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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

R.M., Plaintiff and Appellant, v. FIRST LUTHERAN CHURCH et al., Defendants and Respondents.	B266389 (Los Angeles County Super. Ct. No. TC027219)

APPEAL from an order of the Superior Court of Los Angeles County, William Barry, Judge. Affirmed.

Owen, Patterson & Owen, Gregory James Owen and Susan A. Owen for Plaintiff and Appellant.

Wood Smith Henning & Berman, William Robert Johnson; Haight, Brown & Bonesteel, Vangi M. Johnson, for Defendants and Respondents Latonya Dollison and Victoria Leggette.

Ten plaintiffs, all minors, sued defendants First Lutheran Church, Latonya Dollison, and Victoria Leggette, alleging they sustained personal injuries while attending First Lutheran's preschool. The cases were consolidated for purposes of discovery, and all plaintiffs were represented by the same counsel, Owen, Patterson & Owen, LLP (OP&O). This appeal concerns a $6,500 discovery sanctions order against OP&O. We conclude that the matter properly is before us under Code of Civil Procedure section 904.1, subdivision (a)(12),[1] and affirm the order of the trial court because no abuse of discretion is evident from the record. Defendants' motion for sanctions is denied.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs initiated their actions against defendants in early 2013. Defendants propounded initial written discovery, including requests for production and inspection of documents, form interrogatories, and special interrogatories—which they describe as "basic" and which OP&O describes as "massive" and "duplicative"—on plaintiffs in late 2013.[2] It is undisputed that plaintiffs, through OP&O, timely responded.

The parties agree that defendants claimed that plaintiffs' responses were deficient and sent correspondence to that effect. They differ in their characterization of the correspondence and whether OP&O did or did not respond to it. Neither the correspondence nor any response is in the record.

The trial court mediated an informal discovery conference on January 30, 2015. The conference was held off the record.

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

[2] We express no opinion on the nature or scope of the requests, as they are not included in the limited record before us.

Both parties represent that the conference lasted approximately 90 minutes, and that the trial court provided guidance, insights, and suggestions. Defendants claim they "sent a correspondence to Appellants' [*sic*] detailing the issues addressed"; OP&O's briefing is silent on this subject, and no such correspondence appears in the record.

Plaintiffs served further responses to the discovery requests in early April 2015. In late May, defendants filed two omnibus motions to compel. One of the motions sought to compel further responses to defendants' requests for production ("RFP motion"), and the other sought to compel further responses to defendants' form and special interrogatories. Each motion included a request for monetary sanctions.[3] The RFP motion sought $3,124 in sanctions, and the interrogatory motion sought $3,983, for a total of $7,107. Defendants noticed both motions for the same hearing date in early July. They also noted, in both motions, that "to avoid duplication, a request for the time incurred for attending the hearing on these motions" was made only in the rog motion. The record, which consists solely of an appellant's appendix, includes both motions but OP&O notes that it "intentionally omitted" the appendices and exhibits referred to therein.

On July 2, two court days before defendants' motions were heard, plaintiffs collectively filed a joint opposition to both motions to compel. In it, plaintiffs asserted that they had served additional discovery responses on June 19 and 25 and were "filing

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[3] California discovery law authorizes a trial court to impose monetary sanctions for conduct amounting to "misuse of the discovery process." (§ 2023.030, subd. (a).)

this opposition in an abundance of caution and to let the Court know that the motions [to compel] are moot" in light of the supplemental responses.

The opposition further alleged that defendants misused the discovery process by refusing to meet and confer regarding plaintiffs' June supplemental responses and by refusing to withdraw their motions to compel after receiving those responses. Plaintiffs requested monetary sanctions in the amount of $1,800 pursuant to sections 2023.010 and 2023.030.

The trial court issued a tentative ruling on defendants' motions to compel. In it, the court noted that plaintiffs' opposition "was essentially not considered as a viable opposition" because the justification for its tardiness was "specious." The court also indicated its intent to deny plaintiffs' request for sanctions and to overrule all of their objections to the discovery requests. The court indicated it was inclined to conclude that defendants' meet and confer efforts, which included the court-mediated conference and the correspondence preceding it (and possible correspondence following it), were reasonable, and that plaintiffs' supplemental responses were "insufficient to trigger add'l M&C requirements. Enough ought to be enough." The court indicated that it was inclined to award defendants monetary sanctions of $6,500.

The court held a hearing on the motions on July 7, 2015. There is no transcript of the proceeding in the record; OP&O asserts no reporter was present. The minute order provides in pertinent part: "Counsel argue and submit. The court makes findings as stated in open court. [¶] Plaintiffs' opposition was late and not considered. [¶] Plaintiffs' request for sanctions is denied. [¶] All plaintiffs' objections to the interrogatories are

overruled. [¶] All plaintiffs' objections to request for production of documents are overruled or waived by the plaintiffs except direct attorney/client communication for which a privilege log must be provided with the supplemental responses. [¶] Both motions to compel are granted. [¶] Defendants' request for sanctions is argued. [¶] Sanctions in the sum of $6,500 is [*sic*] imposed against plaintiff's [*sic*] attorney, Law Offices of Owen, Patterson & Owens [*sic*] and for defendants Latonya Dollison and Victoria Leggette."

Defense counsel filed notice of the ruling on July 15, 2015. OP&O timely filed a notice of appeal from the sanctions order on August 11, 2015.[4] Defendants filed a motion for sanctions in conjunction with their respondents brief.

DISCUSSION

I. Appealability

"The right to appeal is statutory only, and a party may not appeal a trial court's judgment, order or ruling unless such is expressly made appealable by statute." (*People v. Loper* (2015) 60 Cal.4th 1155, 1159.) Defendants contend "[t]here is no statutory basis for Appellants to seek review of the monetary sanctions awarded by the trial court" because the order does not satisfy the financial threshold of $5,000 set forth in section 904.1, subdivision (a)(12).

Section 904.1, subdivision (a)(12) authorizes the appeal "[f]rom an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five

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[4] Although it appeals from the sanctions order only, OP&O raises several arguments concerning other rulings the trial court made in the order. We address these arguments to the extent they suggest the sanctions order was improper.

thousand dollars ($5,000)." Discovery sanctions orders are immediately appealable only when the $5,000 threshold is cleared. (*Rail-Transport Employees Assn. v. Union Pacific Motor Freight* (1996) 46 Cal.App.4th 469, 474-475.) Multiple orders for monetary sanctions may not be aggregated to meet the $5,000 threshold. (*Calhoun v. Vallejo City Unified School District* (1993) 20 Cal.App.4th 39, 44-45.)

There is only one sanctions order at issue here, for $6,500, which plainly exceeds $5,000. Defendants argue, however, that the sanctions order should not be viewed as a single order but rather as either 10 separate orders of $650 in sanctions per plaintiff or two separate orders issued in response to defendants' two distinct sanctions requests. Defendants do not provide any authority in support of these contentions, and we find them to be without factual or legal basis. The trial court issued a single sanctions order against plaintiffs' counsel, not each individual plaintiff, and the order did not allocate the sanctions award between defendants' two requests. To the contrary, the minute order characterizes the request for sanctions as a singular request, and the notice of ruling prepared by defendants' counsel simply states that "sanctions were awarded to defendants in the sum of $6,500.00, as against and payable by the law firm of Owen, Patterson & Owen." The order satisfied the statutory threshold in section 904.1, subdivision (a)(12) and accordingly is appealable.

II. Standard of Review

There are "three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record

affirmatively proving error." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) The record in this case sheds little light on what transpired below and any findings the trial court may have made when granting defendants' motions to compel and awarding sanctions. To the extent we nevertheless are able to review the issues presented, we do so only for abuse of discretion. "A trial court's determination of a motion to compel discovery is reviewed for abuse of discretion" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733), as are its imposition of monetary discovery sanctions (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1123) and its refusal to consider late filed papers (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765; Cal. Rules of Court, rule 3.1300(d)). Under this deferential standard, we reverse only if the trial court acted arbitrarily, capriciously, or whimsically (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 9), such that no reasonable person could agree with it (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773).

III. Refusal to Consider Late-Filed Opposition

OP&O contends the trial court abused its discretion by refusing to consider plaintiffs' joint opposition. Characterizing the court's refusal as "Draconian," OP&O argues that the court's "[r]igid rule following" prejudiced plaintiffs' ability to dispute defendants' motions to compel. It further claims that timely filing the opposition while simultaneously attempting to resolve defendants' concerns by making supplemental disclosures "would have required Herculean efforts."

As a general rule, "[a]ll papers opposing a motion . . . shall be filed with the court and a copy served on each party at least nine court days . . . before the hearing." (§ 1005, subd. (b).)

OP&O acknowledges that the joint opposition was untimely. However, it argues that the court should have considered the opposition because "courts should avoid treating a curable violation of procedural rules as the basis to deny a litigant his or her ability to present a case." For this proposition it relies upon *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1344, a sui generis case concerning a local court rule that required litigants in marital dissolution proceedings to present their cases solely by means of written declarations. The trial court sanctioned a pro per husband by excluding virtually all of his evidence from trial because he failed to file a declaration establishing its foundation and admissibility. (*Id*. at pp. 1348-1349, 1363-1364.) The Supreme Court concluded that sanction was an abuse of discretion, because "the trial court applied the sanction provision of its local rules in a mechanical fashion without considering alternative measures or a lesser sanction, resulting in the exclusion of all but two of [husband's] 36 exhibits. Had the court permitted [husband] to testify, he could have provided some foundation for his exhibits." (*Id.* at p. 1365.) Here, there is no indication that the court's rejection of the untimely filing was "mechanical," or that plaintiffs were totally deprived of the opportunity to be heard on defendants' motions to compel. The minute order indicates that counsel orally argued the motions before the court.

Moreover, the consequences associated with the court's refusal to consider plaintiffs' opposition to a motion to compel discovery were less dire than OP&O's brief suggests. Relying on cases involving summary judgment motions, OP&O argues that "[t]he strong public policy favoring disposition of cases on their merits guides court to frequently consider documents that have

been untimely filed." Unlike a similar ruling with regard to a tardy opposition to a summary judgment motion, the court's ruling here did not result in a judgment on the merits due to a minor procedural defect. The merits of the case were not even before the court, as the litigation had stalled for more than two years at the initial discovery phase. Additionally, the record does not support OP&O's assertion that a timely response would have required "Herculean efforts" of the sort described in *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 30. There, the trial court abused its discretion by rejecting a late-filed summary judgment opposition where plaintiffs had only four days to timely respond to the 30-page motion accompanied by more than 800 pages of supporting materials. Defendants' motions to compel were not lengthy, and the record omits the appendices and exhibits defendants attached to them, precluding our evaluation of the volume and complexity of those documents. On the record before us, we cannot conclude that the trial court abused its discretion in refusing to consider plaintiffs' untimely filing.

IV. Adequacy of Meet and Confer Efforts

"It is a central precept to the Civil Discovery Act of 1986 (§ 2016 et seq.) . . . that civil discovery be essentially self-executing." (*Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1434.) To that end, certain motions to compel, including those of the type filed in this case, must be accompanied by a declaration "showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (§§ 2016.040, 2030.300, subd. (b), 2031.310, subd. (b)(2); *Townsend v. Superior Court*, *supra*, 61 Cal.App.4th at p. 1435.) A trial court has the discretion to issue monetary sanctions to a party that misuses the discovery process by "[f]ailing to confer . . . in a reasonable and

good faith attempt to resolve informally any dispute concerning discovery." (§ 2023.010, subd. (i).) The trial court also has the discretion to determine the adequacy of a party's attempts at informal resolution of discovery issues under the circumstances presented, and to fashion a remedy or consequence when it finds an attempt inadequate. (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430, 435 (*Obregon*).) Any factual determinations underlying such a ruling are reviewed for substantial evidence. (*Id.* at p. 430.)

OP&O contends defendants' motions to compel "were fatally defective on their face for lack of an adequate meet-and-confer," because "the single attempt at a meet-and-confer prior to Plaintiffs providing two sets of further responses is plainly inadequate." This contention is not supported by the law. In *Obregon*, on which plaintiffs heavily rely, the court expressly acknowledged that "[a] single letter, followed by a response which refuses concessions *might in some instances be an adequate attempt at informal resolution*, especially when a legitimate discovery objective is demonstrated." (*Obregon*, *supra*, 67 Cal.App.4th at p. 432, emphasis added.) "Although some effort is required in all instances [citation], the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court's discretion and judgment, with due regard for all relevant circumstances." (*Id.* at pp. 432-433.) In other words, even if defendants *did* make only a single attempt to meet and confer, which the correspondence and lengthy court-mediated conference suggest was not the case, that alone would not render their motions to compel defective or their informal efforts inadequate.

OP&O further asserts that the "trial court's terse statement that it has no quibble with the failure to meet and confer on the first and second sets of further responses," was "wrong as a matter of law." This assertion likewise lacks support in the law and the record. The trial court made that comment in a tentative ruling, not the order we are reviewing. (Cf. *Bay World Trading* (2002) 101 Cal.App.4th 135, 141.) After providing the parties with the tentative ruling and hearing argument, the court made findings "as stated in open court" which may have differed from and certainly superseded the statements made in its tentative. The record does not tell us what findings the court made, or what factors it may have considered in making them. We therefore presume that they were correct and proper. (*Fladeboe v. American Isuzu Motors Inc.*, *supra*, 150 Cal.App.4th at. p 58.)

Moreover, OP&O has not provided any authority showing that a party must engage in meet and confer efforts in response to each iteration of supplemental responses its opponent files. We decline to impose such a bright-line rule, which would incentivize piecemeal production, prolong discovery disputes, and raise litigation costs while undermining the discretion of the trial court to determine the appropriate level of effort required in each case.

OP&O also claims that the court "failed to consider any of the required factors, and the service of further responses did, in fact, trigger an additional obligation to meet and confer." This contention is not well taken for two reasons. First, there are no "required factors" the trial court must consider when determining the adequacy of meet and confer efforts; such an assessment is by its nature case-specific. The putative "required factors" to which

OP&O refers are those listed in *Obregon* as "relevant," not mandatory, to the court's consideration of "whether it would be more appropriate to specify additional efforts [at informal resolution] before the court will turn to the merits of the discovery dispute" (*Obregon*, *supra*, 67 Cal.App.4th at p. 435), which is not the question at issue here. While similar considerations also may be relevant to an assessment of the adequacy of meet and confer efforts, we do not know the factors that informed the court's exercise of discretion in this case. That is the second reason OP&O's claim cannot prevail: the record is such that we do not know what the trial court considered when making its ruling. We presume on this record that the court made an appropriate inquiry.

V. Consideration of Responses & Rulings on Objections

OP&O argues that the trial court abused its discretion "in refusing to consider the second further responses" prompted by the motion to compel "and in issuing a blanket overruling of Plaintiffs' objections." These contentions are interrelated; OP&O claims the trial court could not "rule on the objections individually, as warranted here, without also considering the impact that the first and second further responses had on the issues raised in the motions to compel." We find no abuse of discretion.

OP&O again relies on comments the court made in its undated tentative ruling—namely, that the court "did not even look at the Supplemental Response"—and the court's alleged failure to consider "required" *Obregon* factors to support its arguments. These authorities are not persuasive for the reasons already discussed: a tentative ruling is not a final ruling, the record does not disclose the factors the court ultimately

considered, and the *Obregon* factors are pertinent to a different analysis and are not mandatory.

OP&O further contends that its objections to defendants' discovery requests—the nature of which are not disclosed in the record—"need individual attention" and should not have been denied "in one fell swoop without explanation." It claims that plaintiffs are "severely prejudiced" because "they are left without an understanding as to why the objections were overruled, hamstringing their ability to argue the error in doing so on appeal."

Summary rulings covering numerous objections are "a common labor-saving practice in law and motion courts" and may constitute an abuse of discretion where the objections "needed individual attention." (*Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1447.) Without the objections, we cannot assess the propriety of the trial court's rulings on them or the extent to which they "needed individual attention." We cannot ascertain how many objections there were, how similar or different they were, or how meritorious they were; a "blanket ruling" on two identical objections is different in kind than a "blanket ruling" on hundreds of dissimilar objections. Notably, the court's minute order was not a complete "blanket ruling": it distinguished between plaintiffs' objections to interrogatories, their objections to producing documents, and their objections to producing documents containing direct attorney-client communications for which a privilege log must be provided. Given the state of the record, we cannot conclude that the court abused its discretion in issuing broad rulings on plaintiffs' objections.

VI. Trial Court Sanctions

The discovery statutes applicable to this case authorize the trial court to impose sanctions for "misuse of the discovery process" (§ 2023.030, subd. (a)) and require the trial court to impose monetary sanctions against a party or attorney "who unsuccessfully . . . opposes a motion to compel" unless the court finds "that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (§§ 2023.010, subd. (h); 2030.310, subd. (d) [motion to compel interrogatories]; 2031.310, subd. (h) [motion to compel inspection].) OP&O contends that the record does not establish that it engaged in any sanctionable conduct and instead demonstrates that it "acted in good faith and with substantial justification at all times in attempting to resolve the subject discovery disputes informally, serving three sets of responses, the last of which addressed every discovery request stated to be in contention." OP&O further argues that it "is patently unjust to sanction a law firm for alleged discovery abuse while refusing to consider the very evidence before the court that confirms no discovery abuse took place and demonstrates the firm's good faith, substantial justification, and the existence of circumstances making the imposition of the sanction unjust."

We find no abuse of discretion. OP&O opposed defendants' omnibus motions to compel despite implicitly acknowledging their merit by furnishing supplemental responses. (§§ 2023.010, subd. (h); 2030.310, subd. (d); 2031.310, subd. (h).) The statutes governing discovery sanctions *require* the trial court to impose sanctions against "any party, person or attorney who unsuccessfully . . . opposes a motion to compel," unless the court also finds that "the one subject to the sanction acted with

substantial justification or that other circumstances make the imposition of the sanction unjust." (§ 2031.310, subd. (h); see also § 2023.010, subd. (h) [defining unsuccessful and unjustified opposition to a motion to compel as a misuse of the discovery process]; § 2030.310, subd. (d).) The court did not make a finding that OP&O acted with substantial justification, and the other circumstances presented by OP&O—the court's refusal to consider its opposition, overruling of its objections, and finding that meet and confer efforts were adequate—do not demonstrate that the sanctions were unjustly imposed.

VII. Defendants' Motion for Additional Sanctions

Together with their response brief, defendants filed a motion requesting imposition of $10,500 in sanctions on OP&O for pursuing a frivolous appeal. The motion is denied.

Section 907 and California Rules of Court, rule 8.276(a)(1) authorize this court to impose sanctions where an appeal is frivolous or is taken solely to cause delay. An appeal is frivolous "only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) "The first standard is tested subjectively. The focus is on the good faith of appellant and counsel. The second is tested objectively. [Citation.]" (*In re Marriage of Gong and Kwong* (2008) 163 Cal.App.4th 510, 516.) "'While each of the above standards provides independent authority for a sanctions award, in practice the two standards usually are used together "with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have

intended it only for delay." [Citations.]'" (*Ibid.*) A frivolous appeal is not synonymous with an unsuccessful one, however. (*Flaherty*, *supra*, 31 Cal.3d at p. 650.) "An unsuccessful appeal . . . '"should not be penalized as frivolous if it presents a unique issue which is not indisputably without merit, or involves facts which are not amenable to easy analysis in terms of existing law, or makes a reasoned argument for the extension, modification, or reversal of existing law.'" [Citation.]" (*Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 557.) The punishment of sanctions "should be used most sparingly to deter only the most egregious conduct." (*Flaherty*, *supra*, 31 Cal.3d at p. 651.)

OP&O's appeal in this case lacks merit but is not properly deemed frivolous or sanctionable. There is no evidence of subjective bad faith. We are not persuaded otherwise by defendants' assertions that the opening brief "attempts to only state the facts in Appellant's favor." Indeed, defendants take a similar approach in their response brief and motion for sanctions. We also note that defendants opposed OP&O's efforts to obtain a settled statement to supplement the appellant's appendix defendants now repeatedly claim is "utterly misleading, incomplete" and indicative of a frivolous appeal.

DISPOSITION

The order of the trial court is affirmed. Defendants are awarded their costs on appeal.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.