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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HACADUR BULUT, Plaintiff and Respondent, v. REUBEN HALACYAN, Defendant and Appellant.	B231570 (Los Angeles County Super. Ct. No. BC410877)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed in part; reversed in part.

Law Office of Robert S. Altagen, Robert S. Altagen, Hanwei Cheng and Hal D. Goldflam for Defendant and Appellant.

Law Offices of Tony Forberg and Tony Forberg for Plaintiff and Respondent.

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The issues on appeal concern sanctions for violations of the discovery process. We affirm the order granting a terminating sanction for the repeated misuse of the discovery process. We reverse the order awarding a monetary sanction in the amount of $1,240 for a single discovery abuse because the court did not hold a noticed hearing prior to awarding that sanction.

FACTUAL AND PROCEDURAL BACKGROUND

On March 30, 2009, Hacadur Bulut filed a complaint, which as subsequently amended, alleged causes of action for common count money lent, breach of contract, and fraud. Reuben Halacyan and Azteca Motors 2, Inc. (Azteca) were named as defendants. According to the operative complaint, the parties agreed to combine their automobile inventories, sell the vehicles, and share the profits. But, Halacyan and Azteca misappropriated the proceeds from the sale of the vehicles.

Following several unsuccessful efforts by Bulut to obtain discovery from Halacyan and Azteca, described in detail below, the trial court imposed a terminating sanction, and then, after a default prove-up hearing, entered judgment in Bulut's favor. Halacyan (but not Azteca) appealed from the judgment.

1. Interrogatories

On March 25, 2010, Bulut served special interrogatories on Halacyan and on Azteca. In addition to questions concerning Halacyan's and Azteca's affirmative defenses, Bulut also requested information regarding payments made by Bulut to Azteca and payments made by Azteca to Bulut, as well as information regarding Azteca's assets and dissolution. On May 7, 2010, Bulut's counsel wrote appellant's counsel requesting responses to the discovery. Halacyan and Azteca's counsel did not respond to the meet and confer letter. On May 20, 2010, Bulut filed a motion to compel Azteca and Halacyan to provide verified, objection-free responses to the special interrogatories and sought monetary sanctions. Halacyan and Azteca filed no opposition. Halacyan and Azteca's counsel did not appear at the hearing on the motions to compel.

The court ordered Halacyan and Azteca "to provide . . . counsel with written verified responses without objection to the special interrogatories." The court also

ordered Halacyan to serve responses by July 12, 2010, at 12:00 p.m. Halacyan and Azteca violated this court order; they did not serve responses to the special interrogatories on July 12, 2010. Undated interrogatory responses from Halacyan are included in our record, but they contain no verification and numerous objections.[1] Additionally, many of Halacyan's responses are evasive.[2] Bulut's counsel represented that he received the responses on July 29, 2010, and additional responses on November 23, 2010, but never received the objectionless responses the trial court had ordered.

2. Depositions

On March 12, 2010, Bulut served notice of deposition of Arto Zakaryan, who Bulut described as a person most knowledgeable on behalf of Azteca, and a demand for the production of documents. The document request included all agreements, communications, and payments between Bulut and Azteca in addition to documents regarding Azteca's inventory and profits. Zakaryan did not appear for deposition. On May 20, 2010, Bulut filed a motion to compel Zakaryan to attend a deposition and produce the documents requested. Bulut's counsel represented that Halacyan and Azteca had produced no documents. Halacyan, Azteca, and Zakaryan did not oppose the motion. The court ordered Zakaryan's deposition to take place on July 16, 2010, along with the requested document production.

Also on March 12, 2010, Bulut served a notice of deposition of Halacyan and requested the production of documents from Halacyan. Among other things, the request for production sought documents evincing an agreement between Halacyan and Bulut, communications between Halacyan and Bulut, and documents regarding payments from

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1 The responses include a page of "general objections." Special interrogatories Nos. 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 68, and 69 contain specific objections.

2 For example, Bulut separately requested documents supporting each affirmative defense and Halacyan responded to each requests as follows: "[a]ll documents previously produced by Defendants . . ." and "[a]ll documents previously produced by Plaintiff." With respect to questions regarding documents related to the dissolution of Azteca, Halacyan responded, "None exist????"

Halacyan to Bulut. Additionally, Bulut sought documents showing the sales of motor vehicles. Halacyan failed to appear. Bulut moved to compel the deposition and Halacyan did not oppose the motion. The court ordered Halacyan's deposition to take place on July 15, 2010, and ordered Halacyan to produce the requested documents on that day. The court awarded Bulut sanctions in the amount of $2,400. It is undisputed that Halacyan did not appear for his deposition on the court-ordered date.

On June 9, 2010, Bulut served Halacyan's accountant, Aram Aginian, with a deposition subpoena for the production of documents. Aginian failed to appear on the scheduled date and informed Bulut's counsel that Halacyan advised him he did not need to appear for the deposition. When Aginian subsequently appeared for deposition, he did not bring any responsive documents. Bulut represented that the documents were necessary to show Halacyan embezzled money.

3. Requests for Admission

On May 28, 2010, Bulut served requests for admission set three. On August 2, 2010, Bulut's counsel appeared for an ex parte application for an order or in the alternative to shorten time on a motion to deem Bulut's requests for admissions set three to Halacyan be deemed admitted. The requests for admission concerned whether payments made by Azteca were for Halacyan's personal expense.

In written opposition, Halacyan and Azteca opposed the motion to have the requests for admission deemed admitted. Halacyan and Azteca argued that the motion to have the requests for admission deemed admitted was not timely and that sanctions may be awarded only following a noticed motion and hearing.

On August 6, 2010, the court granted Bulut's ex parte application to have his requests for admission set three deemed admitted and awarded him sanctions in the amount of $1,240.

4. Motion for Terminating Sanctions

On August 2, 2010, Bulut sought issue, evidence, and terminating sanctions. Bulut argued terminating sanctions were appropriate because Halacyan and Azteca

repeatedly misused the discovery process and disobeyed a court order regarding discovery.

At a hearing on December 6, 2010, the court stated that Bulut was unable to obtain discovery from Halacyan and Azteca. The court considered awarding an evidentiary sanction but concluded that the discovery abuses warranted a terminating sanction. On December 10, 2010, the court granted a terminating sanction.

DISCUSSION

Halacyan argues that the court erred in imposing a terminating sanction and that the court erred in awarding monetary sanctions on Bulut's motion to deem the requests for admission admitted. We discuss his arguments seriatim, concluding that only the latter has merit.

1. Terminating Sanctions

A trial court's choice of sanctions with respect to discovery matters is reviewed on appeal for abuse of discretion. (*Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 175; *Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228 (*Sauer*).) "'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) In applying the abuse of discretion standard, "[w]e presume the trial court was aware of its various options in imposing an appropriate sanction and we will not select a sanction different from that within the trial court's discretion." (*Sauer, supra,* at p. 230.) Even if we disagree with the trial court's exercise of its discretion, "we are not free to substitute our discretion for that of the trial court." (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 882.)

Sanctions, including terminating sanctions, are appropriate for the misuse of the discovery process. (Code Civ. Proc., § 2023.030, subd. (d).) "Failing to respond to an authorized method of discovery" is a misuse of the discovery process. (§ 2023.010,

subd. (d).) So is making an evasive response to discovery (*id.*, subd. (f)) and "[d]isobeying a court order to provide discovery" (*id*., subd. (g)). Moreover, the failure to meet and confer in good faith constitutes a misuse of discovery. (*Id*., subd. (i).)

"If a party fails to obey an order compelling answers to special interrogatories and/or an order compelling a response to a demand for production of documents, the court may impose a terminating sanction." (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516.) Terminating sanctions are authorized when a party has failed to obey an order compelling attendance at a deposition. (Code Civ. Proc., § 2025.450, subd. (d).) "Repeated failure to respond to discovery and to comply with court orders compelling discovery provides ample grounds for imposition of the ultimate sanction." (*Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1069.)

Here, the trial court did not abuse its discretion in awarding terminating sanctions. Halacyan failed to respond to special interrogatories and failed to appear at his deposition. Bulut was forced to file a motion to compel, which Halacyan did not oppose. The court then ordered Halacyan to provide verified objectionless responses to the interrogatories and to appear at deposition on July 15, 2010. Halacyan failed to comply with the court order. Although Halacyan eventually answered the interrogatories, his responses violated the orders because they were not verified and contained numerous objections.[3] In addition to his discovery abuses concerning his own information, Halacyan also improperly advised his accountant that he was not required to appear for deposition. Given Halacyan's numerous discovery misdeeds and his violation of court-ordered discovery, the trial court did not abuse its discretion in ordering terminating sanctions. (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 297 [no abuse of discretion in awarding terminating sanction for repeated discovery abuse]; *Electric Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1183-1184 [same].)

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[3] Halacyan states that he faxed a verification but his statement is not followed by a citation to the record and not supported by the record.

None of Halacyan's arguments has merit. Halacyan's claim that the terminating sanction was punitive and a lesser sanction would have sufficed is unpersuasive because the record shows a lesser sanction did not suffice. For example, the court previously ordered Halacyan to provide verified responses to the interrogatories without objection. Halacyan simply ignored the order. Halacyan's contention that an evidentiary sanction would have been sufficient does not show that the court abused its discretion in awarding a terminating sanction. (*Sauer, supra*, 195 Cal.App.3d at p. 230 [If an appellant presents facts that merely afford an opportunity for a difference of opinion, "the appellate court is neither authorized nor warranted in substituting its judgment for that of the trial court"].)

Finally, Halacyan's reliance on *Wilson v. Jefferson* (1985) 163 Cal.App.3d 952 is misplaced. In that case, the court recognized the general principle that "'there is no question that a court is empowered to apply the ultimate sanction [of a default judgment] against a litigant who persists in the outright refusal to comply with his discovery obligations [because] the refusal to reveal material evidence is deemed to be an admission that [his] . . . defense is without merit.'" (*Id*. at p. 958.) The court, however, held the general principle was inapplicable in that case because the only discovery the appellant had refused to answer concerned an affirmative defense, which was not dispositive of other issues in the case. (*Id*. at pp. 958-959.) Here, in its interrogatories, Bulut sought information on Halacyan's affirmative defenses and on payments made to and from Bulut. In his requests for documents, Bulut sought documents to show Halacyan embezzled money, which is critical to his claim Halacyan misappropriated funds. Halacyan's claim that the only discovery he failed to provide concerned affirmative defenses is not supported by the record. In short, Halacyan does not demonstrate the trial court abused its discretion in issuing a terminating sanction.

2. Monetary Sanction

Halacyan correctly argues the trial court erred in awarding sanctions ex parte. "A sanction order issued ex parte is void." (*Parker v. Wolters Kluwer U.S., Inc.*, *supra*, 149 Cal.App.4th at p. 296.) The $1,240 sanction therefore must be reversed.[4]

DISPOSITION

The order awarding $1,240 in sanctions is reversed. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.

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[4] Bulut incorrectly argues that Halacyan was required to appeal from the August 6, 2010 order deeming the requests for admission admitted and imposing the $1,240 monetary sanction. An order awarding sanctions exceeding $5,000 is immediately appealable. (Code Civ. Proc., § 904.1, subd. (a)(12).) Here, the order for sanctions in an amount less than $5,000 was not immediately appealable.

Bulut argues that the order was made after a noticed motion and was not made ex parte. His citations to the record do not support that assertion.

In light of the conclusion that Halacyan failed to show the court erred in awarding the terminating sanction, Halacyan's argument that the court erred in deeming the requests for admission admitted without reopening discovery is moot.