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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| WILLIAM J. BARNES,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SHMUEL DAHAN et al.,<br><br>Defendants and Respondents. | B255453<br>(c/w B258350)<br><br>(Los Angeles County<br>Super. Ct. No. SC118800) |

APPEALS from a judgment and order of the Superior Court of Los Angeles County. Gerald Rosenberg, Judge. Affirmed with sanctions.

Law Offices of Douglas E. Klein and Douglas E. Klein for Plaintiff and Appellant.

Wolf, Rifkin, Shapiro, Schulman & Rabkin and Mark J. Rosenbaum for Defendants and Respondents.

This consolidated appeal arises from the trial court's judgment following the grant of a motion for terminating sanctions and an order awarding attorney fees. Because we conclude that appellant has failed to demonstrate that the trial court abused its discretion in dismissing his action, we affirm. We also order appellant to pay sanctions of $4,400 to respondents.

## FACTUAL AND PROCEDURAL HISTORY

### Background

On May 4, 2012, plaintiff and appellant William J. Barnes (appellant) and his wife Ruth Barnes[1] (collectively the Barneses) entered into a two-year lease with defendants and respondents Shmuel and Theodora Dahan for a residence located on Crest View Drive in Los Angeles (the property). Rent was $8,900 per month. The Barneses only paid rent for three months and ultimately lived at the property for the next 21 months without paying rent.

On notice that respondents were considering filing an unlawful detainer action, the Barneses filed this action against respondents for fraud, breach of contract, violation of Business and Professions Code section 17200 and trespass on October 19, 2012. Respondents then filed their unlawful detainer action.[2]

### Discovery History

#### Motions to Compel Responses to Written Discovery

On January 25, 2013, respondents served the Barneses with special interrogatories, form interrogatories, document demands and requests for admissions. The Barneses did not respond to the written discovery. Between March 5 and 21, 2013, counsel exchanged letters. On April 15, 2013, respondents filed separate motions to compel responses to the

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[1] Ruth Barnes is not a party on appeal.

[2] The unlawful detainer action is not the subject of the current appeal. Appellant filed an anti-SLAPP motion (Code Civ. Proc., § 425.16) to the unlawful detainer complaint. The trial court denied the motion and we affirmed the ruling in a prior opinion (*Dahan v. Barnes* (Apr. 8, 2014, B246370) [nonpub opn.]).

All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

special and form interrogatories and document demands, and to have the requests for admission deemed admitted. Respondents' counsel repeatedly asked appellant's counsel to participate in a conference call with the trial court; he refused. The Barneses filed their opposition, claiming the appeal from the denial of the anti-SLAPP motion in the unlawful detainer action acted as a stay in the current action, and attached discovery responses that consisted of blanket objections.

**First Discovery Order**

On May 23, 2013, at the hearing on the motions to compel, the trial court issued its first discovery order in this case, granting the motions to compel. The order required the Barneses to answer the special and form interrogatories and document demands within 10 days, deemed the requests for admission admitted, and ordered the Barneses to pay sanctions in the amount of $4,240 "forthwith."

**First Motion for Terminating Sanctions**

Although the Barneses did pay the $4,240 in sanctions, they did not provide any responses to the written discovery, in violation of the trial court's first discovery order, and their counsel refused to participate in a conference call with the trial court. As a result, respondents filed their first motion for terminating sanctions on July 10, 2013. The Barneses did not file a timely opposition and instead served incomplete discovery responses that did not include the production of any documents. On July 26, 2013, respondents' counsel wrote to the Barneses' counsel about the discovery responses and also asked if the Barneses were available on August 14, 20, 21, 22 or 23, 2013, for their depositions. Appellant's counsel did not respond to the deposition requests, filed an untimely opposition, and produced 24 pages of documents (12 of which consisted of the lease agreement).

The trial court continued the hearing on the first motion for terminating sanctions from August 6, 2013 to August 21, 2013, so that respondents could reply to the untimely opposition and appellant could make a further production of documents. On August 6, 2013, appellant's counsel informed the trial court that Ruth Barnes had dismissed her complaint without prejudice. Appellant produced an additional four pages of documents.

**Second Discovery Order**

On August 21, 2013, at the continued hearing on the first motion for terminating sanctions, the trial court issued its second discovery order. The court did not terminate the action, but imposed lesser sanctions by precluding appellant and his wife from producing any documents beyond what he had already produced. The court, however, continued the matter to September 25, 2013, to allow appellant to produce Wells Fargo bank documents evidencing his alleged payment of rent into an escrow account.

**Depositions and Documents**

Respondents noticed the deposition of appellant for September 16, 2013. His counsel requested that it be rescheduled to October, 2013, but did not provide any new dates. Respondents also noticed the deposition of Ruth Barnes for October 15, 2013, and served a notice for inspection of the property for October 17, 2013.

On September 24, 2013, after 5:00 p.m., appellant produced his Wells Fargo bank records (which do not show monthly transfers of $8,900 to an escrow account).

**Third Discovery Order**

On September 25, 2013, at the continued hearing on the first motion for terminating sanctions, the trial court issued its third discovery order. The court ordered that appellant was precluded from producing any further documents from Wells Fargo Bank. Regarding depositions, the court ordered that respondents' counsel was to set dates for the taking of appellant's, his wife's, and Mr. Dahan's depositions, to take place on three consecutive dates. If appellant and his wife did not appear for their depositions, respondents could appear ex parte to set a motion to compel. The court also continued the matter to October 31, 2013, to address respondents' request for monetary sanctions.

**Motion to Compel Depositions and Inspection of Property**

During the month of October 2013, respondents' counsel suggested dates to appellant's counsel for the depositions. Appellant's counsel rejected all of the dates without providing any alternative dates. He also stated that inspection of the property would not go forward.

On October 29, 2013, counsel participated in a conference call with the trial court, during which respondents' counsel requested that deposition dates be provided by October 31, 2013. No deposition dates were provided by appellant's counsel.

On November 4, 2013, respondents filed an ex parte application seeking an order compelling dates for the depositions of appellant and his wife and inspection of the property.

**Fourth Discovery Order**

On November 4, 2013, the trial court issued its fourth discovery order. The court scheduled inspection of the property for November 22, 2013, appellant's deposition for November 25, 2013, and Ruth Barnes's deposition for November 26, 2013.

**Fifth Discovery Order**

On November 12, 2013, the trial court issued it fifth discovery order, awarding monetary sanctions of $1,060 to respondents, to be paid by appellant within 10 days. Appellant did not pay the sanctions.

**Second Motion for Terminating Sanctions**

Because neither appellant nor his wife appeared for their depositions on the dates scheduled by the trial court, failed to provide any alternative dates, and refused to provide access for inspection of the property, respondents filed their second motion for terminating sanctions. The motion was set for hearing on January 7, 2014.

On December 27, 2013, respondents filed a notice of nonopposition to the second motion for terminating sanctions because appellant had not opposed the motion.

On December 30, 2013, appellant filed a request for dismissal of the action without prejudice. Respondents filed an objection to the dismissal the same day, and on January 7, 2014, respondents filed an ex parte application to vacate the dismissal, which had been entered by the clerk. The trial court continued the matter so that appellant could respond to the second motion for terminating sanctions and the ex parte application to vacate the dismissal.

When appellant did not timely oppose the second motion for terminating sanctions or the ex parte application to vacate the dismissal, respondents filed another notice of

nonopposition. Thereafter, appellant filed a "Supplemental Brief Re Voluntary Dismissal Without Prejudice," arguing that the dismissal deprived the trial court of jurisdiction.

**February 21, 2014 Order**

At a hearing on February 21, 2014, the trial court vacated the dismissal and granted the second motion for terminating sanctions, awarding judgment for respondents.

**Attorney Fees**

On February 25, 2014, respondents filed a motion for attorney fees as the prevailing party. Appellant did not file any opposition, and the motion was granted on June 12, 2014, in the amount of $46,770.75.

**Appellate History**

Appellant's appeals from the judgment terminating his case and the order awarding attorney fees have been consolidated.

In addition to the instant appeals, appellant filed four other related appeals, three of which were dismissed by this court for procedural reasons. Notices of default were also issued in the instant appeals. While the appeals were pending and before any briefing on the merits, respondents filed a motion to dismiss the instant appeals and for sanctions of $4,400. This court granted the sanctions and ordered the appeals dismissed. Thereafter, the California Supreme Court ordered this court's dismissal vacated for failure to give proper notice. After this court vacated its dismissal order, appellant requested a stay based on his filing for bankruptcy protection. We denied the request and issued an Order to Show Cause re Sanctions (OSC). The parties appeared before this court on August 27, 2015, on the issue of sanctions. At the OSC hearing, the matter of sanctions was taken under submission and the parties were ordered to submit briefing on the merits of the appeals, which they have now done.[3]

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[3] The matter was set for oral argument at 9:00 a.m. on January 22, 2016. When the case was called, neither appellant nor his attorney appeared and the nonappearance was deemed a waiver of oral argument. The case was taken under submission and respondents' counsel adjourned the courtroom.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Terminating Sanctions and the Standard of Review

Section 2023.010 classifies misuses of the discovery process to include, "(d) Failing to respond or to submit to an authorized method of discovery" and "(g) Disobeying a court order to provide discovery."

Pursuant to section 2025.450, subdivision (h), if a party or party-affiliated deponent fails to obey an order compelling attendance at a deposition, "the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction." Section 2023.030, subdivision (d)(3), addressing terminating sanctions, expressly authorizes the court to order the dismissal of the action of any party misusing the discovery process.

"Generally, '[a] decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.'" (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390.) "'A willful failure does not necessarily include a wrongful intention to disobey discovery rules. A conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance, is sufficient to invoke a penalty. [Citation.]'" (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 227–228.)

"We review discovery orders for an abuse of discretion." (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc*. (2008) 163 Cal.App.4th 1093, 1102.) The issue is not whether this court would have imposed a lesser sanction, but whether the particular sanction imposed is appropriate under the circumstances. (*Sauer v. Superior Court, supra,* 195 Cal.App.3d at p. 228.) "The court has broad discretion in imposing discovery sanctions, subject to reversal only for arbitrary, capricious or whimsical action." (*Ibid*.)

## II. Appellant Has Failed to Show an Abuse of Discretion

It is well established that "'[a] judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Appellant has failed to demonstrate error.

First, appellant did not file any opposition to the second motion for terminating sanctions, which forms the basis of this appeal. Thus, the arguments he makes in his opening brief, including his primary argument that the court should have balanced the needs of the litigants at an evidentiary hearing before terminating his lawsuit, were never made below. Arguments not made at the trial court are generally forfeited on appeal. (*North Coast Business Park v. Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 25.) For this reason alone, we may affirm the judgment.

Second, appellant's opening brief would have us believe that the terminating sanction imposed on February 21, 2014, was the first sanction imposed by the trial court and that appellant did not misuse the discovery process. As outlined above, nothing could be further from the truth.

The court's statements in *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 486 apply with equal force here: "At the outset, it is important to state what this case is *not* about. This is not a situation where appellants suffered the ultimate dismissal sanction for their first transgression or violation of a discovery rule . . . the dismissal sanction was the culmination of a history of acts in which appellants obstructed discovery, . . . and defied a court order. Not only did appellants fail to respond to discovery, they also failed to oppose respondent's motion to compel or file any opposition to respondent's motion to dismiss the case." The court continued: "Where, as here, the record is replete with instances of delay and failure to comply with a court order, dismissal may be proper. Moreover, appellants had ample opportunity to present their arguments and excuses to the trial court. Instead, they failed to file opposition to the motion to compel or the dismissal motion, leading the trial court and us to presume they had no meritorious arguments." (*Id*. at p. 489.)

Here, the trial court acted well within its discretion in imposing terminating sanctions for appellant's conduct. Before doing so, the court issued five discovery orders, all of which appellant disobeyed to some degree, and imposed evidentiary and monetary sanctions, which clearly did not compel appellant to take his discovery obligations seriously. Moreover, before imposing the ultimate sanction, the trial court denied the first motion for terminating sanctions, and continued the hearings on respondents' motions more than once so that appellant could file oppositions, which he failed to do.

Appellant, who is himself an attorney, argues that he was acting in good faith at all times and that the trial court infringed his rights by requiring him to shut down his own "national foreclosure defense practice" for days or weeks at a time just to respond to discovery based on respondents' "artificially contrived calendaring schedule," ring hollow.

For six months, respondents repeatedly asked appellant for deposition dates, yet appellant never provided a single date. Had he done so, he would not have been forced to sit through three consecutive days of deposition, which he failed to appear for anyway. Respondents also made repeated requests for cooperation and compliance before filing their motions, but were met with noncooperation at every step. Indeed, appellant prevented a court-ordered inspection of the property. Additionally, appellant's argument that he was too busy with his own legal practice to address respondents' discovery is not a legitimate excuse. As an attorney, appellant would know better than most plaintiffs what he was committing to when he filed his lawsuit in the first place. The fact that no trial date had been set did not give appellant carte blanche to thwart respondents' discovery requests and disobey court orders.

Appellant has failed to demonstrate that the trial court abused its discretion by imposing terminating sanctions.[4]

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[4] In light of our conclusion, we reject the claim by appellant, made in a single sentence in his opening brief, that the award of attorney fees should be reversed.

**III. Appellate Sanctions**

Rule 8.276 of the California Rules of Court provides: "On motion of a party or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs under rule 8.278, on a party or an attorney for: [¶] (1) Taking a frivolous appeal or appealing solely to cause delay." Additionally, section 907 provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." An appeal is frivolous "when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) "The two standards are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." (*Id*. at p. 649.)

It is clear to us from the actions taken by appellant on appeal and from appellant's briefs that the appeals are frivolous. They are completely without merit and taken for the purpose of delay. We therefore award respondents the requested sanctions of $4,400.

**DISPOSITION**

The judgment and order awarding attorney fees are affirmed. Respondents are entitled to their costs on appeal, including sanctions in the amount of $4,400.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT