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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

ACT LITIGATION SERVICES, INC., Plaintiff and Appellant, v. GREENBERG TRAURIG LLP et al., Defendants and Respondents.	B248171 (Los Angeles County Super. Ct. No. BC434825)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Reversed and remanded with directions.

Valorem Law Group, Nichole N. Auerbach (Pro Hac Vice), Mark D. Sayre and Patrick J. Lamb for Plaintiff and Appellant Act Litigation Services, Inc.

DLA Piper, William P. Donovan, Jr. and Rachel E. K. Lowe for Defendant and Respondent FTI Consulting, Inc.

Gaims Weil West, Alan Jay Weil, Barry G. West and Jesse J. Contreras for Defendants and Respondents Greenberg Traurig, LLP, John A. Sten and Jason C. Moreau.

Webster Kaplan Sprunger and Neil H. Freedman for Defendants and Respondents Michael Miller, Paul Tearen and Neil Garde.

In a prior appeal, we affirmed the disqualification of Law Offices of Ian Herzog (Herzog) as attorney for plaintiff ACT Litigation Services, Inc. (ACT). (*ACT Litigation Services, Inc. v. Greenberg Traurig LLP* (July 31, 2012, B232811) [nonpub. opn.].) After the remittitur issued, ACT, a California corporation, did not retain a new attorney for two months, during which time it could not proceed with this action. (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284, fn. 5 [under California law, a corporation may not represent itself].) ACT's failure to comply with the court's previous orders during this period led defendants to move for terminating sanctions. At the hearing on that motion, ACT's newly retained counsel—who was named as attorney of record one business day before the hearing—requested time to obtain declarations from his client to explain its conduct and the reasons for the delay. The trial court denied this request and dismissed the action.

In this appeal from the judgment of dismissal, ACT contends the trial court erred in refusing to hear any explanation of its conduct and the reasons for the delay in hiring a replacement attorney. We conclude that ACT's new counsel should have been allowed to show, if possible, good reason for the delay. The trial court's refusal to allow him to do so was error, and we reverse and remand for a new hearing at which ACT shall have an opportunity to explain its conduct. After considering the evidence at the new hearing, the court shall determine whether or not there was misconduct and, if so, impose the appropriate sanction, including a terminating sanction if that is warranted by the evidence.

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, ACT contracted with Syntax-Brillian Corporation (Syntax),[1] a client of defendant and respondent Greenberg Traurig LLP. Pursuant to the agreement, ACT created an electronic database for Syntax that contained approximately 3.7 million

[1] Syntax is not a party to this litigation.

document pages, at a cost of more than $1.2 million. After ACT created the database, Syntax filed for chapter 11 bankruptcy and did not pay ACT for its services.

In March 2010, Herzog filed ACT's complaint for negligent misrepresentation, fraud, and deceit against Greenberg Traurig, attorneys John A. Sten and Jason C. Moreau of that firm, FTI Consulting Inc. (FTI) (the reorganization services company that ran Syntax), and FTI affiliates Michael Miller, Paul Tearen, and Neal Garde. The complaint alleged that defendants fraudulently induced ACT to enter into the contract with Syntax, which they knew or should have known was on the brink of bankruptcy and not likely to pay for ACT's services.

In February 2011, Greenberg Traurig moved to disqualify Herzog based on its use and public disclosure of Syntax and Greenberg Traurig documents that were protected by the attorney-client privilege and the attorney work product doctrine. Greenberg Traurig also sought a protective order regarding documents it claimed contained privileged information.

While these motions were pending, Herzog filed a first amended complaint and other documents that disclosed some of the privileged information. On Greenberg Traurig's ex parte application, the trial court temporarily sealed some of the privileged documents pending further hearing.

In its April 2011 order, the trial court made three principal rulings. First, it granted Greenberg Traurig's motion to disqualify Herzog.[2] Second, the court sealed the

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[2] The order stated in relevant part: "The contract between ACT and Syntax required ACT to hold confidential information in confidence and not to use it for purposes other than specified in the [services agreement]. ACT and its attorneys performed word searches for attorney client privileged and work product documents and filed them in the public record in this case. There was no waiver or exception to the privileges that permitted such actions. This case presents intentional conduct, far beyond 'mere exposure' discussed in *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644. ACT attorneys Law Offices of Ian Herzog are disqualified. (*Rico v. Mitsubishi Motors* (2007) 42 Cal.4th 807, 819.) ACT and its former, current and future counsel in this action are prohibited from making any use or disclosure of SBC or its attorneys' privileged attorney client communications or work product provided to ACT pursuant to the [services agreement]."

first amended complaint and ordered ACT to file a redacted version that omitted the privileged information. ACT complied with this order in April 2011. Third, the court granted a motion requiring ACT to provide Greenberg Traurig, Sten, and Moreau with discovery responses within 20 days. ACT, which was without an attorney following Herzog's disqualification, did not comply with this order.

ACT filed a notice of appeal from the disqualification order. (See *Orange County Water Dist. v. The Arnold Engineering Co.* (2011) 196 Cal.App.4th 1110, 1116, fn. 2 [order granting or denying a motion to disqualify counsel is immediately appealable as an injunction order].) It also filed two writ petitions seeking extraordinary relief and a stay of the disqualification order. (Nos. B232857, B233198.) We denied both petitions.

While the appeal from the disqualification order was pending, the trial court held an ex parte hearing on Greenberg Traurig's application to seal several paragraphs of the second amended complaint.[3] The hearing resulted in an order directing the removal of the second amended complaint from the court's website, directing Greenberg Traurig to file a redacted copy of the second amended complaint, and directing ACT to serve the second amended complaint and file a proof of service by May 2011. Herzog, although disqualified, objected that the case was stayed by the appeal from the disqualification order, which constituted a mandatory injunction (citing Code Civ. Proc., § 916).

Following the hearing, the trial court entered an order staying the litigation pending the appeal from the disqualification order. It vacated all future hearing dates, including the hearing date for a motion to compel discovery by Tearnen, Garde, and Miller.

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[3] There was a dispute whether the second amended complaint was served. In support of its application, Greenberg Traurig provided the declarations of its counsel (Jesse J. Contreras of Gaims, Weil, West & Epstein, LLP), FTI's counsel (Rachel E.K. Lowe of DLA Piper LLP), and Miller, Garde, and Tearnen's counsel (Jeffrey W. Mayes of Silver & Freedman, APLC), which stated that defendants had not been served with the second amended complaint, notwithstanding the affidavit of service, which indicated that service was effected on April 11, 2011.

On July 31, 2012, we issued our opinion affirming the disqualification order. The Supreme Court denied review in November 2012 (S205331), and our remittitur issued on December 19, 2012.

At the first post-remittitur status conference, in January 2013, the superior court announced that the stay was lifted as of December 19, 2012, but ACT was without an attorney and could not proceed without one. It issued an order to show cause re dismissal "for failure to obtain counsel," which was set for February 2013. It also directed that once ACT obtained a new attorney of record, the parties were to meet and confer on the outstanding motion to compel discovery, which also was scheduled for the next hearing.

After the status conference, the court added the following matters for the February 2013 hearing:

1. FTI's motion to dismiss the second amended complaint, which was joined by Tearnan, Garde, and Miller. The motion was based on ACT's failure to comply with the prior order to serve the second amended complaint and file a proof of service by May 2011.

2. FTI's demurrer to the second amended complaint.

3. Greenberg Traurig's motion for terminating sanctions and to strike the second amended complaint, which was joined by Sten and Moreau. The motion for terminating sanctions was based on ACT's failure to comply with the April 2011 order requiring that it provide discovery responses and a privilege log within 20 days. By counting 20 days from the date the remittitur issued, Greenberg Traurig calculated the time to comply had expired in January 2013, and that terminating sanctions were warranted under Code of Civil Procedure section 2023.030. The motion to strike was based on ACT's inability to proceed without an attorney.

ACT retained attorney Wayne McClean to oppose the motions to dismiss and the demurrer. He filed opposition papers on ACT's behalf, stating that he was "Specially Appearing" for ACT.[4] It is undisputed that McClean was not ACT's attorney of record.

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[4] These papers were stricken from the record.

On the last business day before the February 2013 hearing, ACT filed a substitution of attorney that identified Mark Sayre as its new attorney of record.[5]

Sayre appeared at the February 2013 hearing with attorney Chris Roberts from McClean's law firm. The trial court refused to allow Roberts to participate at the hearing because he was not an attorney of record. The court noted that although ACT had been given sufficient time to retain new counsel —whether measured from the date the disqualification order was affirmed or the date the remittitur was issued—it did not do so until the eve of the hearing. The court pointed out that because McClean could not make a special appearance on behalf of a nonexistent attorney of record, his opposition papers would be stricken. The result was that the motions to dismiss were "unopposed."

After explaining that it was "not dismissing the case for failure to obtain counsel," the trial court stated it was granting the following motions: (1) FTI's motion to dismiss based on ACT's failure to comply with the prior order to serve the second amended complaint and file a proof of service by May 2011; and (2) Greenberg Traurig's motion for terminating sanctions based on ACT's failure to comply with the April 2011 order to provide discovery responses and a privilege log within 20 days.

Following the court's ruling, Sayre sought to call Roberts as a "fact witness" to explain why ACT was not at fault for the delay in retaining a new attorney of record. The trial court refused Sayre's request, stating, "I don't need a fact witness. [McClean] should not have filed [the oppositions to the motions to dismiss], period. [ACT] should have had timely oppositions to these motions filed [by a new attorney of record,] particularly after these motions were put on calendar when the remittitur was issued."[6]

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[5] The record does not indicate the date of Sayre's retention, but the substitution of attorney was filed on Friday, February 15, 2013. Monday, February 18, was a holiday. The hearing on February 19 was held on the first business day (Tuesday) following a three-day weekend.

[6] The record shows, however, that all of the motions to dismiss were calendared after the post-remittitur January 8, 2013 status conference.

The court expressed concern that ACT had retained Sayre on the eve of the hearing, and he was denying any knowledge of the case. The court stated, "This is the point: This is the way A.C.T. Litigation Services is conducting itself? And I've given them time to get oppositions filed, I've given them time to get oppositions filed, I've given them time to get counsel up to speed on this case and they haven't taken advantage of it."

In response to the court's inquiry whether ACT deserved "one more chance" to explain its conduct, Greenberg Traurig's attorney argued "[t]here's no explanation for this conduct, Your Honor. It's not difficult to get an attorney in Los Angeles." Counsel pointed out that the 20-day period for complying with the discovery order had expired long ago. He argued: "We have no explanation for why discovery orders haven't been complied with. We have no explanation for why, when the court orders that pleadings be served that they were not served." "There's no evidentiary basis [to give ACT one more chance]. There's no explanation for this conduct. It doesn't make sense when you look at it from the outside and they've certainly given us no inside information that would explain why this conduct occurred. It's inexcusable."

Sayre assured the court that he had an explanation for his client's conduct, but he could not disclose it without violating the attorney-client privilege. He requested leave to obtain declarations from his client that would explain its conduct and the reasons for the delay. He argued the declarations were necessary to enable the court to "make a decision based upon the facts not supposition."

Stating that it had "more than enough facts," the court denied counsel's request to provide declarations from ACT. The court granted the motions to dismiss,[7] and took the

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[7] In its written judgment of dismissal, the trial court stated: "The Order to Show Cause is held. Plaintiff ACT Litigation Services is an active California Corporation and must be represented by counsel. ACT has had since 12/26/12, the date of the remittitur in B232811, to obtain counsel. [¶] Attorney Wayne McClean has filed pleadings and papers on behalf of ACT and notes on those papers that he is 'specially appearing' for ACT Litigation Services. Attorney McClean . . . has not substituted in as counsel of record. Attorney McClean signed and filed these papers with the Court after the Court

remaining matters (the discovery motion and demurrer to the second amended complaint) off calendar. ACT timely appealed from the judgment of dismissal.

DISCUSSION

Following Herzog's disqualification, ACT did not retain a new attorney until the eve of the hearing on the motions to dismiss. During the period that it was without an attorney, ACT failed to comply with the trial court's outstanding orders to provide discovery and serve the second amended complaint. It also failed to request a continuance or seek some other form of relief before the dismissal hearing.

At the dismissal hearing, Sayre stated that he was precluded by the attorney-client privilege from divulging the reasons for ACT's conduct and the delay in retaining new counsel. He requested leave to obtain declarations from his client to provide that information, which was critical to the court's evaluation of ACT's conduct. The court denied the request, stating it had "more than enough facts."

Contrary to the trial court's statement, the record is silent as to the reasons for ACT's delay in retaining new counsel. A two-month delay might or might not be

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issued, on 1/8/13, an Order to Show Cause re dismissal of plaintiff ACT Litigation's action for failure to obtain counsel of record. [¶] Attorney McClean's filings of 2/4/13 (opposition to motion to compel), 2/4/13 (opposition to motion to dismiss), 2/4/13 (opposition to demurrer) and 2/6/13 (opposition to motion for terminating sanctions) are stricken from the record. [¶] A 'special appearance' is an appearance for the limited purpose of challenging the assertion of jurisdiction over the party. *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444 n. 2. It is also used to denote an appearance at a hearing at the request of and in the place of the attorney of record, with or without compensation. *Id*. [¶] Here, at the time attorney McClean filed the papers, there is no counsel of record for plaintiff ACT Litigation Services. Attorney McClean cannot specially appear for another attorney when there is no attorney representing ACT Litigation Services. Attorney Sayre was not counsel of record until 2/15/13. [¶] . . . [¶] Defendant FTI Consulting, Inc.'s motion to dismiss is GRANTED. Plaintiff's action is dismissed for failure to serve the second amended complaint filed on 4/11/11 on defendants as required by the 5/13/11 order. [¶] . . . [¶] The motion for terminating sanctions is GRANTED. Plaintiff's action is dismissed for failure to comply with the 4/14/11 order granting defendants' motion to compel."

indicative of an intentional abandonment. The record provides only a partial basis to determine whether or not ACT's conduct warranted a terminating sanction. Under the circumstances, Sayre's request to provide declarations from his client to explain the reasons for the delay was reasonable.

Because it had only a limited factual basis to exercise discretion, the trial court was premature in concluding that immediate dismissal of the action was warranted. In order to reach an informed, intelligent and just decision, the trial court must know and consider the material facts and evidence, and apply the correct legal principles. (*Oldham v. California Capital Fund, Inc.* (2003) 109 Cal.App.4th 421, 430.) A trial court is vested with broad discretionary powers to enforce its orders, but its discretion is not unlimited. (*Fred Howland Co. v. Superior Court* (1966) 244 Cal.App.2d 605, 610 (*Fred Howland*).) As we stated in *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 763–765, in exercising its discretion a trial court must "calibrate the sanction to the wrong. Whether the misconduct violates a court order is relevant to the exercise of inherent power, but it does not define the boundary of the power. [Citations.] The decision whether to exercise the inherent power to dismiss requires consideration of all relevant circumstances, including the nature of the misconduct (which must be deliberate and egregious, but may or may not violate a prior court order), the strong preference for adjudicating claims on the merits, the integrity of the court as an institution of justice, the effect of the misconduct on a fair resolution of the case, and the availability of other sanctions to cure the harm. [Citations.] We do not attempt to catalogue all the factors that must be considered in any particular case, except to emphasize that dismissal is *always* a drastic remedy to be employed *only* in the rarest of circumstances. We also do not attempt to catalogue the types of misconduct necessary to justify an exercise of the inherent power to dismiss, because 'corrupt intent knows no stylistic boundaries.' (*Aoude* [*v. Mobil Oil Corp.* (1st Cir. 1989)] 892 F.2d [1115,] 1118.) Rather, we hold only that when the 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, the trial court has the inherent power to

dismiss the action. Such an exercise of inherent authority is essential for every California court to remain '"a place where justice is judicially administered."' (*Von Schmidt v. Widber* (1893) 99 Cal. 511, 512, quoting 3 Blackstone Commentaries 23.) [Fns. omitted.]"

Applying this standard here, we conclude the failure to allow ACT's attorney leave of any duration to provide declarations to explain its conduct and the delay in retaining new counsel was erroneous. (See *In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1169 [trial court must exercise its discretion with due regard to all interests involved, and the refusal of a continuance which has the practical effect of denying the applicant a fair hearing is reversible error]; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297–1298 [an action taken by the trial court according to a mistaken view of its discretionary power constitutes error].)

For this reason, the judgment of dismissal must be reversed and the matter remanded for a new hearing, at which ACT shall have the opportunity to present evidence concerning the reasons for its conduct and the delay in retaining new counsel. The trial court shall then determine whether or not ACT committed misconduct, and, if so, impose the appropriate sanction. If the court finds that ACT acted in a manner that is so deliberate and egregious as to warrant dismissal of the action, it may dismiss the action. If the court finds that ACT's delay in retaining new counsel is excusable, then its failure to comply with the court's prior orders must be evaluated in that light. If the court finds that ACT committed an excusable wrong that resulted at most in a delay in the preparation of the case and some additional work for counsel—"matters for which a reasonable monetary award would readily compensate" (*Fred Howland, supra*, 244 Cal.App.2d at p. 612)—the court is authorized to impose an appropriate monetary sanction.

DISPOSITION

The judgment of dismissal is reversed; the matter is remanded for a new hearing at which plaintiff shall have an opportunity to explain its conduct and the delay in retaining

new counsel. After considering the evidence, the court shall determine whether or not there was misconduct and, if so, impose the appropriate sanction. ACT is entitled to recover its costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.