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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

BAHMAN KHODAYARI, Plaintiff and Appellant, v. ALEXANDER H. ESCANDARI et al., Defendants and Respondents.	B263187 (Los Angeles County Super. Ct. No. BC440188)

APPEAL from an orders of the Superior Court of Los Angeles County, Abraham Khan, Judge. Reversed and remanded.

Bahman Khodayari, in pro. per., for Plaintiff and Appellant.

Alexander H. Escandari for Defendants and Respondents.

Bahman Khodayari, a self-represented litigant, appeals from the order dismissing his legal malpractice action against his former attorney Alexander H. Escandari and related entities, Escandari & Michon, P.C. and Escandari Law Firm, Inc. (collectively Escandari), as a terminating sanction for violating an October 2012 discovery order, as well as the award of monetary sanctions made as part of the earlier discovery order. Khodayari also contends the trial court erred in referring discovery motions he had filed to a discovery referee while deciding Escandari's discovery motions itself. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Khodayari's Complaint for Legal Malpractice*

Khodayari, representing himself, sued Escandari for legal malpractice on June 22, 2010 using a Judicial Council form complaint, alleging Escandari had misrepresented his expertise in criminal and real estate law when he agreed to represent Khodayari, failed to properly research issues arising from his representation, submitted excessive bills and ultimately abandoned Khodayari, withdrawing from a criminal case at a critical time with a false excuse. On November 12, 2010 Khodayari filed an unverified first amended complaint, asserting 16 causes of action, including breach of contract, fraud and professional negligence. The amended complaint added factual allegations describing the various legal proceedings in which Khodayari was involved starting in early 2007 and detailing the interaction between Khodayari and Escandari from their first meeting on March 3, 2008 and Khodayari's retention of Escandari on March 12, 2008, through Escandari's withdrawal from the representation on April 30, 2008.

Escandari's demurrer to the first amended complaint was overruled on March 7, 2011. Escandari thereafter answered the amended complaint and filed a cross-complaint. (The appellate record contains a copy of Khodayari's answer to the cross-complaint but not the cross-complaint itself.)

2. *The Discovery Disputes and Further Challenges to Khodayari's Complaint*

In early May 2011 Khodayari served form interrogatories, special interrogatories and requests for the production of documents on Escandari. Deeming Escandari's responses inadequate, Khodayari then filed a total of nine motions to compel further responses to the written discovery he had served. (Khodayari filed a separate motion as to each of the three defendants and for each of the three forms of written discovery he had propounded.) On September 28, 2011 the court ordered the appointment of a discovery referee to rule on the nine motions, finding it would consume a substantially disproportionate amount of court time and resources for the court to decide the motions itself. The court ordered all motions off calendar without prejudice to renoticing them before the discovery referee.[1]

Prior to a scheduled status conference on November 23, 2011, Khodayari moved to compel the deposition of Alexander Escandari; and Escandari moved to compel the deposition of

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[1] The court directed the parties to provide each other with three names of potential discovery referees. Each side was to strike two of the three names. The remaining two names were to be submitted to the court to select the appointed discovery referee. The court scheduled a hearing for November 23, 2011 to select the referee if one had not already been agreed to by the parties.

Khodayari. Each side also moved for protective orders with respect to his own deposition. The court granted both motions to compel, setting dates for the commencement of each deposition, denied the motions for protective orders, and denied all requests for sanctions. The minute order for November 23, 2011 also stated that Khodayari informed the court "he agrees to the first referee on the list."

On February 21, 2012, contending that Escandari had raised frivolous issues and objections at the court-ordered deposition, Khodayari moved to compel a further deposition and additional responses to his demand to produce documents at the deposition. On April 5, 2012 the court ordered Khodayari's motion off calendar without prejudice to renewing it before the appointed discovery referee. In addition, the court authorized the referee to preside at the deposition and rule on objections.

Two weeks before the hearing on Khodayari's motion to compel, Escandari moved for judgment on the pleadings. On May 15, 2012 the court granted the motion and gave Khodayari leave to amend. On June 4, 2012 Khodayari filed a second amended complaint for damages, which now purported to plead 17 causes of action.[2] On August 20, 2012 the court sustained the demurrer without leave to amend as to the causes of action for intentional infliction of emotional distress and abuse of process and overruled it in all other respects. The court gave Escandari

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[2] The second amended complaint replaced a single cause of action for breach of contract with separate causes of action for breach of written contact and breach of unwritten contract. In addition, Khodayari omitted the cause of action for unjust enrichment and added a cause of action for civil conspiracy.

30 days to answer and, among other orders, set a May 14, 2013 trial date for a seven-day jury trial.

On the same date as the hearing on the demurrer, Escandari moved to compel further responses to his requests for admissions and on the following day moved to compel further responses to his first set of special interrogatories and request for documents.[3] Both motions included requests for an award of monetary sanctions pursuant to Code of Civil Procedure section 2023.010 for misuse of the discovery process. Khodayari filed a combined opposition, arguing, in part, Escandari had engaged in legal gamesmanship to avoid responding to his discovery, including frustrating efforts to have a discovery referee appointed and then failing to cooperate in scheduling hearings on Khodayari's motions to compel. Khodayari also asserted Escandari had failed to meet and confer in a reasonable manner with respect to the discovery at issue in the motions. Khodayari argued Escandari's discovery motions should be referred to the discovery referee and Escandari ordered to cooperate so that the referee could resolve all outstanding discovery disputes. Khodayari also argued Escandari was not entitled to recover monetary sanctions under governing case law (even assuming there otherwise was any basis to award such sanctions) because Alexander Escandari and his two related law firms were all being represented by a junior associate of Escandari & Michon, one of the defendants.

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[3] Escandari sought responses to 12 requests for admission, 54 special interrogatories and 32 requests for production of documents. Khodayari had objected to each discovery request, providing no substantive responses.

3. *The Order Compelling Khodayari To Provide Further Discovery Responses and Awarding Monetary Sanctions*

On October 11, 2012 the court granted both motions to compel and awarded monetary sanctions of $4,000 (reduced from the $4,650 requested by Escandari).[4]

In an ex parte application for an order regarding his own discovery motions filed November 1, 2012, Khodayari repeated his charge that Escandari had frustrated Khodayari's ability to obtain discovery and prepare for trial by providing incomplete responses and refusing to cooperate and appear before the discovery referee. Because the court had decided Escandari's motions, but referred Khodayari's motions to the referee, discovery was one-sided and unfair, he complained. Khodayari asked that the court withdraw the discovery reference and decide his still-pending discovery motions or, alternatively, order all matters, whether filed by Escandari or Khodayari, be heard by the discovery referee. The court denied the application. The following week the court denied Khodayari's application to extend

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[4] The court's minute order stated its tentative ruling "is adopted and filed this date and incorporated herein by reference as the final order of the Court." However, no copy of the tentative ruling is included in the clerk's transcript, and the superior court's case summary does not reflect it was ever filed. The court's use of incorporation by reference, rather than explaining its reasoning in the order filed, makes appellate review difficult and, although not improper, falls far short of a "best practice."

In addition, Escandari was ordered to give notice of the court's October 11, 2012 order, but no notice of ruling appears in the clerk's transcript; and the superior court's case summary does not indicate that any notice was filed.

the time for him to comply with the court's order to respond to the discovery propounded by Escandari.[5]

4. *Terminating Sanctions*

On December 5, 2012 Escandari moved for terminating sanctions (dismissal of the complaint with prejudice) and imposition of further monetary sanctions of $3,560 because Khodayari had not provided the discovery responses or paid the monetary sanctions as ordered by the court on October 11, 2012. Khodayari's opposition papers largely repeated his arguments proffered in response to the motions to compel and his ex parte application regarding the one-sided nature of discovery to date. In addition, Khodayari argued terminating sanctions were inappropriate, insisting Escandari had made no showing that less severe sanctions were not sufficient to cure whatever harm had been caused by his failure to provide responses. Khodayari also advised the court that, concurrently with his opposition papers, he was filing a petition for an extraordinary writ in this court regarding the October 11, 2012 and November 1, 2012 discovery orders.[6]

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[5] Although the demurrer to the second amended complaint had been sustained only as to two of Khodayari's 17 causes of action, on October 26, 2012 Escandari filed a motion for judgment on the pleadings, arguing once again that the remaining causes of action failed to plead facts sufficient to state a cause of action. The court denied the motion on December 10, 2012.

[6] On January 16, 2017 Khodayari filed a petition for writ relief in this court, seeking review of the order compelling further responses to Escandari's written discovery and the award of monetary sanctions and the order denying his ex parte request

The court granted Escandari's motion for terminating sanctions on January 17, 2013, finding Escandari had established that Khodayari violated the October 11, 2012 discovery order by not serving any further responses and Khodayari's declaration in opposition failed to show the failure to respond was not willful. The court then stated, "Where a party willfully disobeys a discovery order, courts have discretion to impose terminating, issue, evidence or monetary sanctions. [Citations.]" The court did not explain why it selected terminating, rather than less severe, sanctions. The request for additional monetary sanctions was denied.[7]

5. *Khodayari's Appeals*

Even though Escandari's cross-complaint was still pending, the court ordered "the case," not simply Khodayari's second amended complaint, dismissed with prejudice. Khodayari filed a notice of appeal. We subsequently dismissed the appeal as taken from a nonappealable order, citing *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 ("an appeal cannot be taken from a judgment that fails to complete the disposition of all causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining").

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that the trial court withdraw the discovery reference. We summarily denied the petition on January 24, 2017.

[7] The court also denied a separate motion for sanctions Escandari had filed seeking attorney fees for responding to what Escandari characterized as Khodayari's frivolous ex parte applications on November 1 and November 9, 2012.

Khodayari then moved to dismiss the cross-complaint for failure to prosecute. Escandari twice failed to appear at scheduled hearings. The court dismissed the cross-complaint on February 27, 2015. Khodayari thereafter filed a timely notice of appeal.[8]

CONTENTIONS

Khodayari contends the trial court should have referred Escandari's motions to compel to the discovery referee or, in the alternative, should not have decided those motions without withdrawing the reference and also deciding the motions he had previously filed; the award of monetary sanctions in the October 11, 2012 order was improper because Escandari and the two related law firms were representing themselves in the action; and imposition of a terminating sanction was not justified under the circumstances of this case. Escandari did not file a respondent's brief.[9] Accordingly, we decide the appeal on the

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[8] During the pendency of his prior appeal, Khodayari was declared a vexatious litigant in an unrelated case in the superior court and made subject to a prefiling order pursuant to Code of Civil Procedure section 391.7. Following notice from this court that Khodayari required permission to proceed with the current appeal, Khodayari filed a response setting forth his grounds for appeal. No opposition was received from Escandari. The Administrative Presiding Justice granted Khodayari's request for a prefiling order and permission to proceed.

[9] Although he had not participated in the appeal in any manner, Escandari appeared at the time scheduled for oral argument and asserted he had only learned of the pendency of Khodayari's appeal earlier that week. Escandari explained his law office had moved in February or March 2015, prior to the filing of Escandari's notice of appeal, and claimed Khodayari's

record, Khodayari's opening brief and his oral argument. (Cal. Rules of Court, rule 8.220(a)(2); see *In re Marriage of Davies* (1983) 143 Cal.App.3d 851, 854 [notwithstanding respondent's silence, appellant still has the affirmative burden to show error].)

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Deciding Some Discovery Motions While Appointing a Discovery Referee To Resolve Others*

Code of Civil Procedure section 639, subdivision (a)(5), authorizes the appointment of a discovery referee to hear "any and all discovery motions and disputes relevant to discovery in the action" when the court "determines that it is necessary."[10]

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various filings, as well as all notices from this court, had been sent to his old address. Escandari could not explain why mail sent to his former address would not have been forwarded. (None of the mail sent to him or his law firm from this court was returned to our clerk's office.) Furthermore, although Escandari apparently notified the California State Bar of his change of address, he did not inform either the trial court or this court of his new address. Finally, as Khodayari pointed out, his opening brief in this appeal was served on Escandari at this new address. Escandari's purported lack of knowledge of the appeal is not credible. His failure to timely file a respondent's brief has forfeited his right to do so.

[10] Code of Civil Procedure section 639, subdivision (a), provides, "When the parties do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a referee in the following cases . . . . [¶] . . . [¶] (5) When the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all

California Rules of Court, rule 3.920(c) supplements that provision, specifying, "A discovery referee must not be appointed under Code of Civil Procedure section 639(a)(5) unless the exceptional circumstances of the particular case require the appointment."

Trial courts thus have "broad discretion to employ private referees without the parties' consent, to assist in resolving discovery disputes." (*Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 100; see *Mashon v. Haddock* (1961) 190 Cal.App.2d 151, 169 ["[a] motion for a reference is addressed to the sound discretion of the trial court, and will not be disturbed on appeal unless there is abuse of discretion"]; see generally *Seahaus La Jolla Owners Assn. v. Superior Court* (2014) 224 Cal.App.4th 754, 766 [discovery orders reviewed under abuse of discretion standard].) However, "there ought to be a finding of something out of the ordinary before the services of a referee are forced upon a nonconsenting party" (*Hood v. Superior Court* (1999) 72 Cal.App.4th 446, 449); and a reference of all discovery matters to a discovery referee is inappropriate except in unusual cases where multiple motions present complex issues or require review of a large number of documents making the inquiry "inordinately time-consuming." (*Taggares*, at p. 105; see *Hood*, at p. 449, fn. 4 ["It is one thing to refer out a particularly complex discovery dispute that appears to involve an extraordinary expenditure of judicial time. It is quite another to refer out all discovery, however simplistic, in a routine tort action . . ."].)

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discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon."

Here, the trial court did not send all discovery motions to a discovery referee or even all of Khodayari's motions. After referring Khodayari's nine discovery motions to compel further responses to written discovery,[11] the court considered Khodayari's motion to compel Escandari's deposition, which it granted, and his motion for a protective order with respect to his own deposition, which it denied. A further motion to compel the continued deposition of Escandari was thereafter referred to the referee. Khodayari describes his various motions as routine, and our review of them suggests this characterization is apt and the court's decision to use a discovery referee was ill-advised. Nonetheless, other than criticizing the trial judge's case management style, Khodayari makes no attempt to demonstrate the court acted in an arbitrary or irrational manner when it found that the motions would consume a substantially disproportionate amount of court time to decide and ordered the reference.[12] (See, e.g., *Shamblin v. Brattain* (1988) 44 Cal.3d 474,

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[11] An initial motion to compel filed by Khodayari was taken off calendar when Escandari provided further interrogatory responses before the hearing date.

[12] When appointing a discovery referee to consider Khodayari's motions, the court explained, "You have inundated us with all these discovery motions. I have an active case load of approaching 475 cases. I can't dedicate that much time to just your case. We have limited resources. So rather than to go into the merits, the tentative is simply to take this off calendar; require you both to go to a referee. I'll make the referral under 639. Then you can file as many motions as you feel is justified under the circumstances. I don't have the resources for all your discovery motions, for those nine motions."

478-479 ["The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."].)

Khodayari's principal complaint about the reference on appeal, as it was in his November 1, 2012 ex parte application, is that the court gave Escandari an unfair advantage by deciding his motions to compel in October 2012, while Escandari was at the same time obstructing any hearing by the discovery referee to resolve Khodayari's motions. Because of that imbalance, Khodayari argued, either all discovery motions should be heard by the court or all should be referred to the discovery referee. Escandari's dilatory tactics and the trial court's apparent unwillingness to actively manage the case or to take reasonable steps to enable Khodayari, a self-represented litigant, to properly prepare his case are troubling. (See *Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1434 [trial court's obligation to dispose of matters promptly and efficiently does not override its responsibility to ensure all litigants have the opportunity to have their matters fairly adjudicated, particularly when one party is self-represented].) However, Khodayari never brought to the trial court's attention any specific actions by Escandari that prevented the discovery referee from addressing Khodayari's motions, nor did Khodayari seek the court's assistance in a timely manner to compel Escandari to cooperate with the reference process.[13] Presuming, as we must, that the court properly

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[13] As discussed, it appears a discovery referee may have been selected as of November 23, 2011, nearly one year before the court considered Escandari's motions to compel discovery.

decided which matters to hear itself and which to refer to the discovery referee, Khodayari has provided no legal or factual basis upon which we can reverse those determinations. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [cardinal rule of appellate review that order of trial court is presumed correct and prejudicial error must be shown]; *Dills v. Redwoods Associates, Ltd*. (1994) 28 Cal.App.4th 888, 890, fn. 1 [appellate court "will not develop the appellants' arguments for them"].)

2. *The Trial Court Improperly Awarded Monetary Sanctions to the Self-represented Attorney and Law Firm Litigants*

A lawyer representing himself or herself in litigation, like other self-represented litigants, cannot recover attorney fees as a discovery sanction. (*Kravitz v. Superior Court* (2001) 91 Cal.App.4th 1015, 1020; *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1175.)[14] This rule, based on the Supreme Court's analysis of the right to recover attorney fees under Civil Code section 1717 in *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*),[15] applies as well when a litigant law firm is represented

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[14] Although an order imposing a discovery sanction is ordinarily reviewed for abuse of discretion (*City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272, 282; *Diepenbrock v. Brown* (2012) 208 Cal.App.4th 743, 748), when, as here, the issue involves a litigant's legal entitlement to fees under a particular statute or case authority, the question is one of law that we review de novo. (*People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071; see *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

[15] In *Trope, supra,* 11 Cal.4th 274, the Supreme Court held a lawyer representing himself in litigation against a former client for breach of contract was not entitled to attorney fees: "[W]e

by one of its own attorneys; the law firm is effectively self-represented and not entitled to fees. (*Soni v. Wellmike Enterprise Co. Ltd*. (2014) 224 Cal.App.4th 1477, 1488 [attorney litigant who prevailed on his breach of contract claim against former client denied contractual attorney fees pursuant to *Trope;* substantial evidence supported finding that attorney was represented by associates of his own firm in action that was related to firm's interests, not attorney's personal interests]; *Carpenter & Zuckerman*, *LLP v. Cohen* (2011) 195 Cal.App.4th 373, 385 [law firm litigant represented by its associate attorney was prohibited under *Trope* from recovering attorney fees under Code of Civil Procedure section 425.16 for work performed by one of its associate attorneys in representing firm]; *Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, 1207 [same].)[16]

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hold that an attorney who chooses to litigate in propria persona and therefore does not pay or become liable to pay consideration in exchange for legal representation cannot recover 'reasonable attorney's fees' under [Civil Code] section 1717 as compensation for the time and effort he expends on his own behalf or for the professional business opportunities he forgoes as a result of his decision." (*Id.* at p. 292.)

[16] The rule does not apply to an attorney who is represented by other members of his or her firm in litigation involving a personal matter unrelated to the firm. In that case the attorney is not self-represented. (See *Gilbert v. Master Washer & Stamping Co.* (2001) 87 Cal.App.4th 212, 222-223 [attorney who prevailed on his personal claim for breach of contract against his landlord could recover attorney fees incurred by other members of his firm in representing him; the other members of the law firm are not representing their own personal interests or those of the law firm, but the separate and distinct interests of the

The monetary sanctions awarded pursuant to Code of Civil Procedure sections 2023.010, subdivision (g), and 2023.030, subdivision (a), for attorney fees incurred by Escandari in moving to compel further discovery responses fall squarely within this prohibited category, as Khodayari unsuccessfully argued in the trial court. The two motions, filed jointly on behalf of Alexander H. Escandari, Escandari Law Firm, Inc. and Escandari & Michon, were prepared and signed by Alexander H. Escandari and Ali Fathi for Escandari & Michon as counsel for all three defendants. Fathi identified himself in supporting declarations as a "junior associate in the firm of Escandari & Michon, counsel to Defendants' in the above-entitled case."[17] Because these parties were all self-represented within the meaning of governing case law, the trial court erred in awarding monetary sanctions in the form of legal fees that were not

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defendant]; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 96 [same].)

[17] In support of the request for monetary sanctions Fathi declared that defense attorneys had spent at least seven hours preparing the two motions and anticipated spending an additional six hours preparing reply memoranda and preparing for and attending the hearings on the motions. Applying an hourly rate of $350, Escandari requested a total of $4,650 in sanctions, which included $100 in filing fees. Although the prohibition against awarding monetary sanctions to a self-represented litigant for discovery disputes does not include recovery of costs as sanctions if reasonably identifiable and allocable (*Kravitz v. Superior Court*, *supra*, 91 Cal.App.4th at p. 1010), we cannot tell from the trial court's order, which awarded a reduced sum of $4,000 in sanctions without explanation, whether the filing fees were included or excluded.

actually incurred. (See also *Musaelian v. Adams* (2009) 45 Cal.4th 512, 515 [Code of Civil Procedure "section 128.7 does not authorize sanctions in the form of an award of attorney fees to self-represented attorneys"].)

3. *The Trial Court Abused Its Discretion in Issuing a Terminating Sanction*

Finding only that Khodayari had not complied with the October 11, 2012 discovery order and failed to demonstrate his noncompliance was not willful, the court imposed a terminating sanction and dismissed the action with prejudice.[18] Although the trial court has "broad discretion" to impose discovery sanctions subject to reversal only for "arbitrary, capricious, or whimsical action" (see *Van v. LanguageLine Solutions* (2017) 8 Cal.App.5th 73, 80; *Kayne v. The Grande Holdings Limited* (2011) 198 Cal.App.4th 1470, 1474), on this record, and in the absence of any showing that a less severe sanction would not be effective, granting the motion for a terminating sanction was an abuse of discretion. (See *Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 [despite trial court's broad discretion in imposing discovery sanctions, "the courts have long recognized that the terminating sanction is a drastic penalty and should be used sparingly"]; see also *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992

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[18] Contrary to Khodayari's contention on appeal, nothing in the court's ruling suggests it was Khodayari's failure to pay the monetary sanctions that had been awarded, rather than his failure to serve further discovery responses, that was the basis for the court's order granting the motion for terminating sanctions.

[“‘[d]iscovery sanctions “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”’”]; *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613 [“[t]he rule that a sanction order cannot go further than is necessary to accomplish the purpose of discovery . . . is rooted in constitutional due process”].)

“Although in extreme cases a court has the authority to order a terminating sanction as a first measure [citations], a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective [citations].” (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.*, *supra*, 246 Cal.App.4th at pp. 604-605; see *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280 [trial court is justified in imposing terminating sanctions “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”]; cf. *Parker v. Wolters Kluwer United States, Inc*. (2007) 149 Cal.App.4th 285, 301 [“[i]t is well established ‘the purpose of discovery sanctions “is not ‘to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits,’” . . . but to prevent abuse of the discovery process and correct the problem presented . . .”’].)

Without question, the trial court had the authority to impose sanctions for Khodayari’s disobedience of its October 11, 2012 discovery order. But the order dismissing Khodayari’s lawsuit was the first sanction imposed for that violation; the court imposed the sanction only three months after the order had

been made (and after denying Khodayari's ex parte request for additional time to comply); and Khodayari had not violated any other discovery order. There is no basis in the record to conclude that the court could not have obtained Khodayari's compliance with lesser sanctions or that the misconduct was so extreme as to justify dismissal of the action as a first measure. For example, the court could have stayed further proceedings by Khodayari until he obeyed the discovery order and set an order to show cause regarding dismissal of the complaint. (Code Civ. Proc., § 2023.030, subd. (d)(2).) Or it could have identified specific evidentiary or issue sanctions it would impose if Khodayari continued to withhold evidence from discovery. (*Id.*, § 2023.030, subds. (b), (c).)

In sum, the court erred in imposing the ultimate sanction in the first instance. On remand, the trial court retains its discretion to impose an appropriate lesser sanction, commensurate with the violation at issue, after full consideration of the circumstances surrounding Khodayari's failure to comply with the October 11, 2012 order and his explanation for his actions.

DISPOSITION

The orders granting the motion for terminating sanctions and dismissing the lawsuit and the October 11, 2012 award of sanctions are reversed. The cause is remanded for further proceedings consistent with this opinion. Khodayari is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. SEGAL, J.