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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ASHLEY CUSATO et al., Cross-complainants and Appellants, v. GREENBERG TRAURIG, LLP, Cross-defendant and Respondent.	B242696 (Los Angeles County Super. Ct. No. BC418194)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Affirmed in part and reversed and remanded with directions in part.

Law Office of Anthony D. Zinnanti, Anthony D. Zinnanti for Cross-complainants and Appellants.

Gaims Weil West, Alan Jay Weil, Barry G. West, Steven S. Davis for Cross-defendant and Respondent.

Damon Cusato, Ashley Cusato,[1] and Robert Washburn appeal from an order dismissing their cross-complaint and imposing monetary sanctions. The trial court determined that terminating sanctions were proper because appellants deleted gigabytes of data and otherwise modified their computers in violation of orders requiring preservation of computer data.

We affirm the trial court's decision to impose terminating sanctions. We remand this matter to the trial court, however, to reconsider its order of monetary sanctions. Billing records upon which the monetary sanctions award was based were improperly withheld from appellants. Those billing records appear to indicate that respondent, Greenberg Traurig, LLP (Greenberg), through its attorneys in this matter, violated the court orders pertaining to the preservation of computer data. For this and other reasons discussed herein, the issue of monetary sanctions must be revisited.

FACTUAL AND PROCEDURAL BACKGROUND

The Lawsuit

This lawsuit arose from the failure of a business venture formed to exploit various patent-protected technologies. According to appellants' first amended and supplemental cross-complaint filed in April 2010 (cross-complaint), appellants retained Greenberg in 2005 to provide business advisory services, including business introductions, for their company, Thunder Creative Technologies Inc. (Thunder).

In July 2007, Greenberg attorney Carol Perrin began providing services to appellants, and in December 2007, she formed the company CMW Technology LLC (CMW). Pursuant to an agreement prepared by Perrin, CMW became the owner of Thunder's intellectual property. The founding members of Thunder (including appellants) became owners of CMW, along with Perrin and an investor with whom she had a working relationship, H.R. Mashhoon.

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[1] For clarity of reference, we refer to Damon Cusato and Ashley Cusato by their first names.

In July 2009, Perrin and Mashhoon initiated a lawsuit against appellants. Their second amended complaint alleged that appellants induced Mashhoon to invest in CMW based on misrepresentations regarding the technology and appellants' purported contacts in the United States military. Perrin alleged that appellants made unlawful recordings of her confidential communications. The complaint sought damages and dissolution of CMW.

Appellants' cross-complaint alleged that Mashhoon and Perrin, acting for herself and on behalf of Greenberg, falsely represented that Mashhoon would invest $1 million in CMW, and that Mashhoon and Perrin secretly intended to force CMW into dissolution in order to acquire its intellectual property. The cross-complaint also alleged that the agreement prepared by Perrin improperly gave control of CMW to Perrin and Mashhoon.

Electronic Information Preservation Orders

In August 2010, Greenberg served appellants with a request for production of documents. Appellants did not respond to the request, and indicated that they would not produce responsive computers until trade secret technology was removed. Greenberg brought an ex parte application in October 2010 asking the trial court to order that computer evidence be preserved. The court entered an order requiring appellants to "preserve all computers, hard drives, servers or other media containing any data, including recordings, relevant to this case, and [appellants] are prohibited from deleting, modifying, spoliating or otherwise tampering with, directly or through any third parties, all data and electronic information, including recordings, on any of the above-referenced media until further order of the Court."

Shortly thereafter, counsel for Greenberg contacted then-counsel for appellants notifying him that Greenberg had engaged the computer forensic firm Stroz Friedberg (Stroz) to create mirror images of the computer hard drives referenced in the October 2010 order. At a status conference on November 10, 2010, the trial court questioned why the parties had not completed the electronic discovery. The court instructed the parties to have a computer expert create mirror images of the computer hard drives and hold the images until the parties established protocols for their release. The court approved of

Stroz for this task. The court's ensuing minute order stated that Stroz was "charged with making mirror images of the data, and holding said data (not to be released to anyone) without further order of this court."

Appellants continued to resist the turnover of their computers to Stroz. The trial court entered another order on November 15, 2010, requiring appellants to produce to Stroz all computers containing relevant data by November 16, 2010, and noting that the previous order to preserve evidence remained in effect. The order stated: "Stroz Friedberg shall securely hold and not release the data to anyone on the foregoing mirror image copies pending receipt of protocols for the release and review of such data pursuant to the agreement of the parties or the Court's order."

On November 19, with the computers still not produced, Greenberg filed an ex parte application seeking another court order for production. The trial court ordered that the computers be turned over to Stroz immediately, that they be mirror imaged, that the images be stored in a locked room or a lockbox, and that nothing be done with the images until cleared with the court. Both Washburn and Damon turned over their computers to Stroz that day. Ashley finally delivered her computer on November 23, 2010.

In January 2011, having still received no response to its request for production of documents, Greenberg brought a motion to compel. The trial court granted the motion in February, ordering Damon and Washburn to serve responses without objection. The motion was found moot as to Ashley, as she had already served responses by the time the reply brief was filed.

In July 2011, the trial court entered a stipulated order providing protocols for the examination of the computers imaged by Stroz. The order provided that the purpose of Stroz's examination was to determine whether evidence had been deleted and/or spoliated, and to facilitate production of data responsive to Greenberg's requests for production.

Terminating Sanctions

In February 2012, Greenberg filed a motion for terminating sanctions against appellants. Greenberg contended that appellants had spoliated "mountains" of evidence by deleting files from their computers prior to turning them over to Stroz, and that they subsequently lied under oath when questioned about the spoliation during deposition.

Along with the motion, Greenberg presented the declaration of Samuel Rubin, a director of digital forensics at Stroz. His declaration stated that, pursuant to the July 2011 stipulated order, Greenberg requested that Stroz analyze the forensic images taken from appellants' computers for evidence of file deletion. Rubin determined that between October 29, 2010 (when the preservation of evidence order was entered) and November 19, 2010 (when Washburn turned over his computer), Washburn deleted 111 e-mails from his computer. Rubin further found that on November 14, 2010, Damon downloaded the application "File Shredder" and ran the program three times over the next three days, rendering any previously deleted file unrecoverable. The application had the effect of rendering 419 gigabytes of hard drive space unreadable. In addition, Damon erased and overwrote at least 41.3 gigabytes of data on a second computer. As for Ashley, Rubin found that between November 18, 2010 and November 21, 2010, she deleted at least 2,468 files and folders from her laptop, and approximately 83 percent were overwritten and made unrecoverable.

Greenberg's motion also detailed untruthful deposition testimony given by both Damon and Ashley. Damon denied searching for, installing, or using a wiping program on his computers, and denied being familiar with the "File Shredder" program. Ashley denied deleting files between November 18 and 20, 2010, and untruthfully testified about being in Florida when she missed a scheduled deposition in California.

In addition to requesting terminating sanctions, Greenberg also requested an award of over $300,000 in monetary sanctions. According to Greenberg, Stroz charged a total of $121,437.25 for its computer forensic services, and Greenberg's attorney fees related to the computer issues totaled over $160,000.

Appellants, acting in propria persona, opposed the motion. They argued that there was no evidence of spoliation and that, because the computers were appellants' personal computers, it could only be expected that files such as e-mails would be deleted. Appellants further contended that they should be provided with copies of Stroz's billing records.

On March 22, 2012, the trial court heard and granted the motion for terminating sanctions. The court stated that it made no finding regarding the veracity of appellants' claims, but found that they had violated the court's orders not to modify the contents of their computers. The court awarded $44,000 in attorney fees to Greenberg, but stated that it was unable to award the Stroz fees without a copy of Stroz's invoices. Greenberg subsequently submitted the Stroz invoices in camera, and, after review, the trial court awarded Greenberg an additional $120,285.97 for Stroz's work, bringing the total monetary sanctions award to $164,285.97.

DISCUSSION

Appellants appeal from the trial court's order dismissing their cross-complaint with prejudice and awarding sanctions. Such an order is appealable. (See *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 487 [appeal from order of dismissal due to terminating sanctions]; *Herrscher v. Herrscher* (1953) 41 Cal.2d 300, 303 [order dismissing cross-complaint is appealable where parties to the cross-complaint are not identical with the parties to the original action].)

Appellants make several arguments on appeal. They assert that the orders requiring the turnover of their computers were void because the computers contained attorney-client communications. Appellants further argue that the Stroz billing records were improperly submitted and reviewed in camera, leaving them with no ability to confront adverse testimonial evidence. They also contend that terminating sanctions and the sizable sanctions award exceeded the scope of permissible remedial action. We address each of these issues below.

I. **The preservation and turnover orders were proper.**

Appellants argue that their computers contained attorney-client communications, and therefore the orders requiring preservation of information and transfer of the computers for imaging were void *ab initio*.

By the time the orders were issued, appellants had failed to respond or object to Greenberg's request for production. Responses would have been due in early September 2010. The first preservation order did not issue until October 29, 2010. The attorney-client privilege may be waived by "failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (Evid. Code, § 912, subd. (a).)

Appellants contend that any waiver of attorney-client privilege had not been established by the time the orders were entered. Whether waiver actually occurred or not is irrelevant, however, because, at the time of the ordered turnover of computers, appellants still had the opportunity to maintain the confidentiality of their attorney-client communications. In a November 12, 2010 letter from their counsel, appellants demanded that all imaged data be stored in a locked hard drive to preserve the confidentially of attorney-client communications. This is the process that the trial court ordered the parties to follow on November 19, 2010. The parties were given the opportunity to establish protocols allowing for release of the imaged data. Those protocols, established in July 2011, provided that neither Stroz nor Greenberg could examine "content materials" such as documents and e-mails—the sort of data that would contain attorney-client communications. Thus, even though they failed to timely respond or object to Greenberg's requests for production, appellants were still given the opportunity to maintain the attorney-client privilege.

Appellants also argue that their computer information was not safe with Stroz, because Stroz had been hired by Greenberg. Appellants, however, acquiesced in the computer imaging performed by Stroz. The November 12, 2010 letter from appellant's attorney acknowledged that the computers would be delivered to Stroz for imaging.

Further, appellants failed to propose any other firms to perform the imaging, even though the trial court stated that it was "open to suggestion" of a firm other than Stroz.

Given these circumstances, the preservation and turnover orders were entirely proper.

II. Terminating sanctions were warranted.

An order imposing discovery sanctions is reviewed for abuse of discretion. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.) It is reversible only for "'arbitrary, capricious or whimsical action.'" (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 114.) "[T]he question before this court is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose." (*Do It Urself Moving & Storage. Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36-37.)

"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.' [Citations.] '"The trial court has a wide discretion in granting discovery and . . . it is granted broad discretionary powers to enforce its orders but its powers are not unlimited. . . . [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]"' [Citation.]" (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487-488.)

Appellants contend that the trial court's order imposing terminating sanctions was not remedial but entirely punitive. They argue that Greenberg would have had the opportunity to raise the issue of spoliation at trial and impeach appellants' credibility. Appellants' attempt to minimize the wrongfulness of their transgressions is not compelling.

Although terminating sanctions are severe and justified only in limited circumstances, they may properly be imposed when "the party's discovery obligation is clear and the failure to comply with that obligation is clearly apparent." (*New Albertsons*

v. Superior Court, supra, 168 Cal.App.4th 1403, 1423.) Appellants' obligations here were clear. The October 2010 order prohibited defendants, without caveat, "from deleting, modifying, spoliating or otherwise tampering with, directly or through any third parties, all data and electronic information, including recordings," on any computers containing information relevant to the case. Appellants themselves identified the subject computers as ones containing relevant information. It is undisputed that appellants deleted files (and, in some cases, scrubbed the hard drives) after the trial court ordered that no deletion or modification occur.

Appellants further argue, speciously, that Greenberg failed to show any of the deleted information was relevant to the case. As detailed by the declaration of the Stroz expert, the use of the "File Shredder" application and other overwriting of deleted data made a large swath of data unrecoverable. Thus, it is impossible to determine how much and exactly what relevant evidence was spoliated.

Appellants put themselves in this predicament by violating the trial court's orders. If they had simply allowed the data to be imaged and released per agreed-upon protocols, as ordered by the trial court, then they could have prevented the release of irrelevant and/or private information. Instead, they sought to subvert the discovery process by destroying information. Terminating sanctions were clearly justified.

III. <u>The trial court must revisit its order imposing monetary sanctions</u>.

Finally, we examine appellants' argument that the Stroz billing records were improperly withheld from their review.[2] Appellants contend that because the billing records were submitted in camera, they never had the opportunity to question the scope and reasonableness of Stroz's work, even though the billing records were the basis of the trial court's sizable monetary sanctions award. This argument has merit.

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[2] Greenberg's December 30, 2013 motion to augment the record, which attaches the Stroz billing records, is granted.

It is unclear why the trial court allowed the billing records to be submitted in camera. Appellants argued to the trial court that they should be able to view the records, but they were not allowed to do so.

Greenberg contends the records were protected by the attorney-client privilege and/or the work product doctrine. But the nature of Stroz's work and testimony rendered its records unprotected. Communications between an attorney and an expert solely retained as a consulting expert may be privileged, and a consulting expert's reports may constitute work product. (*DeLuca v. State Fish Co. Inc.* (2013) 217 Cal.App.4th 671, 688.) "The situation is different, however, with a testifying expert. As a general rule, neither the attorney-client privilege nor the work product protection will prevent disclosure of statements to, or reports from, a testifying expert." (*Id.* at p. 689.)

Stroz was a testifying expert. Rubin, as Stroz's representative, testified by declaration about the techniques used by Stroz to analyze the computer images and discussed the evidence of spoliation uncovered by Stroz. In addition, the billing records were used as evidence of the amounts charged by Stroz. Moreover, Stroz was acting upon order of the court to facilitate electronic discovery, and it was highly involved in the course of the litigation. Its role did not even vaguely resemble the "behind the scenes" work of a consulting expert.

Appellants argue that their Sixth Amendment right to confront witnesses was violated by the trial court's decision to allow in-camera review. The cases appellants rely on for this proposition all involve criminal proceedings and are not applicable here. "Nevertheless, in civil proceedings a party has a due process right to cross-examine and confront witnesses." (*Prime Gas, Inc. v. City of Sacramento* (2010) 184 Cal.App.4th 697, 710.) The trial court's decision denying appellants the opportunity to examine the Stroz billing records was thus improper.

This Court has reviewed the Stroz billing records and has determined that they present issues requiring further briefing before the trial court. One, possibly troubling, issue stands out. The trial court, in its preservation and turnover orders, mandated that the subject computer media be imaged and not analyzed or released for review until the

parties agreed on relevant protocols. In keeping with these orders, Rubin's declaration stated, "Pursuant to a July 20, 2011 Stipulated Order, counsel for Greenberg Traurig . . . asked Stroz Friedberg to analyze these forensic images for evidence of high levels of file deletion activity in the period of time before the computers were forensically imaged." However, Stroz's billing records appear to indicate that it began its forensic examination of the computer media in or around February 2011—well before the July 2011 stipulated order—and that Greenberg's counsel was aware of Stroz's ongoing examination.

Thus, it appears that while Greenberg was complaining about appellants' violations of the trial court's orders, Greenberg (through counsel) was violating the court's orders. Although appellants' wrongful conduct cannot be excused, they should not be required to pay for work that was wrongful. The trial court ordered that appellants pay the entire amount billed by Stroz. A significant amount of Stroz's work, however, appears to have been performed in contravention of the court's orders.

On remand, therefore, appellants are to be provided with complete copies of Stroz's billing records,[3] and the parties are to undertake further briefing regarding the work performed by Stroz. The trial court is to determine how much, if any, in monetary sanctions was properly imposed against appellants, and if any further court action is appropriate.

Moreover, on remand, the trial court is to also reconsider whether monetary sanctions against Washburn were appropriate. The vast majority of the files deleted were on computers owned by Damon and Ashley. Compared to the many gigabytes of data deleted and/or modified by Damon and Ashley, Washburn's computer only showed evidence of approximately 100 deleted e-mails following the preservation order, and there is no evidence that Washburn used any type of program to try to render the deleted e-mails unrecoverable. Furthermore, unlike with Damon and Ashley, there is no

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3 Greenberg submitted the Stroz billing records in camera to this Court, as well. Although the in-camera process is unwarranted, the issue is moot because appellants will have the opportunity to review the records following remand.

evidence that Washburn gave misleading or untruthful testimony. Under these circumstances, it was an abuse of discretion to find Washburn equally responsible for monetary sanctions as the primary offenders.[4]

DISPOSITION

The judgment is affirmed insofar as it imposes terminating sanctions against appellants. The judgment is reversed in part and remanded to the trial court to reconsider its order awarding monetary sanctions against appellants. Appellants are to be provided with the Stroz billing records, and the parties are to brief the issue of whether monetary sanctions were properly awarded and, if so, what an appropriate amount of monetary sanctions would be. The trial court is to further consider Washburn's relative lack of culpability. The trial court may make any further permissible order that it deems appropriate.

Appellants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

CHAVEZ, J.

FERNS, J.*

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[4] Terminating sanctions against Washburn were appropriate, as all three appellants potentially could have gained the same advantages from the spoliation of evidence. (See *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 474.)

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