 17, 2016, Samayo and Parenti filed a notice of motion for joinder in VP Partners' motion for sanctions under section 128.7. On February 26, 2016, VP Partners filed a notice of order to show cause requiring Garcia to personally appear in court on March 17, 2017, and show cause why the court should not deem plaintiff in pro per due to the death of counsel Swanstrom and Garcia having failed to obtain new counsel and/or otherwise appear in pro. per.

The court conducted a hearing on March 17, 2017. According to the minute order, the office of Vincent Davis called the court to indicate he would appear for Garcia at approximately 9:30 a.m. The hearing commenced at 8:45 a.m. Counsel for respondents advised the court that no substitution of counsel was filed on behalf of Garcia. Garcia did not appear in court. The court granted the motion for sanctions, finding that VP Partners complied with the 21-day safe harbor provision of section 128.7, and that Garcia's complaint was frivolous and was asserted for an improper purpose. The motion for joinder in the sanctions motion filed by Samayo and Parenti was granted. The complaint was ordered dismissed, and the demurrers were taken off

calendar as moot. The court's minute order reflected that attorney Davis arrived in court at 9:20 a.m.

DISCUSSION

Garcia argues the trial court committed reversible error in finding that VP Partners complied with the 21-day safe harbor provision of section 128.7, subdivision (c). Garcia also argues the proof of service on the sanctions motion was defective, because the sanctions motion was not listed as one of the documents served, and as a result the 21-day safe harbor period did not commence. In addition, Garcia contends the amended proof of service did not cure the defect in the original proof of service. Finally, Garcia argues any sanctions ordered in favor of Samayo and Parenti, and the dismissals in their favor, must be reversed because the rulings were based on their joinder in VP Partners' defective sanctions motion.[3]

Standard of Review

"Ordinarily, a ruling on a motion for sanctions brought under section 128.7 is reviewed under a deferential abuse-of-

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[3] Garcia asserts in one sentence, without citation to the record, citation of authority, or argument, that defendants other than respondents did not join in the sanctions motion and their dismissals must be reversed. We reject, and do not discuss, this undeveloped argument.

discretion standard. (*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 698; *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167; cf. *Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 401–405 (*Cooter & Gell*) ['an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination'].) [Fn. omitted.] But where a question of statutory construction is presented in the course of the review of a discretionary decision, such issues are legal matters subject to de novo review. (*Pineda v. Williams–Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529; see *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175 . . . ." (*Optimal Markets, Inc. v. Salant* (2013) 221 Cal.App.4th 912, 921–922.)

"'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "[A]n appellate court will ordinarily not consider procedural defects or erroneous rulings where an objection could have been, but was not raised below. [Citation.] The policy behind the rule is fairness. 'Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider.' [Citations.]" (*In re*

Marriage of Falcone & Fyke (2008) 164 Cal.App.4th 814, 826 (*Marriage of Falcone*).)

Sanctions under Section 128.7

"Code of Civil Procedure section 128.7 (section 128.7) authorizes trial courts to impose sanctions to check abuses in the filing of pleadings, petitions, written notices of motions or similar papers. Sanctions may include payment to the movant of attorney fees incurred as a consequence of the violation. (§ 128.7, subd. (d).)" (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 514.)

A safe harbor provision is included in section 128.7, subdivision (c)(1): "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. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees."

"[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, 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." (*Li v. Majestic Industrial Hills LLC* (2009) 177 Cal.App.4th 585, 595 (*Li*).)

Analysis

We examine VP Partners' motion for sanctions against the statutory requirements. In doing so, we bear in mind that the motion was unopposed in the trial court, the issues raised on appeal are limited, and it is Garcia's burden to establish reversible error.

First, section 127.8 requires a separate motion for sanctions. The requirement of a separate motion was satisfied when VP Partners filed its sanctions motion on December 8, 2015.

Second, the sanctions motion must be served pursuant to section 1010. VP Partners' motion for sanctions was in writing, it included a notice of motion, and it was served by mail on November 12, 2015, as we explain below.

Garcia argues the sanctions motion was not properly served by mail because the November 12, 2015 proof of service did not mention the motion as among the documents served. Garcia is correct that the sanctions motion is not listed in the original proof of service, which indicates the

served documents were the notice of demurrer, demurrer, memorandum of points and authorities, and declaration pursuant to section 430.41.

Garcia's argument regarding the proof of service ultimately fails because on January 8, 2016, VP Partners filed an amended proof of service. The amended proof of service stated that Swanstrom had been served on November 12, 2015, with the notice of motion and motion for sanctions. The amended proof of service was served on Swanstrom by mail on January 7, 2016. No objection was made in the trial court to the amended proof of service.

It has long been the law in California that a defective proof of service may be amended to cure an error. "'It is the fact of service of process which confers jurisdiction, and it is a familiar practice in California, as well as elsewhere, when the proof of such service is absent or defective, to permit it to be amended or supplied.' [¶] And again: 'To support judgments entered upon insufficient proof of service of process, or without the proof of such service appearing in the record, courts have uniformly permitted such proof to be amended or supplied, not for the purpose of authorizing them to enter new judgments based upon such proof, but to show that judgments previously entered were not entered without jurisdiction, and are not, and never were, void,' citing *Allison v. Thomas*, 72 Cal. 562, and numerous other cases. [¶] We conclude, therefore, in view of the authorities, that the judgment in question was not void, and the court did not err in permitting the amended affidavit of service to

be filed." (*Herman v. Santee* (1894) 103 Cal. 519, 524–525 (*Herman*); see also *Allison v. Thomas* (1887) 72 Cal. 562, 564 ["The officer may always amend his return if there are no intervening rights which would be affected"].)

Garcia claims the amended proof of service was invalid because neither Souders or Jessica Holt, who signed the November 12, 2015 proof of service, declared under penalty of perjury that service of the sanctions motion had been perfected by mail, as required by section 1013, subdivision (a). The issue is forfeited because it is raised for the first time on appeal. Assuming there was a defect in the amended proof of service, it could have been easily cured by VP Partners had an objection been made. In the absence of an objection, the trial court was not alerted to the alleged defect, and we are unwilling to reverse on a ground never called to the court's attention. Not only did Garcia fail to object to the amended proof of service, he made no attempt to call the issue to the trial court's attention pursuant to section 473 after the sanctions motion was granted and dismissal was ordered. "[A]n appellate court will ordinarily not consider procedural defects or erroneous rulings where an objection could have been, but was not raised below." (*Marriage of Falcone*, *supra*, 164 Cal.App.4th at p. 826.) Having made no argument in the trial court on the form of service, Garcia "cannot now be heard to complain of the action of the court on this ground." (*Herman*, *supra*, 103 Cal. at p. 525.)

Third, Garcia claims VP Partners did not comply with the 21-day safe harbor period of section 128.7, subdivision (c)(1). We have concluded, based on the amended proof of service, that Swanstrom was served with the sanctions motion by mail on November 12, 2015. The sanctions motion was filed in court 26 days later on December 8, 2016. By the time the sanctions motion was filed in court on December 8, the complaint had not been withdrawn "within 21 days after service of the motion." (§ 128.7, subd. (c)(1).)

Our calculation that the sanctions motion was filed in court 26 days after service of the motion on Swanstrom does not take into account whether the safe harbor period was extended by five days because the motion was served by mail in California. (§ 1013.) *Marriage of Falcone*, *supra*, 164 Cal.App.4th at page 826 expressly held that a contention that application of section 1013's five-day extension applies to service of a sanctions motion by mail is forfeited if, as here, the issue is not raised in the trial court. In accord with *Marriage of Falcone*, we hold any claim that section 1013 applies in this case is forfeited. Even if the five-day extension of time for service by mail under section 1013 applied, the sanctions motion was served by VP partners on Swanstrom exactly "21 days before the hearing on the challenged document." (*Li*, *supra*, 177 Cal.App.4th at p. 592, citing *Day v. Collingwood* (2006) 144 Cal.App.4th 1116, 1129.) The record establishes compliance with the safe harbor provision. Finally, we point out that the hearing on the sanctions motion was not conducted until three months

after the motion was filed in court, and at no time did Garcia object or attempt to withdraw the complaint.

Finally, we reject Garcia's argument that Samayo and Parenti joined in a VP Partners's defective sanctions motion. We have determined that the sanctions motion was properly filed and granted under section 128.7, and Garcia fails to develop any argument that requires reversal of the dismissal in favor of Samayo and Parenti.

DISPOSITION

The sanctions order and dismissals are affirmed. Respondents are awarded costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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