

Filed 12/12/18 Nicola Six Limited v. Heard CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NICOLA SIX LIMITED,

Plaintiff and Respondent,

v.

AMBER HEARD et al.,

Defendants and Appellants.

B288209

(Los Angeles County
Super. Ct. No. SC126725)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Browne George Ross, Eric M. George, Keith J. Wesley and Jeffrey C. Berman for Defendants and Appellants.

No appearance for Plaintiff and Respondent.

I. INTRODUCTION

Defendants Amber Heard (Heard) and Under the Black Sky, Inc., appeal the award of \$6,850 in discovery sanctions following the trial court's grant of plaintiff Nicola Six Limited's motion to compel the deposition of Amber Heard. We affirm.

II. BACKGROUND

On March 27, 2017, plaintiff served a notice for the deposition of Heard on May 4, 2017. According to her attorney, Heard was in Australia filming a movie and unavailable on May 4. The record does not indicate Heard served objections or otherwise responded to the notice. Instead, plaintiff agreed to reschedule the deposition, and on April 24, 2017, plaintiff's attorney e-mailed Heard's attorney confirming an agreement "that we are taking off calendar, for the time being, the May 4 date for Amber Heard's deposition and that while reserving our rights regarding other dates, we will reschedule it."

In the following months, plaintiff tried to reschedule the deposition. Plaintiff's attorney e-mailed Heard's counsel on May 24, 2017, asking for deposition dates and received no response. On June 29, 2017, plaintiff's attorney again requested deposition dates, and Heard's attorney responded he was "going to do some fact-finding . . . about Ms. Heard's availability for a deposition." Plaintiff's counsel asked that he provide the proposed dates in a week. A month passed with no dates provided. On July 31, 2017, plaintiff's counsel e-mailed Heard's attorney that he had not "received proposed deposition dates for your client Ms. Heard, despite our discussions and repeated

requests. Please advise.” Another month passed. On August 28, 2017, plaintiff’s counsel proposed nine deposition dates in September. Heard’s counsel did not respond.

On October 27, 2017, plaintiff filed and served a motion under Code of Civil Procedure¹ sections 2023.010, 2023.030, and 2025.450 for an order compelling Heard to appear for a deposition on a date set by the court and sanctions. Plaintiff argued that after agreeing to accommodate Heard’s schedule, plaintiff had been trying to set a deposition date for six months, and Heard had been nonresponsive. Plaintiff sought sanctions as the prevailing party in a discovery dispute and because Heard willfully refused to appear for the deposition.

On November 13, 2017, Heard’s attorney sent an e-mail to plaintiff’s counsel offering six deposition dates in December 2017.

On November 16, 2017, Heard filed her opposition to the motion to compel. She asserted the motion was premature because she was willing to be deposed in December. She contended she had never refused or failed to appear because the deposition had been taken off calendar. She argued that plaintiff had failed to meet and confer before filing the motion, and that if plaintiff had informed Heard of its intent to file the motion, she would have made herself available for a deposition.

In its reply, plaintiff countered that it had tried for months to obtain available dates from Heard without a motion to compel, but that it took the filing of the motion for her finally to provide deposition dates.

On December 1, 2017, the trial court granted the motion “in its entirety,” ordered Heard’s deposition to take place on January 23, 2018, and continued the issue of sanctions to

¹ All statutory citations are to the Code of Civil Procedure.

January 30, 2018. The parties then filed additional briefs on the issue of sanctions, with plaintiff asking for \$31,325 in discovery sanctions under sections 2023.010, 2023.030, and 2025.450 and \$30,000 in sanctions under section 128.5, and Heard arguing she acted with substantial justification and would have appeared for a deposition if plaintiff had told her it was going to file a motion to compel.

On January 30, 2018, the trial court issued a tentative order granting the request for discovery sanctions pursuant to section 2025.450, subdivision (g)(1) and denying the request for section 128.5 sanctions. The court rejected Heard's argument that plaintiff did not meet and confer, finding that plaintiff counsel's conversations and correspondence satisfied the meet and confer requirement. The court concluded "[t]he motion to compel deposition presented a straightforward issue of an uncooperative party who refused to sit for deposition or was unreasonably obstructing attempts to depose her." The requested amount of fees was "unwarranted and unreasonable" because "[s]uch motions are common place and ordinarily justify sanctions in the range of \$500 to \$1200." Here "sanctions are properly awarded in the amount of \$6850." The trial court then adopted the tentative decision as the order and found "Heard was uncooperative and refused to sit for deposition or unreasonably obstructed attempts to depose her."

Thereafter, defendants appealed the grant of sanctions.²

² Both defendants appealed even though the motion to compel was against Heard and sanctions were awarded solely against Heard.

III. DISCUSSION

A. *Standard of Review*

“We review the trial court’s ruling on a discovery sanction under the deferential abuse of discretion standard. [Citation.]’ [Citation.] ‘A court’s decision to impose a particular sanction is “subject to reversal only for manifest abuse exceeding the bounds of reason.” [Citation.]’ [Citation.]” (*Does v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1435; see also *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102 [“Sanction orders are ‘subject to reversal only for arbitrary, capricious or whimsical action.’ [Citations.]”].)

“A determination of whether an attempt at informal resolution is adequate also involves the exercise of discretion.” *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431 (*Obregon.*) “A reviewing court must . . . first determine whether substantial evidence supports the factual basis on which the trial court acted, and then determine whether the orders made by the trial court were an abuse of discretion in light of those facts.” (*Id.* at p. 430.) “To the extent that reviewing the sanction order requires us to construe the applicable discovery statutes, we do so de novo, without regard to the trial court’s ruling or reasoning. [Citation.]” *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1286 (*Clement.*)

“We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.)

B. *Discovery Sanctions Under the Code of Civil Procedure*

The discovery process is premised on the parties making good faith attempts to resolve discovery disputes without court involvement. (*Obregon, supra*, 67 Cal.App.4th at p. 434 [“it is a ‘central precept’ of the Civil Discovery Act of 1986 that discovery ‘be essentially self-executing’” and “reasonable and good faith efforts at informal resolution of discovery disputes are no doubt a key part of the discovery system”].) When that does not occur, the court must ensure that a party is not abusing the discovery process. “Any discovery request, even an initial one, can be misused in an attempt to generate settlement leverage by creating burden, expense, embarrassment, distraction, etc. It is a judge’s responsibility to control such abuse.” (*Id.* at p. 431.)

One tool for controlling such abuse is sanctions. The Code of Civil Procedure provides multiple bases for a court to impose an award of attorney fees as discovery sanctions. Section 2023.030 gives authority to impose sanctions “against anyone engaging in conduct that is a misuse of the discovery process,” including “a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney[] fees, incurred by anyone as a result of that conduct.” Section 2023.010 defines a misuse of the discovery process as including “[f]ailing to respond or to submit to an authorized method of discovery” and “[f]ailing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery.” (§ 2023.010, subds. (d), (i); see also *Ellis v. Toshiba America Information Systems, Inc.* (2013)

218 Cal.App.4th 853, 877-878 (*Ellis*) [sanctions available for “failing to meet and confer in good faith to resolve a discovery dispute when required by statute to do so”].) And section 2025.450, subdivision (g) directs the court when granting a motion to compel a deposition to “impose a monetary sanction . . . in favor of the party who noticed the deposition . . . unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.”³

C. *The Award of Attorney Fees Against Heard*

Heard advances two arguments against the grant of monetary sanctions. First she argues she cannot be sanctioned for failing to attend a deposition because plaintiff took the May 4, 2017, deposition off calendar. Because no deposition date was noticed thereafter, plaintiff had no grounds to move to compel under section 2025.450, and Heard could not fail to appear.

Heard’s argument is not well-taken. Plaintiff did not withdraw its deposition notice. To accommodate Heard, plaintiff agreed to take off the May 4, 2017, date and reschedule for another time. The record reveals substantial evidence that Heard then refused without justification to provide dates when she would appear for a deposition and ignored plaintiff’s attempts

³ We also note section 2023.020 mandates an attorney fees award against any party “who fails to confer as required,” regardless of the outcome of the discovery motion. (*Ellis, supra*, 218 Cal.App.4th at pp. 879-880 [failure to cooperate in creating protocol for inspection of electronic records was sufficient basis for imposition of sanctions pursuant to section 2023.020, even though no statute required meet and confer].)

to reschedule the deposition. Section 2025.450, subdivision (a) permits a motion to compel when “after service of a deposition notice,” a party “fails to appear for examination.” By refusing to provide dates or respond to plaintiff’s attempts to identify available dates, Heard failed to appear for a deposition after being properly served with a deposition notice, necessitating a motion to compel before she finally offered dates. “Whenever one party’s improper actions . . . in seeking or resisting discovery necessitate the court’s intervention in a dispute, the losing party presumptively should pay a sanction to the prevailing party” (*Clement, supra*, 177 Cal.App.4th at pp. 1286-1287.)

Heard’s argument also ignores the other bases for sanction in the Code of Civil Procedure, such as sections 2023.010 and 2023.030. Substantial evidence supports findings that Heard failed to submit to an authorized method of discovery, failed to meet and confer in a reasonable good faith attempt to set a deposition date, and engaged in conduct that is a misuse of the discovery process. For many months she ignored plaintiff’s attempts to reschedule her deposition until being served with the motion to compel. Heard’s refusal to participate in rescheduling the deposition is a sufficient basis for sanctions. (*Ellis, supra*, 218 Cal.App.4th at p. 880 [sanctions warranted where moving party “repeatedly attempted” discussions and sanctioned party “did not reciprocate in a constructive fashion”].) Heard’s argument—that once the May 4 date was taken off calendar to accommodate her schedule, she had no obligation to provide dates or appear for a deposition unless and until plaintiff served her with a new deposition notice—runs contrary to the requirement that parties respond or submit to authorized discovery, resolve disputes in good faith, and not abuse the discovery process by

causing delay and driving up costs. (§ 2023.010, subd. (d); *Clement, supra*, 177 Cal.App.4th at pp. 1291-1292.)

Next Heard argues the award is improper because plaintiff failed to meet and confer. The record does not support this conclusion. On May 24, 2017, June 29, 2017, July 31, 2017, and August 28, 2017, plaintiff's counsel asked Heard's counsel for available deposition dates with no meaningful response.

In sum, the record establishes that Heard refused to appear for a deposition or cooperate in setting the deposition date until she faced the threat of a court order, and therefore the motion to compel was necessary to obtain those dates and some modicum of cooperation. The trial court's decision to sanction Heard was not outside the bounds of reason.

IV. DISPOSITION

The order awarding sanctions is affirmed. Plaintiff is awarded its costs on appeal.

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SEIGLE, J.*

We concur:

BAKER, Acting P. J.

KIM, J.

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