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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ANTHONY N. KLING et al.,

Plaintiffs and Appellants,

v.

JOSEPH HASSID et al.,

Defendants and Respondents.

B261391

(Los Angeles County
Super. Ct. No. SC098810)

APPEAL from an order of the Superior Court of the County of Los Angeles, Allan J. Goodman, Judge. Affirmed.

Kling Law Firm, Anthony N. Kling; Law Offices of David C. Knieriem, David C. Knieriem, pro hac vice; Law Offices of Allen Hyman and Allen Hyman for Plaintiffs and Appellants.

Raiskin & Revitz, Steven J. Revitz for Defendants and Respondents.

INTRODUCTION

Plaintiffs and appellants¹ appeal from the trial court's order awarding sanctions against them and in favor of defendants and respondents.² According to plaintiffs, the trial court erred when it failed to hold a hearing to determine whether their prior attorneys were solely responsible for the Local Rules violations upon which the sanctions award against them was based. Plaintiffs further contend that the trial court exceeded its authority by awarding as sanctions the amount of attorney fees incurred as a result of the Local Rules violations, instead of limiting the award to the fees incurred for making the sanctions motion.

We affirm the sanctions order because plaintiffs forfeited both of their contentions by failing to raise them in the trial court.

PROCEDURAL BACKGROUND

A. Complaint

In July 2008, the original plaintiffs filed suit against a number of defendants, including the defendants in this appeal. Plaintiffs asserted causes of action for statutory liability under Civil Code section 832, negligence, and nuisance abatement. The complaint was based on the construction of a project near plaintiffs' commercial property

¹ The original complaint named as plaintiffs Anthony N. Kling, individually and as Trustee of the Anthony N. Kling Trust of 1997; Mary J. Kling as Trustee of the Family Trust Under the Heywood F. and Mary J. Kling Living Revocable Trust Dated July 28, 1987; and Kling Corporation, a California Corporation. In May 2013, the trial court granted plaintiffs' motion to amend the complaint by adding 3123 SMB, LLC as a new party plaintiff.

² Defendants are Joseph Hassid, Santa Monica Investments, LLC, and Bay Cities Discount Kitchen and Appliances, Inc.

on Santa Monica Boulevard which allegedly caused subsidence issues at, and other related damage to, plaintiffs' property.

B. Sanctions Motion

On July 30, 2014, defendants filed their sanctions motion against plaintiffs. The notice of motion specified that defendants were seeking sanctions against "plaintiffs, Anthony Kling, Mary Kling, Kling Corporation and 3123, LLC," but there was no request for sanctions against plaintiffs' current or former attorney. The motion was supported by the declaration of defendants' attorney Steven Revitz. The accompanying memorandum of points and authorities stated that the motion was made pursuant to Local Rule 3.37 and was "based on plaintiffs' repeated and willful failure to comply with Local Rules 3.52 and 3.53" which deal with the preparation of the so-called "Long Cause" joint exhibit binders and the negotiation of evidentiary stipulations. The memorandum concluded by requesting the trial court "award monetary sanctions in favor of [defendants] against plaintiffs, and each of them, in the amount of \$18,596 as a result of [plaintiffs'] repeated and willful failures to comply with the [Long Cause] Binder Rules and the Local Rules concerning the identification and marking of exhibits."

C. Minute Order Dismissing Plaintiffs' Complaint

The trial court explained its August 27, 2014, minute order dismissing the complaint as follows: "[A]fter extensive hearings on the issue, the [c]ourt . . . issued a [20] page minute order setting out its reasons and ruling dismissing the entire action with prejudice [for failure to bring the action to trial within five years in violation of Code of Civil Procedure section 583.310]. In that minute order, the [c]ourt asked that a proposed order and judgment be prepared and circulated and that the parties brief the issue of whether a judgment may be entered while cross-complaints remain pending."

D. Opposition to Sanctions Motion

On October 27, 2014, plaintiffs, by and through their attorney of record, Michael Dempsey, filed their opposition to the sanctions motion. In their three-page opposition, plaintiffs made two primary arguments: (i) they “should not be sanctioned again, on top of the dismissal of their case”; and (ii) they should not be sanctioned “because all they were doing was trying to correct the version of the exhibit list their prior counsel . . . submitted to [defendants] in the summer of 2013 for the Long Cause Binders.” In making the latter argument, plaintiffs admitted that the “decisions that were made and the actions that were taken concerning the exhibit list and the exhibits during the October 2013-June 2014 time frame [i.e., the time frame upon which the sanctions motion was based] were made by Anthony and Mary Kling. Every action that was taken, and every decision that was made, was intended by them to try to correct the deficiencies they were convinced existed in the October List. They firmly believed that if they were required to go to trial on the October List, their case could not be fully and properly presented and they would lose.” Plaintiffs also argued that they complied with the Local Rules on joint exhibit binders, they were not the sole cause of the issues with the joint exhibit binder, and the record did not support a number of defendants’ contentions. Plaintiffs, however, did not argue that their former attorney was solely responsible for the Local Rules violations or that they were entitled to a hearing to determine whether their prior attorney was solely responsible for those violations.

E. Reply in Support of Sanctions Motion

In their reply brief in support of their sanctions motion, defendants argued that plaintiffs “are anything but victims in this case. The dismissal of the [c]omplaint resulted from *their own repeated refusals to comply with the Rules* after they had more than six months to do so (actually years). The victims in this matter are the defendants. They are the ones who had to incur substantial attorney’s fees because Mr. Kling decided he should not be bound by the [Local] Rules.” (Italics added.)

F. Ruling on Sanctions Motion

On November 18, 2014, the trial court held a hearing on various matters, including defendants' sanctions motion. Prior to the hearing, the trial court provided the parties with a tentative ruling on, inter alia, the sanctions motion, which ruling proposed to grant the motion. At the hearing, plaintiffs, by and through attorney Dempsey, offered no additional argument beyond that contained in their opposition papers.

Following argument, the trial court ruled from the bench that its tentative ruling would be the final ruling of the court. The trial court explained its ruling: "The opposition contains an unverified statement of purported facts that is contrary to the events that actually occurred. The [c]ourt found the true facts and set them out in its August 27, 2014, [20] page minute order dismissing the action. It did so after several extensive hearings at which all parties had ample opportunity to present their views. The memorandum in opposition to the motion, filed October 27, 2014—two months after the issuance of the minute order setting out the [c]ourt's findings—simply ignores the facts determined in that August 27 [o]rder. It may be summarized as rearguing some of the events that [led] to the dismissal with prejudice after the facts supporting that action were determined. [¶] *The [o]pposition is to any sanctions at all; it does not address the amount of sanctions that are warranted.* The [c]ourt agrees with the statement in the declaration accompanying the motion that the fees incurred would not have been incurred had plaintiffs complied with the Los Angeles Superior Court [Local] Rules regarding trial preparation, in particular rules 3.37, 3.52, and 3.53 and the [c]ourt's orders that the parties comply with those rules and rules 3.25(f), (g), and (h). The violations of the [Local] Rules of the [c]ourt are many and manifest as set out in the moving papers and as documented in the August 27 Order. There is substantial good cause for an award of sanctions, jointly and severally, *against the [plaintiffs] individually.* [¶] . . . [¶] The total amount awarded is \$19,071.00. The [trial c]ourt finds this amount reasonable based on the above." (Italics added.)

DISCUSSION

A. Contentions

Plaintiffs raise two contentions concerning the sanctions award against them. First, they contend that, to the extent any sanctions were warranted, they should have been assessed against their prior attorneys of record only, not against them. Citing *State of California Ex Rel. Public Works Bd. v. Bragg* (1986) 183 Cal.App.3d 1018 (*Bragg*), they argue that under Code of Civil Procedure section 575.2, subdivision (b),³ the trial court had an affirmative obligation to hold a hearing on the issue of whether plaintiffs or their attorneys were responsible for the Local Rules violations in issue. According to plaintiffs, because the trial court failed to hold the required hearing, the sanctions award must be reversed.

Plaintiffs' second contention is that the trial court was only authorized to award sanctions based on the fees incurred in making the sanctions motion, not for fees incurred as a result of the Local Rules violations in issue. Citing *Sino Century Development Limited v. Farley* (2012) 211 Cal.App.4th 688—which held at page 691 that California Rules of Court, “rule 2.30 does not authorize full compensation of all attorney fees incurred as a result of a rules violation, but only authorizes the court to award reasonable attorney fees incurred in connection with the proceedings in which the aggrieved party

³ Code of Civil Procedure section 575.2 provides: “(a) Local rules promulgated pursuant to Section 575.1 may provide that if any counsel, a party represented by counsel, or a party if in pro se, fails to comply with any of the requirements thereof, the court on motion of a party or on its own motion may strike out all or any part of any pleading of that party, or, dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose other penalties of a lesser nature as otherwise provided by law, and may order that party or his or her counsel to pay to the moving party the reasonable expenses in making the motion, including reasonable attorney fees. No penalty may be imposed under this section without prior notice to, and an opportunity to be heard by, the party against whom the penalty is sought to be imposed. [¶] (b) It is the intent of the Legislature that if a failure to comply with these rules is the responsibility of counsel and not of the party, any penalty shall be imposed on counsel and shall not adversely affect the party’s cause of action or defense thereto.”

seeks sanctions”—plaintiffs assert that because the amount of sanctions awarded was greater than the amount of fees incurred in making the sanctions motion, the trial court exceeded its authority and the award must therefore be reversed.

B. Forfeiture

1. Legal Principles

“The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 37, pp. 497-500.) The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon* (2001) 25 Cal.4th 1082 [108 Cal.Rptr.2d 385, 25 P.3d 598] (*Simon*): ““““The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had”” [Citation.] ““No procedural principle is more familiar to this Court than that a *constitutional* right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” . . .’ [Citation.] [¶] ‘The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . : ““In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge’s attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.”” [Citation.]” (Fn. omitted; [citations].)’ (*Simon, supra*, 25 Cal.4th at p. 1103, italics added.)” (*Keener v. Jeld-Wen* (2009) 46 Cal.4th 247, 264-265.)

2. *Analysis*

A review of plaintiffs' opposition to the sanctions motion confirms that plaintiffs' did not raise the two contentions on appeal in the trial court. There, plaintiffs argued only that it would be unfair to award sanctions against them, in addition to the dismissal of their complaint, and that they were only trying to correct the exhibit list that prior counsel had prepared. As a result, neither the trial court nor defendants had an opportunity to address the current contentions on appeal. Had those contentions been raised below, any purported error could have been corrected or avoided. Plaintiffs' failure to advance their current contentions in the trial court therefore forfeited them on appeal. (See *Wiley v. Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177, 188 ["As a general rule, appellate courts will not consider procedural defects in connection with either relief sought or a defense asserted where no objection was made to the lower court"].)

In *Bragg, supra*, 183 Cal.App.3d 1018—the case upon which plaintiffs primarily rely in support of their first contention—the court recognized the general rule that an appellate court will not consider procedural defects or erroneous rulings when an objection could have been but was not made in the trial court. (*Id.* at p. 1023.) But the court in that case also recognized an exception to that rule when only a question of law is presented based on undisputed facts in the record. (*Id.* at p. 1024.)

In this case, unlike in *Bragg, supra*, 183 Cal.App.3d 1018, plaintiffs' contention that the Local Rules violations in issue were solely the result of their prior attorneys' conduct presents a disputed factual issue that we cannot resolve on appeal. Thus, the exception recognized in *Bragg* does not apply here. Moreover, the sanctions motion was premised on the assertion that plaintiffs, not their attorneys, were solely responsible for the rules violations in issue and plaintiffs' opposition did not address that assertion directly. Plaintiffs' contention on appeal that their attorneys were solely responsible for the rules violations was therefore forfeited on appeal.

Similarly, plaintiffs' second contention that the trial court exceeded its authority by awarding as sanctions attorney fees incurred because of the Local Rules violations was not raised in the trial court. Indeed, the trial court's minute order on the sanctions

motion expressly noted that “[t]he [o]pposition is to any sanctions at all; *it does not address the amount of sanctions that were warranted.*” Therefore, plaintiffs’ argument concerning the amount of sanctions awarded has also been forfeited on appeal.

DISPOSITION

The order awarding sanctions against plaintiffs is affirmed. Defendants are awarded costs on appeal.

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KUMAR, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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