Filed 10/1/19 Barber v. Superior Court CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| LORI BARBER et al.,<br><br>Petitioners,<br><br>v.<br><br>THE SUPERIOR COURT OF LOS ANGELES COUNTY,<br><br>Respondent;<br><br>SOUTHERN CALIFORNIA EDISON COMPANY et al.,<br><br>Real Parties in Interest. | B293204<br><br>(Los Angeles County Super. Ct. No. YC066729 c/w Super. Ct. No. BC497689) |

ORIGINAL PROCEEDING in mandate. William F. Highberger, Judge. Petition granted.

Stolpman Law Group and Thomas G. Stolpman for Petitioners Lori Barber et al.

Frederick R. Bennett, Court Counsel, for Respondent Superior Court of Los Angeles County.

Limnexus, Sandy Sakamoto, Arnold Barba, George Busu, David D. Yang and Alexander Su for Real Party in Interest Southern California Edison Company.

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Petitioners Lori Barber, Thomas Barber, Chance Barber, Adelaide Barber, Constantino Contreras, Mary Contreras, Cristobal Contreras, and Stephanie Contreras (plaintiffs) lived near an electrical substation (the Topaz substation) owned by defendant Southern California Edison Company (SCE).[1] They sued SCE to recover damages allegedly caused by electrical currents and radiation emanating from the substation. Their case has been consolidated with another action filed by approximately 100 individuals (the *Richmond* case) alleging similar claims.[2]

In July 2018, the Los Angeles County superior court granted SCE's motion for evidentiary sanctions, preventing plaintiffs from introducing evidence essential to the viability of some or all of their claims. After the court denied plaintiffs' motion for reconsideration or modification of the sanctions order, plaintiffs filed a petition for a writ of mandate in this court.

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[1] Plaintiffs are members of two families—the Barber family and the Contreras family—who are among approximately 100 individual plaintiffs in the consolidated actions below.

[2] The *Richmond* case is titled *Daniel Richmond v. Southern California Edison Co.*, Los Angeles Superior Court case No. BC497689.

We agree with the plaintiffs that the court abused its discretion by imposing evidentiary sanctions without first imposing a lesser sanction. Accordingly, we grant the writ.

## FACTUAL SUMMARY

Plaintiffs filed the operative third amended complaint in November 2013. At that time, they were represented by the law firm, Stolpman, Kriss, Elber & Silver. The plaintiffs, like their counterparts in the *Richmond* action, allege that SCE designed, constructed, owns, maintains, and operates the Topaz substation, and has intentionally or negligently allowed "stray, uncontrolled, manmade electric currents" to escape from the substation causing plaintiffs to suffer personal injuries, property damages, and the diminution in the value of their homes. The plaintiffs assert causes of action for intentional infliction of emotional distress, negligence, negligence per se, nuisance, fraud and deceit, negligent misrepresentation, trespass, inverse condemnation, and assault and battery. They seek damages and, with respect to the inverse condemnation claim, the present fair market value of their homes and the diminution in value caused by SCE's conduct.

SCE successfully demurred to the third amended complaint and plaintiffs appealed. In January 2016, we reversed the judgment in an unpublished decision. (*Richmond et al. v. Superior Court* (Jan. 20, 2016, B260243, B260268) [nonpub. opn.].) Around the same time, the law firm representing the plaintiffs broke apart. Plaintiffs were thereafter represented by the then newly-formed Stolpman Law Group—essentially, the sole proprietorship of attorney Thomas Stolpman.

Between September 2016 and June 2017, SCE propounded: a second set of form interrogatories to each plaintiff; a second

set of requests for admissions to some plaintiffs and a third set to other plaintiffs; a second set of requests for production of documents to some plaintiffs and a third set to others; and a fifth set of special interrogatories to each plaintiff. The fifth set of special interrogatories—the discovery most relevant to SCE's motion for discovery sanctions—included 91 interrogatories. The discovery requests were similar or identical to discovery served on the plaintiffs in the *Richmond* action.

Stolpman's law office served plaintiffs' responses to the form interrogatories, special interrogatories, and the request for admissions between March and August 2017. Responses to the requests for production of documents were served in January 2018.

On June 16, 2017, SCE sent a "meet and confer" letter to Stolpman addressing plaintiffs' responses to SCE's form interrogatories and requests for admissions. The letter described deficiencies in the plaintiffs' responses, including: missing, deficient, and unsigned verifications; two responses that included objections but were not signed by counsel; improper objections as to one set of request for admissions; and the failure to respond fully to certain form interrogatories. The letter suggested that SCE would file a motion to compel if the issues were not resolved.

Stolpman responded to SCE's counsel, stating that he would provide supplemental responses within two weeks, and granted SCE an extension of time to file a motion to compel, if necessary. In July and August 2017, plaintiffs served supplemental responses to the form interrogatories and requests for admissions, and initial responses to the special interrogatories.

On September 14, 2017, SCE's counsel sent a "meet and confer" letter to Stolpman regarding deficiencies in the plaintiffs' responses. The responses, counsel stated, were unverified, and the responses to requests for admissions and to form and special interrogatories were inadequate. With respect to SCE's fifth set of special interrogatories, SCE agreed to "withdraw" certain interrogatories, but asked that plaintiffs respond to 51 specified interrogatories that remained unanswered.

The discovery issues were addressed at a status conference before the court on December 8, 2017. The court asked the parties to submit a stipulation regarding deadlines for plaintiffs to provide further responses and deadlines for SCE to file motions to compel.

On December 18, 2017, the parties entered into a stipulation that provided plaintiffs would serve verified responses or supplemental responses to certain discovery requests on or before December 28, 2017. If plaintiffs fail to provide responses "that reflect a bona fide attempt to comply with their obligations under the Civil Discovery Act, . . . SCE may file a motion to compel and seek appropriate sanctions at that time." The trial court approved the stipulation in an order dated December 20, 2017 (the December 2017 order). Plaintiffs' deadline for serving responses was subsequently extended by agreement among counsel.

In January 2018, Stolpman served further supplemental responses to the form interrogatories, special interrogatories, and requests for admissions, and also served plaintiffs' initial responses to the requests for production.

In response to further meet and confer efforts among counsel, Stolpman served additional supplemental responses

in April 2018. The supplemental responses resolved some of the outstanding issues, but others remained.

On May 3, 2018, SCE's counsel sent to Stolpman a letter stating that "SCE wants to be clear that . . . there will be no further extensions [for serving supplemental discovery responses] beyond May 8, 2018." Stolpman thereafter provided further supplemental responses to the fifth set of special interrogatories that were dated May 8, 2017 and served on May 9, 2018.

On May 22, 2018, SCE's counsel sent to Stolpman a "follow up" meet and confer letter, stating that SCE has "no alternative but to bring motion(s) to compel."

SCE did not file a motion to compel. Instead, on May 25, 2018, SCE filed a motion for unspecified "discovery sanctions" against plaintiffs.[3] In its accompanying memorandum of points and authorities, SCE clarified that it was "specifically moving only on" 28 special interrogatories, which plaintiffs had not answered in their response to SCE's fifth set of special interrogatories. SCE also filed a separate statement identifying these interrogatories, noting the absence of a response, and

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[3] The notice of motion did not "specify the type of sanction sought," as required by statute. (Code Civ. Proc., § 2023.040.) SCE purported to base its motion on: (1) section 2016.010, which identifies the title of the Civil Discovery Act, (2) section 2023.010, which specifies conduct that constitutes a misuse of discovery, and (3) section 2031.310, which sets forth the form and content of a motion to compel further responses to inspection demands. It did not identify section 2023.030—the statute that authorizes issue sanctions and evidentiary sanctions for discovery misuse. These defects in the notice were not raised by plaintiffs in the trial court or this court.

offering SCE's reasons why plaintiffs should "be precluded from offering any evidence" on the subjects of the interrogatories.[4]

In its moving papers, SCE explained that it had decided not to file a motion to compel because "[n]o order to compel or monetary sanctions will rectify the bad faith exhibited by [p]laintiffs[]." Plaintiffs' behavior, SCE argued, "demonstrates a disregard for the law which deserves meaningful consequences."

Plaintiffs filed a three-page opposition to the motion, which included no citations to legal authority justifying the failure to respond to the specified interrogatories. Stolpman argued that there was "no evidence of wil[l]ful failure to comply with the [law]," and no evidence that the plaintiffs "engaged in any conduct which would interfere with or obstruct the [d]iscovery process." Stolpman supported the opposition with his declaration stating that his law firm, which had previously represented plaintiffs, terminated on January 1, 2016. Stolpman further explained that one of his former partners had agreed to continue to work on discovery in the case, but she was ultimately unable to do so because "her attention was diverted to caring for elderly parents." And although Stolpman's spouse is an attorney,

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[4] For example, SCE asked each plaintiff, "Do YOU contend that [your residence] diminished in value during the period of YOUR ownership thereof as a result of any condition created or permitted to exist by [SCE] in connection with [your residence]?" SCE argued that plaintiffs, by failing to respond to this interrogatory, should "be precluded from offering any evidence to the effect that [their residences] diminished in value during the period of their ownership thereof as a result of any condition created or permitted to exist by SCE in connection with [their residence]."

she had "medical and disability issues" that prevented her from practicing law. Stolpman thus handled the SCE discovery himself. Plaintiffs will, the opposition concluded, serve responses to the interrogatories.

At oral argument on the motion, Stolpman informed the court that he had "screwed up," and argued that a monetary sanction against him personally, instead of evidentiary sanctions, was appropriate because it would be "unfair for the court to penalize eight individuals because their lawyer didn't do that good a job." The plaintiffs, Stolpman explained, "have done what they could do," and it was Stolpman who did not "put it in the right form." Stolpman stated that $5,000 would be a reasonable monetary sanction.

The court took the matter under submission, and on July 5, 2018, issued an order granting SCE's motion. The order has three parts. First, all written responses or supplemental responses to written discovery that were not verified are "null and void," and plaintiffs are precluded from (1) serving further or supplemental responses to resurrect any null and void response and from serving verifications to correct the missing or defective verifications, and (2) offering as evidence any facts or matters contained solely within such null and void responses. Second, every objection in responses not signed by counsel for plaintiffs is stricken and plaintiffs may not thereafter make any such objection.

Under the third part, plaintiffs are precluded from offering evidence of the following: (1) They informed SCE that they or any other person has been exposed to stray electrical current at their residential properties; (2) Their residential properties were damaged or harmed by SCE's conduct; (3) Their personal

property was damaged or harmed by SCE's conduct; (4) The conditions at the properties were or were not abatable at reasonable costs and by reasonable means; (5) Their real properties diminished in value during the period of their ownership as a result of any condition that SCE created or permitted to exist; (6) SCE's facilities associated with distribution of electrical service to the plaintiffs' properties are defective; (7) The design of SCE's facilities associated with distribution of electrical service to the properties are defective; (8) A stray voltage or current that plaintiffs could not feel or physically perceive when residing at the properties caused them harm; or (9) That stray electrical current interfered with plaintiffs' use and enjoyment of the properties.[5]

Although the parties dispute the effect of the sanctions, SCE concedes that they effectively terminate plaintiffs' causes of action for inverse condemnation, trespass, and nuisance. To the extent they do not entirely preclude plaintiffs' other claims, they plainly and severely narrow the nature of the claims and the types of injuries for which plaintiffs can recover damages.

On July 17, 2018, plaintiffs filed a motion for reconsideration and/or modification of the July 5 order based on Code of Civil Procedure section 1008, subdivision (a), and section 473, subdivision (b). Plaintiffs requested that the evidentiary sanctions be replaced with a monetary sanction. The motion was supported by Stolpman's declaration, stating that the evidentiary sanctions will prevent plaintiffs "from proving that

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[5] The court also directed Stolpman Law Group and the plaintiffs, jointly and severally, to "reimburse[]" SCE for the cost of filing the motion in the amount of $1,920.

[they] have been injured and that [SCE] has caused the injury," and that the sanctions "effectively act as a terminating sanction." Stolpman further stated that the "failure in providing discovery responses properly labeled, numbered and verified by [p]laintiffs is entirely my fault."

The court denied the motion for reconsideration on August 13, 2019. Plaintiffs then filed this petition. After considering SCE's opposition, we issued an alternative writ on February 26, 2019. The trial court declined to comply with the alternative writ, and we issued an order to show cause.

## DISCUSSION

California law authorizes a range of remedies for a party's "misuse of the discovery process." (Code Civ. Proc., § 2023.030.) These include monetary sanctions, evidentiary sanctions, issue sanctions, and terminating sanctions. (*Ibid.*; *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1214 (*Karlsson*).) Sanctions are ordinarily imposed incrementally, "starting with monetary sanctions and ending with the ultimate sanction of termination." (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992 (*Doppes*).) "If a lesser sanction fails to curb misuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions until the sanction is reached that will curb the abuse." (*Ibid.*)

" 'Discovery 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." ' " (*Doppes*, *supra*, 174 Cal.App.4th at p. 992.) The " ' " 'court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose

punishment.' " ' " (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35 (*Do It Urself*).)

We review the court's discovery rulings for abuse of discretion. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102 (*Liberty Mutual*).) Under this standard, we will reverse the court's ruling " 'if there is no substantial basis for the manner in which trial court discretion was exercised or if the trial court applied a patently improper standard of decision.' " (*People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071.)

Generally, "only monetary sanctions can be imposed in the absence of a prior court order compelling discovery." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2019) ¶ 8:1935, p. 8M-5.) This rule "provides some assurance that such a potentially severe [nonmonetary] sanction will be reserved for those circumstances where the party's discovery obligation is clear and the failure to comply with that obligation is clearly apparent." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1423 (*New Albertsons*).)

Here, SCE never filed a motion to compel or sought a discovery sanction of any kind prior to seeking the severe evidentiary sanctions the court imposed. Although its counsel referred during meet-and-confer correspondence to filing motions to compel if the parties' differences were not resolved, they never informed plaintiffs that they might seek an evidentiary sanction in the first instance. Indeed, only three days before filing the motion for discovery sanctions, SCE's counsel informed Stolpman that SCE has "no alternative but to bring motion(s) to compel."

Nor did the court grant a motion to compel or impose a monetary sanction prior to imposing the challenged evidentiary sanctions. The only order in the case concerning discovery prior to the order imposing evidentiary sanctions was the December 2017 order. That order merely set deadlines for plaintiffs to serve supplemental responses to SCE's discovery, which they had agreed to provide, and authorized SCE to "file a motion to compel and seek appropriate sanctions" in the event the supplemental responses did not "reflect a bona fide attempt to comply with their [statutory] obligations." The December 2017 order thus required no more than what the parties were required to do under the Civil Discovery Act, and authorized SCE to file "a motion to compel" in the event of any deficiencies; it included no finding that plaintiffs violated a discovery rule; it imposed no sanction; and its authorization for SCE to seek "appropriate sanctions" provided no indication that an extraordinary and severe evidentiary sanction would be imposed the first time SCE filed a discovery motion.

Courts have allowed departures from the general rule requiring incremental increases in the severity of sanctions in cases where a monetary sanction would have been futile. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 8:1906, p. 8M-2; *New Albertsons*, *supra*, 168 Cal.App.4th at p. 1426.) When, for example, a party is unable to provide documents it had promised to produce, "a warning to plaintiffs, in the form of a formal order to comply, would have been futile." (*Do It Urself*, *supra*, 7 Cal.App.4th at p. 36; see also *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1546 [order compelling production of documents would have been futile where party asserted that the documents

had been stolen].) An order compelling discovery and imposing lesser sanctions would also have been futile when "the discovery cutoff had passed, and . . . trial was imminent." (*Karlsson*, *supra*, 140 Cal.App.4th at p. 1215.) When the failure to produce documents is not discovered until that "late date, [an] evidentiary sanction" precluding the responding party's use of a wrongfully withheld document is "virtually the only viable option available." (*Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447, 1455.)

SCE has failed to show that an order compelling responses and a lesser discovery sanction would have been futile in this case. No evidence has been lost or stolen, neither a trial date nor discovery cutoff date has been set, and plaintiffs are able and willing to produce answers to the subject interrogatories. Indeed, as plaintiffs have illustrated through a lengthy comparison of the challenged 28 special interrogatories and their responses to SCE's first set of form interrogatories, plaintiffs have already provided information SCE called for in the subject interrogatories. The failure to respond to the subject interrogatories appears to be due entirely to the negligence of plaintiffs' counsel, as Stolpman has admitted, and not the result of any deliberate misconduct by counsel or the plaintiffs. The record, in short, discloses no reason to doubt that plaintiffs will provide the information SCE seeks if the court orders them to do so, imposes an appropriate monetary sanction against their counsel, and warns that evidentiary sanctions will follow if the order is not obeyed.[6] A lesser sanction, therefore, would not have been a futile act.

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[6] Because SCE did not request a monetary sanction and the record includes no evidence of SCE's counsel's time or

Although plaintiffs' delay in responding to SCE's discovery has been substantial, SCE has not shown any prejudice other than the delay in litigating the case. Such delay, however, occurs whenever one party must file a motion to compel; it does not itself justify evidentiary sanctions. Moreover, the prejudicial effect of the delay is likely minimized by the fact that the case is consolidated with the much larger *Richmond* case, in which approximately 100 similarly-situated plaintiffs are asserting factually similar claims and responding to similar discovery in presumably similar ways. Although the responses by *Richmond* plaintiffs do not excuse the plaintiffs' failures to respond—SCE is entitled to the verified responses of each plaintiff, even if they are identical to other plaintiffs—as a practical matter, the delay in receiving the plaintiffs' responses has probably not seriously impeded SCE's trial preparation. Any prejudice is further mitigated by the fact that much of the information SCE seeks in the subject 28 interrogatories has been provided in other discovery responses. By contrast, the prejudice to plaintiffs as a result of the order is extreme, as it effectively eviscerates some or all of their claims.

In addition to situations where a motion to compel and a lesser sanction would have been futile, trial courts have the inherent power to impose a terminating sanction when

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billings, the amount of the sanction will, if requested, need to be determined by the trial court in the first instance upon a proper motion. (See § 2023.040; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶¶ 8:2001-2002, pp. 8M-9 to 8M-10.) Nevertheless, it appears from the record that the court appropriately rejected Stolpman's suggestion that a $5,000 monetary sanction would suffice.

a "plaintiff has engaged in misconduct during the course of the litigation that is deliberate, that is egregious, and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial." (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 764 (*Stephen Slesinger*).) In *Stephen Slesinger*, which SCE cites for support, the plaintiff's investigator trespassed onto the defendant's properties on multiple occasions and stole thousands of documents, some labeled "confidential," from defendant's offices and trash receptacles. The plaintiffs were aware of the investigator's actions and of the documents he took, but failed to disclose that fact or produce the documents until years after the unlawful activity occurred. (*Id.* at pp. 766-768.) Plaintiffs also altered some of the documents that were produced to remove their confidential designation. (*Id.* at pp. 770–771.) Based on this and other wrongful conduct, the trial court imposed a terminating sanction and the Court of Appeal affirmed, stating that the plaintiff's actions were "deliberate and egregious," and any lesser sanction would have been "inadequate to ensure a fair trial." (*Id.* at p. 776.) Here, by contrast, the plaintiffs' discovery deficiencies are attributable to Stolpman's negligence, not any unlawful activity by him or plaintiffs, and there is no evidence of acts comparable or analogous to the plaintiff's conduct in *Stephen Slessinger*.

The other cases SCE relies upon are also distinguishable. In each case, the sanctioned party violated prior discovery orders before the nonmonetary sanction was imposed, the court imposed lesser sanctions before imposing evidentiary or terminating sanctions, imposing a lesser sanction would have been futile, the misuse did not come to light until trial, or the

party engaged in more egregious misuses of the discovery process than that which occurred in this case. (See *Doppes*, *supra*, 174 Cal.App.4th at pp. 993–994 [the defendant had violated numerous discovery orders and directives by a discovery referee, the court initially imposed monetary sanctions, and plaintiff "stonewalled in producing highly relevant documents," resulting in "severe prejudice" to the plaintiff]; *Liberty Mutual*, *supra*, 163 Cal.App.4th at pp. 1097–1099 [terminating sanctions imposed after two prior motions to compel were granted and after monetary sanctions were imposed]; *Karlsson*, *supra*, 140 Cal.App.4th at p. 1215 [evidentiary and issue sanctions upheld where discovery abuse appeared when "trial was imminent" and lesser "sanctions would have been futile"]; *Do It Urself*, *supra*, 7 Cal.App.4th at p. 36 [narrow evidentiary sanction upheld because the plaintiffs were unable to provide a promised audit and "a warning to plaintiffs, in the form of a formal order to comply, would have been futile"]; *Puritan Ins. Co. v. Superior Court* (1985) 171 Cal.App.3d 877, 881, 886 [plaintiff could not introduce its expert's opinion regarding tests performed on physical object because plaintiff could not locate or produce the object to defendant]; *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270 273 [court precluded plaintiff from introducing testimony of a witness the plaintiff had willfully failed to identify in response to interrogatories and did not disclose until trial had begun].)

The court's July 5, 2018 order imposes severe and broad evidentiary sanctions when SCE had not previously filed a motion to compel and the court had not previously imposed a monetary sanction. The record does not suggest that an order to compel and a monetary sanction would be futile in this case, or

that other circumstances exist that would justify an exception from the general rule requiring incremental increases in discovery sanctions. Accordingly, we grant the petition.

**DISPOSITION**

The petition is granted. Let a peremptory writ of mandate issue directing respondent Superior Court of Los Angeles County to vacate its July 5, 2018 order granting Southern California Edison Company's motion for discovery sanctions and to enter a new and different order denying that motion without prejudice to Southern California Edison Company's filing a motion to compel discovery responses and requesting sanctions. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.