Filed 9/12/18 Andrews v. Mobile Aire Estates CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOEL ANDREWS et al.,

Plaintiffs and Appellants,

v.

MOBILE AIRE ESTATES et al.,

Defendants and Respondents.

B276389
(Los Angeles County
Super. Ct. No. KC063123)

APPEAL from orders of the Superior Court of Los Angeles County, Dan Thomas Oki, Judge. Affirmed.

Law Office of John V. Gaule and John V. Gaule for Plaintiffs and Appellants.

Anderson, McPharlin & Conners and Eric A. Schneider for Defendant and Respondent Sierra Corporate Management, Inc.

As a sanction for discovery abuse, the trial court dismissed the underlying action by appellants Joel and Telma Andrews against respondent Sierra Corporate Management, Inc. (Sierra). We reject appellants' challenges to the dismissal and affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The limited record before us discloses the following facts: In February 2012, appellants initiated the underlying action against Sierra, Mobile Aire Estates, and Lee Kort, asserting claims for imposing a rent increase without notice (Civ. Code, § 798.30), unlawful eviction (Gov. Code, § 12955, subd. (a)), retaliation (Civ. Code, § 1942.5; Gov. Code, § 12955, subd. (f)), conversion, and intentional infliction of emotional distress. The claims were predicated on allegations that in 1986, appellants entered a written rental agreement with Sierra and the other defendants regarding a space for their mobile home. In February 2010, after refusing appellants' requests for rental assistance and relief from a rent increase, Sierra and the other defendants evicted them.[1]

The case was assigned to Judge Robert A. Dukes. In May 2012, Sierra filed a motion to compel mediation and a general reference of the matter under Code of Civil Procedure section 638.[2] Judge Dukes ordered the dispute submitted to mediation,

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[1] The record shows that Sierra managed Mobile Aire Estates, where appellants rented a space for their mobile home. Of the named defendants, only Sierra has appeared as respondent in this appeal.

[2] The motion relied on a provision of appellants' rental agreement entitled "Resolution of Disputes," which stated: "[Y]ou agree that any and all disputes you have with us will be

directed a general reference of the dispute if mediation was unsuccessful, and stayed the action pending completion of the mediation and general reference.

The action was later reassigned to Judge Dan Thomas Oki. In August 2013, pursuant to a stipulation of the parties, Judge Oki appointed retired Judge Joseph DeVanon to conduct the general reference.

In early 2014, Sierra submitted six motions to compel responses to its first round of discovery, that is, three directed at Mr. Andrews and three directed at Mrs. Andrews. The motions concerned Sierra's first set of special interrogatories, first set of form interrogatories, and first set of requests for production of documents. Each motion contended that no response had been made to the pertinent discovery request despite repeated extensions, and sought monetary sanctions. Appellants did not oppose the motions.

In April 2014, Judge DeVanon granted Sierra's motions to compel. In connection with those rulings, Judge DeVanon recommended that Judge Oki impose sanctions totaling $3,192 against appellants. Judge Oki "approved, adopted and . . . ordered" Judge DeVanon's rulings on the motions to compel and the recommended sanctions.

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submitted first to non-binding mediation and, if the dispute cannot be resolved by that method, submitted to what is called a 'general reference' which will be conducted per the provisions of [Code of Civil Procedure section] 638. All issues relating to the dispute will be subject to the reference and the referee who is appointed shall have all the necessary powers to decide all the questions of law and fact relating to the dispute." (Italics and underscoring deleted.)

In September 2015, Sierra submitted motions to compel further responses from appellants with respect to Sierra's second set of form interrogatories. Sierra also sought monetary sanctions and an award of Judge DeVanon's fees for reviewing the motions. The focus of the motions was on Form Interrogatory No. 17.1, which concerned Sierra's requests for admissions accompanying the form interrogatories. The interrogatory asked appellants to provide specified information to any response that was not an "unqualified admission," namely, the facts underlying the response, together with the identities and locations of witnesses and documents supporting the existence of those facts.[3]

Sierra's motions to compel contended that although it had repeatedly agreed to extend the deadline for responses to the interrogatory, appellants failed to submit any response. In August 2015, nine months after the initial deadline, appellants served only a partial response. Appellants denied each request for an admission and explained their responses, but identified no witnesses, documents, or accompanying location information to support their responses. Later, counsel for appellants failed to respond to a "meet and confer" letter regarding the responses.

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[3] Form Interrogatory No. 17.1 stated: "Is your response for each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission: [¶] (a) state the number of the request; [¶] (b) state all facts upon which you base your response; [¶] (c) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and [¶] (d) identify all DOCUMENTS and other tangible things that support your response and state the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT or thing."

Appellants opposed the motions, contending they had fully answered the interrogatory because they referred to themselves and other individuals in explaining their responses to the requests for admission. Furthermore, noting that they had produced some documents and answered other form interrogatories, they argued that "[i]t is ridiculous to have to restate verbatim these same documents and names of witnesses."

In November 2015, Judge DeVanon granted Sierra's motions to compel further responses from appellants to Sierra's second set of form interrogatories. Judge DeVanon further recommended that Judge Oki impose sanctions totaling $1,500 against appellants, and order them to pay Judge DeVanon's fees -- which amounted to $2,000 -- for reviewing and ruling on Sierra's motions. Judge Oki "approved, adopted and . . . ordered" Judge DeVanon's rulings on the motions to compel, as well as the recommended sanctions and fee award.

In March 2016, Sierra submitted motions for terminating and monetary sanctions against appellants, contending they had failed to comply with the orders compelling further responses to Sierra's second set of form interrogatories. Supporting the motions was a declaration from Sierra's counsel, who stated that after Judge DeVanon and Judge Oki directed appellants to submit further responses to Form Interrogatory No. 17.1, she asked their counsel to provide those responses, but he never did so. According to Sierra's counsel, appellants also never paid the monetary sanctions imposed on them, and had not responded at all to Sierra's third round of discovery.

Judge DeVanon granted Sierra's motion for terminating sanctions, ordered the complaint dismissed, and awarded Sierra costs as the prevailing party. Later, on May 12, 2016, Judge Oki entered orders that "approved, adopted and . . . ordered" Judge

DeVanon's rulings, including the dismissal of the complaint. Appellants noticed their appeal from Judge Oki's May 12 orders.

DISCUSSION

Appellants contend their action was improperly dismissed as a terminating sanction for discovery misconduct. As explained below, we disagree.

A. *Governing Principles*

"California discovery law authorizes a range of penalties for conduct amounting to 'misuse of the discovery process,'" including terminating sanctions. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991, quoting Code Civ. Proc., § 2023.030.)[4] Misuses of the discovery process include the following: "(d) Failing to respond or to submit to an authorized method of discovery. [¶] (e) Making, without substantial justification, an unmeritorious objection to discovery. [¶] (f) Making an evasive response to discovery. [¶] (g) Disobeying a court order to provide discovery." (§ 2023.010.) Terminating sanctions may take the form of "[a]n order dismissing the action." (§ 2023.030, subd. (d)(3).)

"'The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action." (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36 (*Do It Urself*).) Generally, "California discovery law authorizes a range of penalties for a party's refusal to obey a discovery order, including monetary sanctions, evidentiary sanctions, issue sanctions, and terminating sanctions. [Citations.] . . . [¶] . . . [¶] The discovery statutes thus 'evince an incremental approach to

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[4] All further statutory citations are to the Code of Civil Procedure.

discovery sanctions, *starting* with monetary sanctions and *ending* with the ultimate sanction of termination.'" (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 603-604 (*Lopez*).) Nonetheless, in suitable circumstances, a terminating sanction is properly ordered "as a first measure." (*Id*. at p. 604.)

The trial court may impose a terminating sanction for discovery abuse "after considering the totality of the circumstances: [the] conduct of the party to determine if the actions were willful; the detriment to the propounding party; and the number of formal and informal attempts to obtain the discovery." (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1246.) Generally, "[a] decision to order terminating sanctions should not be made lightly. But where a 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, the trial court is justified in imposing the ultimate sanction." (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.) Under this standard, trial courts have properly imposed terminating sanctions when parties have willfully disobeyed one or more discovery orders. (*Lang v. Hochman*, *supra*, at pp. 1244-1246 [discussing cases].)

When the trial court's exercise of its discretion relies on factual determinations, we examine the record for substantial evidence to support them. (*Waicis v. Superior Court* (1990) 226 Cal.App.3d 283, 287; see *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 929.) In this regard, "the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the

determination [of the trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.)

Here, appellants' claims against Sierra were submitted to Judge DeVanon as a general reference. "A general reference is an appointment to a referee made pursuant to section 638, subdivision (a), giving the referee authority '[t]o hear and determine *any or all* of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.' [Citations.]" (*Lindsey v. Conteh* (2017) 9 Cal.App.5th 1296, 1303, quoting section 638, subdivision (a).) In contrast, "[a] special reference is an appointment to a referee made pursuant to section 638, subdivision (b), or section 639, giving the referee authority to perform certain specified tasks and report a recommendation back to the trial court for independent consideration and further action by the court. [Citations.]" (*Ibid.*) Ordinarily, the nature and scope of a reference is determined not only by the language of the order of reference, but also by "any recitals in the referee's ruling, the conduct of the parties and the subsequent actions of the trial court." (*Ibid.*)

The difference between general and special references implicates our standard of review. When a ruling is within the scope of a general reference, we examine the referee's ruling as if it had been issued by the trial court, and review the ruling "using the same rules that apply to a decision by the trial court." (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191.) When the ruling is within the scope of a special reference, it is advisory only; the trial court is obliged to consider the ruling independently and decide whether to accept or reject it. (*Lopez*, *supra*, 246 Cal.App.4th at pp. 588-589.) In such circumstances, we review the trial court's decision to accept the recommended ruling for an abuse of discretion. (*Ibid.*)

B. *Analysis*

We discern no error in the terminating sanctions. As explained below, nothing before us shows that Judge DeVanon or Judge Oki misjudged the gravity of appellants' dilatory conduct or the likelihood that a lesser sanction might cure it.

At the outset, we note that the partial record circumscribes our review of those sanctions. The record does not fully reflect the parties' discovery or the proceedings before Judge DeVanon and Judge Oki, and does not resolve whether Judge DeVanon, as referee, was authorized to impose the terminating sanctions independently of Judge Oki.[5] The only aspect of the rationale for the terminating sanctions disclosed in the record is Judge DeVanon's findings in support of the sanctions. Our review is thus necessarily restricted to those findings, regardless of whether they were independently binding or merely advisory in nature.[6]

In suitable circumstances, noncompliance with a single discovery order, coupled with a persistent failure to respond to

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[5] Regarding the parties' discovery and the related proceedings, the record contains only Sierra's discovery motions, the oppositions to Sierra's motions to compel responses to its second set of form interrogatories, Judge DeVanon's rulings and recommendations on Sierra's discovery motions, and Judge Oki's orders approving those ruling and recommendations.

[6] That is because "[a] fundamental rule of appellate review is that "'[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.'" [Citations.]" (*Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841, italics omitted.)

discovery requests, is sufficient to support terminating sanctions. (*Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1614-1618 (*Collisson & Kaplan*).) Here, Judge DeVanon found that the misconduct by appellants met or exceeded that standard, stating: "This case has now languished for over two years, and despite multiple motions to compel and financial sanctions[,] is still in early stages of discovery. [¶] (1) Not responding to [Sierra's] initial discovery despite extensions . . . required [Sierra] to bring . . . motions to compel as well as incur[] attorney fees and costs[.] [¶] (2) [Sierra] complains that monetary sanctions were never paid after the April 2014 order. . . . [¶] (3) [Appellants] then failed to provide complete responses to the second set of discovery despite numerous extensions to do so, prompting a second set of motions to compel that were . . . granted. [¶] (4) [Appellants] *still failed to provide complete responses to the interrogatories*. [¶] (5) Additionally, [appellants] failed to pay the monetary sanctions as well as the . . . costs associated with th[e] second set of motions to compel."[7] (Italics added.)

In the view of Sierra's showing accompanying its motions for terminating sanctions, there is sufficient evidence to support those findings. Accordingly, the record discloses ample grounds for the imposition of terminating sanctions.

Appellants contend the terminating sanctions constituted an excessive penalty. They argue that Judge DeVanon, in ordering terminating sanctions, "went from zero to sixty without considering any other sanctions." They further maintain that

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[7] Regarding the nonpayment of the monetary sanctions imposed on appellants, Judge DeVanon remarked: "[C]ounsel states that he did in fact pay the sanctions, but has been unable . . . to locate records to that effect."

they responded to Sierra's discovery in good faith, that their failure to respond touched only a few issues, and that their dilatory conduct was due to the large volume of discovery Sierra propounded. As explained below, we are not persuaded.

On appeal, "the question before this court 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." (*Do It Urself*, *supra*, 7 Cal.App.4th at pp. 36-37; accord, *Collisson & Kaplan*, *supra*, 21 Cal.App.4th at p. 1620.) Generally,"[t]he penalty should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793)

We concluded Judge DeVanon's decision to impose terminating sanctions was not an abuse of discretion. Because the imposition of multiple monetary sanctions, following the grant of multiple motions to compel, had proven ineffectual, the key question concerns the selection of terminating sanctions over evidentiary or issue sanctions. Although the record does not contain Sierra's requests for admissions, they appear to have focused on the factual issues central to the complaint's claims, namely, whether Sierra acted improperly in denying appellants rent assistance, increasing their rent, and evicting them. Judge DeVanon thus could reasonably have concluded that the failure to identify witnesses and documents significant to those factual issues materially impaired Sierra's defense against the entire complaint, rather than with respect to discrete items of evidence or isolated issues. (See *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1105 ["A party cannot intelligently defend itself against . . . damage claims when

the other side's discovery responses consist of legal doubletalk and provide no useful information]; *Karz v. Karl* (1982) 137 Cal.App.3d 637, 650 ["An important aspect of legitimate discovery from a defendant's point of view is the ascertainment, in advance of trial, of the specific components of plaintiff's case so that appropriate preparations can be made to meet them. It is impossible to discover this other than from the plaintiff."].) Accordingly, as no targeted evidentiary and issue sanctions were appropriate, Judge DeVanon did not err in determining that terminating sanctions were proper.[8]

Ruvalcaba v. Government Employees Ins. Co. (1990) 222 Cal.App.3d 1579, upon which appellants rely, is distinguishable. There, the appellate court reversed terminating sanctions against a party who did not respond to discovery requests, as the party had not failed to comply with any court order compelling discovery. (*Id*. at pp. 1580-1584.) Here, both appellants failed to comply with orders compelling discovery and failed to pay monetary sanctions.

Appellants also contend Sierra's motions for terminating sanctions were "procedurally defective" because they referred to Sierra's third round of discovery, regarding which Sierra had submitted no motions to compel. However, Judge DeVanon expressly excluded that round of discovery from his rationale for imposing terminating sanctions, stating: "The referee is informed that there is now a third set of discovery that has not been

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[8] To the extent appellants challenge the terminating sanctions on the ground that Sierra's excessively "voluminous" discovery requests explained their dilatory responses, that contention fails on the limited record before us, which does not disclose the full amount of Sierra's discovery.

responded to, but those discovery matters *are not a part of this motion*." (Italics added.) For that reason, the reference to the third set of discovery in Sierra's motions cannot be regarded as prejudicial. In sum, appellants have shown no error in the orders of dismissal.[9]

DISPOSITION

The orders of dismissal are affirmed. Sierra is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J. MICON, J.*

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

[9] In a related contention, appellants suggest that Judge DeVanon exceeded the scope of his appointment with respect to the terminating sanctions. However, as noted above, they have not provided a record sufficient to establish whether Judge DeVanon was authorized to impose terminating sanctions independently of Judge Oki. We therefore presume that Judge DeVanon did not exceed his authority regarding the terminating sanctions, either because they fell within the scope of his general reference, or because Judge Oki independently accepted them.