Filed 9/30/19 Shtofman v. Arch Insurance Co. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROBERT SCOTT SHTOFMAN, Plaintiff and Appellant, v. ARCH INSURANCE COMPANY et al., Defendants and Respondents.	B282958 (Los Angeles County Super. Ct. No. BC611057)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, David Sotelo, Judge. Judgment reversed; one sanctions order affirmed; appeal dismissed as to another sanctions order.

Robert Scott Shtofman, in pro. per.; Law Offices of Richard M. Chaskin and Richard M. Chaskin for Plaintiff and Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, Paul S. White, Linda T. Hoshide and Shannon L. Santos for Defendant and Respondent Arch Insurance Company.

Julie Lim, in pro. per., and for Defendant and Respondent Gloria Lopez.

Plaintiff and appellant Robert Scott Shtofman (Shtofman) appeals a judgment on the pleadings in favor of defendant and respondent Arch Insurance Company (Arch). Shtofman also appeals two orders directing him to pay monetary sanctions to defendant and respondent Gloria Lopez (Lopez), by and through her attorney, Julie C. Lim (Lim).

We reverse the judgment on the pleadings, concluding that Shtofman is entitled to leave to amend his ninth cause of action against Arch, and that his tenth cause of action against Arch was well pled.

We perceive no error in an order directing Shtofman to pay $5,400 in sanctions to Lopez and therefore affirm that order. We dismiss Shtofman's appeal from another sanctions order that directed him to pay $1,560 to Lopez because that order is below the $5,000 threshold for appealability. (Code Civ. Proc., § 904.1, subds. (a)(11), (a)(12).)

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from an attorney fee dispute. Attorneys Shtofman and Lim represented Lopez in a personal injury action (the *Lopez* action) against various defendants, including Allied Barton Security Services LP (Allied Barton). Arch, as Allied Barton's insurer, appointed the law firm of Murchison & Cumming LLP (Murchison) to defend Allied Barton in the *Lopez*

action. After the *Lopez* action was filed but before it was settled, Lopez discharged Shtofman and was solely represented by Lim. Following the settlement of the *Lopez* action, Shtofman filed suit against various defendants, including Arch, Lim, and Lopez, seeking to recover the attorney fees that he allegedly was owed for his services in the *Lopez* action. With respect to Arch, Shtofman contended its wrongdoing consisted of its failure to include him as a payee on a $1.5 million settlement check.

1. *Shtofman's operative second amended complaint (SAC).*

The SAC alleged in relevant part as follows:

In July 2013, Lopez retained attorneys Shtofman and Lim to represent her in a personal injury action against Allied Barton and others (not parties to this appeal). Lopez executed a written attorney-client retainer agreement with Shtofman and Lim that provided for a 40 percent contingency fee, to be divided equally between Shtofman and Lim, as well as the express creation of a lien in favor of Shtofman and Lim on any monies Lopez might recover.

Lim and Shtofman initiated and prosecuted the *Lopez* action until January 15, 2014, when Lopez discharged Shtofman as her attorney and proceeded solely with Lim. Shtofman subsequently discovered that Lopez had entered into a $1.5 million settlement with Allied Barton and its insurer, Arch. Shtofman asserted that Arch was obligated to pay him the sum of $300,000 plus costs under the terms of his lien on Lopez's settlement proceeds.

Based on the foregoing, the SAC pled two causes of action against Arch: a cause of action captioned "constructive trust" (ninth cause of action) and a cause of action for interference with prospective economic advantage (tenth cause of action).

Shtofman alleged that Arch had notice of his lien because Murchison represented *both* Arch and its insured, Allied Barton, in the *Lopez* case, and that on September 19, 2014, he served attorney Nanette Reed (Reed) at the Murchison firm with notice of his lien on Lopez's recovery. The "notice of lien for attorney's fees and costs" was attached to the SAC as an exhibit, and the accompanying service list showed that the notice of lien had been served on Murchison, which was listed as counsel for Allied Barton.

2. *Arch's motion to strike Shtofman's allegations that he served Arch with notice of the lien.*

On June 27, 2016, Arch filed a motion to strike, seeking to eliminate from the SAC the allegations that Shtofman served his attorney lien on Arch. Arch contended the exhibits to the SAC showed that Arch was *not* served with notice of the attorney lien; Arch took the position that the service list established that Murchison was served with the notice of lien solely in its capacity as counsel for Allied Barton.

In addition, Arch requested that Shtofman's punitive damages allegations be stricken because the SAC failed to allege specific facts to show malice, oppression, or fraud, and that Shtofman's claim for 20 percent of the contingency fee or $300,000 also be stricken because Shtofman's potential recovery was limited to "the reasonable value of the services he ha[d] rendered up to the time of discharge" (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 791), rather than the amount specified in the contingency fee agreement.

The trial court granted Arch's motion, stating "the allegations are insufficient to state some kind of intentional wrongful conduct by Arch because Arch never received notice of

the attorney lien. Plaintiff does not dispute that the SAC admits that Arch was never actually directly served with the notice of the lien. Arch was never a party to the underlying action, so it would not have any reason to check the court record in the underlying action. Finally, Plaintiff's authority for the proposition that notice of the lien was somehow imputed to Arch . . . simply does not state as much. [Citations.] If anything, Plaintiff's authority indicates that notice to the attorney imputes notice to the client, a rule that is inapplicable to Arch Insurance." The trial court also struck Shtofman's punitive damages allegations and his "request for '$300,000 in attorney's fees.' "

3. *Arch's motion for judgment on the pleadings.*

Arch thereafter filed the motion for judgment on the pleadings, which is the focus of this appeal. Arch contended that neither of the two causes of action against it, the ninth and tenth causes of action, stated a claim for relief.

Arch contended the ninth cause of action failed to state a cause of action because a constructive trust is merely an equitable remedy, rather than a substantive claim for relief. Further, the SAC failed to plead adequate facts to support the requested remedy of a constructive trust because there was no allegation that Arch held the settlement funds in trust for Shtofman's benefit.

As for the tenth cause of action, Arch asserted it failed to state a claim for intentional interference with prospective economic advantage. Arch noted that the trial court already had ruled that Arch lacked knowledge of Shtofman's lien, and given Arch's unawareness of the lien, Shtofman could not assert a viable cause of action against Arch for intentional interference

with prospective economic advantage or for interfering with Shtofman's lien rights.

4. *Shtofman's opposition to the motion for judgment on the pleadings.*

In opposition, Shtofman argued that the ninth cause of action, although wrongly captioned as "constructive trust," stated a cause of action for tortious interference with lien rights in accordance with *Siciliano v. Fireman's Fund Ins. Co.* (1976) 62 Cal.App.3d 745.

Shtofman further contended the tenth cause of action included the necessary allegations for a cause of action for tortious interference with prospective economic advantage. Shtofman argued the trial court erred in ruling on the motion to strike that Arch had no knowledge of his economic relationship with Lopez. Shtofman asserted the SAC alleged that Arch and its counsel of record, Murchison, had actual and constructive notice that Shtofman had represented Lopez and that Shtofman was entitled to be paid for his attorney fees and costs in the *Lopez* action, and the trial court was required to accept those allegations as true.

5. *Trial court's ruling granting Arch's motion for judgment on the pleadings.*

On March 27, 2017, the trial court granted Arch's motion for judgment on the pleadings.

With respect to the ninth cause of action, the trial court ruled that "[c]onstructive trust is a remedy, and not a substantive cause of action." Further, "[e]ven if the Court took the alternative view, that constructive trust is a cognizable standalone cause of action, there is no viable underlying claim against Arch." Also, "[t]o the extent Shtofman asserts that he

mislabeled this cause of action and that it should be labeled as tortious interference with lien, it would improperly duplicate the tenth cause of action for interference, which is based on the same facts, rendering it subject to dismissal."

As for the tenth cause of action for intentional interference with an economic relationship, the trial court reasoned, "if Arch lacked notice of the lien, it could not have intended to act in some way with respect to the lien." To the "extent that Shtofman attempts to pin notice to Arch on his giving notice to attorney Reed, the proof of service attached to the notice of lien (SAC, Exh. 1) does not indicate that Reed was being served in her capacity as Arch's counsel." Further, "it is undisputed that Arch was never a party to the underlying action. Thus, it stands to reason that Arch would not have any reason to check the court record in the underlying action. . . . [¶] Moreover, the notice of lien itself is all but dispositive of the notice issue." The trial court found: "In short, the SAC pleads no facts supporting this conclusion that Arch somehow had notice of the lien. These conclusions may be disregarded, especially because the complaint specifically alleges the persons on whom Shtofman actually did serve notice of the lien. [Citation.] Other parties' notice of the lien is not imputed to Arch." In the "absence of facts that could establish that Shtofman served the notice on Arch, the SAC fails to plead Arch's knowledge of the relationship or intent to disrupt it."

On April 21, 2017, the trial court entered judgment on the pleadings in favor of Arch.

6. *Three sanctions orders obtained by Lopez.*

On April 4, 2017, Lopez filed an ex parte application for an order compelling Shtofman's deposition following his failure to appear for his noticed deposition. On April 4, 2017, the trial court granted the ex parte request, ordered Shtofman to appear for his deposition and to produce requested documents without objection on April 25, 2017 at 9:00 a.m., and directed Shtofman to pay $1,560 in monetary sanctions to Lopez's attorney.

On April 13, 2017, Shtofman filed an ex parte application to set aside the April 4, 2017 order. The trial court denied Shtofman's ex parte application and ordered him to pay $700 in monetary sanctions to Lopez's attorney.

On April 25, 2017, Shtofman failed to appear for his court-ordered deposition.

On April 28, 2017, Lopez filed a noticed motion for monetary, issue and/or terminating sanctions, asserting Shtofman had engaged in a continuing pattern of discovery abuse. Lim requested $5,075 in attorney fees in connection with the motion (14.5 hours at the rate of $350 per hour) as well as $335 for the court reporter and other costs, for a total of $5,410. Lim's declaration appended a "Table of Litigation and Discovery Abuses" committed in this matter by Shtofman, setting forth 28 separate litigation and discovery abuses.[1]

Shtofman's opposition to the motion was not timely filed. Shtofman stated in an opposing declaration that he mistakenly assumed the deposition was scheduled for 10:00 a.m., rather than

---

[1] Lim's moving declaration and the appendix thereto were not included in the record on appeal.

9:00 a.m., and that he arrived at the location of the deposition at 10:10 a.m. By that time, the deposition had been adjourned.

On May 25, 2017, the matter came on for hearing. The trial court declined to consider Shtofman's untimely opposition, denied Lopez's request for terminating sanctions, and awarded Lopez $5,400 in monetary sanctions. The trial court explained: "In this context, willfulness does not require a wrongful intention. A simple lack of diligence may be deemed willful where the party knew there was an obligation, had the ability to comply, and failed to do so." The court found: "Here, Lopez presents evidence of Shtofman's unduly engaging in gamesmanship, committing delays, and violating orders throughout the discovery process. Although the Court recognizes that because of [Shtofman's] seemingly irrational conduct, defendants have been required to tolerate clearly unnecessary delays and costs, the Court declines to exercise its discretion to issue a terminating sanction—at this time. However, if Shtofman fails to strictly and professionally comply with this order or any other procedurally compliant process, Lopez or any other defendant may bring a motion for terminating sanction by way of ex parte motion, based on this motion."[2] The court concluded that $5,400 was an appropriate sanction to compensate Lopez "for the unnecessary fees she has

---

[2] We note that sanctions cannot be awarded on an ex parte basis, even if the court has warned the violating party at an earlier hearing of the specific consequence if its order is violated. (Code Civ. Proc., § 2023.030; *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 5-6; Weil & Brown et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2019) § 8:1983.)

incurred in having to manage the discovery process that resulted from Shtofman's abuses."[3]

7. *The appeal*.

On May 26, 2017, Shtofman filed a notice of appeal specifying the following: (1) the April 21, 2017 judgment on the pleadings in favor of Arch; (2) the April 4, 2017 sanctions order directing him to pay $1,560 in monetary sanctions to Lopez; and (3) the May 25, 2017 sanctions order directing him to pay another $5,400 to Lopez.

CONTENTIONS

Shtofman contends: the judgment on the pleadings should be reversed because the ninth cause of action, although mislabeled "constructive trust," states facts sufficient to state a cause of action against Arch for interference with contractual relations and attorney lien rights; and the tenth cause of action states facts sufficient to state a cause of action against Arch for interference with prospective economic advantage and lien rights. Shtofman also contends the sanctions orders entered in favor of Lopez on April 4, 2017, April 13, 2017, and May 25, 2017, were legally erroneous, and that the $5,400 award of monetary sanctions was excessive.

---

[3] The May 25, 2017 order also directed Shtofman to pay $550 in monetary sanctions to Arch, which filed a joinder in Lopez's motion for sanctions. Although Arch argues in its respondent's brief that the $550 award to it should be affirmed, the issue requires no discussion because Shtofman's opening brief only challenges the May 25, 2017 order with respect to the $5,400 that was awarded to Lopez.

DISCUSSION

I.

The appeal from the judgment on the pleadings.

1. *Standard of appellate review.*

Because a motion for judgment on the pleadings is the functional equivalent of a general demurrer, the same rules apply. (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 900.) " 'We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. [Citation.] Because a demurrer tests only the legal sufficiency of the pleading, the facts alleged in the pleading are deemed to be true. [Citation.] We do not review the validity of the trial court's reasoning, and therefore will affirm its ruling if it was correct on any theory.' [Citation.]" (*Ibid.*)

With respect to leave to amend, a failure to request leave to amend in the lower court does not bar a plaintiff from making such a request on appeal. (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 861.) If a demurrer was sustained without leave to amend, we must decide whether there is a reasonable possibility the plaintiff is capable of amending the pleading to cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The burden of proving such reasonable possibility rests with the plaintiff. (*Ibid.*)

2. *Trial court erred in concluding the SAC failed to allege that Arch had notice of Shtofman's lien on Lopez's recovery.*

In granting Arch's motion for judgment on the pleadings, the trial court ruled in substance that Shtofman failed to allege that Arch had notice of his lien on Lopez's recovery. The trial court stated: "[T]he SAC pleads no facts supporting this

conclusion that Arch somehow had notice of the lien. These conclusions may be disregarded, especially because the complaint specifically alleges the persons on whom Shtofman actually did serve notice of the lien. [Citation.] Other parties' notice of the lien is not imputed to Arch." The trial court reasoned that in the "absence of facts that could establish that Shtofman served the notice on Arch, the SAC fails to plead Arch's knowledge of the relationship or intent to disrupt it."

On our de novo review, we disagree with the trial court's reading of the SAC.

Paragraph 16 of the SAC pled in relevant part that "Reed and the law office of . . . Murchison . . . represented defendant Arch . . . and its insured, Allied Barton . . . , in the *Lopez* case." Paragraph 200, in the ninth cause of action, reiterated that allegation. The SAC further pled that based on the rule "that letters sent to the attorney must be regarded as sent to the client," on or about "September 19, 2014, [Shtofman] caused to be served on [Reed and Murchison] and *a fortiori* upon *Arch* . . . and its insured[], Allied Barton . . . , a 'Notice of Lien for Attorney's Fees and Costs,' " a copy of which was appended to the SAC as Exhibit 1. (Italics added.) Exhibit 1 showed on its service list that Reed and Murchison were among the persons served with the notice of lien. Taking as true, as we must, the allegation that Murchison represented Arch, Shtofman's averment that notice of lien was served on Murchison is sufficient to allege that Shtofman served the notice of lien on Arch.[4]

---

[4] We note that in an apparent clerical error, page 5 of the notice of lien, at the top of the service list, referred to a different case, *Ivoko v. Azonobi et al.*, Civil Number R1C 512676. However, the caption on the first page of the notice of lien

Further, apart from the fact that the SAC pled that Murchison represented both Arch and Allied Barton, both Arch and Allied Barton were clients of Murchison as a matter of law. It is undisputed that Arch appointed Murchison to defend Allied Barton in the *Lopez* action. "Excepting *Cumis* counsel,[5] an attorney hired by a liability insurer to defend an action against one of its insureds owes duties to both insurer and insured under tort law (duty to represent their interests with due care) and the Rules of Professional Conduct: 'In the absence of a conflict of interest between the insurer and the insured that would preclude an attorney from representing both,[6] the attorney has a dual attorney-client relationship with insurer and insured.' [*State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.* (1999) 72 CA4th 1422, 1429, 86 CR2d 20, 24; *Lysick v. Walcom* (1968) 258 CA2d 136, 146, 65 CR 406, 413]." (Croskey, Heeseman, Ehrlich & Klee, Cal. Prac. Guide: Insurance Litigation (The Rutter Group 2019) § 7:840, italics omitted.)

Thus, Arch's repeated arguments in its respondent's brief that "Murchison [solely] represented Allied Barton, not Arch," and that "Murchison [solely] was counsel for Allied Barton in the

---

properly referred to the *Lopez* action, No. BC517067. This discrepancy between the caption and the service list does not impact our inquiry into the sufficiency of the pleading with respect to Arch's knowledge of Shtofman's lien.

5 See *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358.

6 There is no suggestion that a conflict existed between Arch and Allied Barton that precluded Murchison from representing both.

[*Lopez*] Action, it was not counsel for Arch," are simply incorrect. Because Reed represented the interests of Arch in connection with the *Lopez* action, notice of the lien to Murchison also constituted notice of the lien to Arch.

Therefore, the line of cases cited by Shtofman supports his position that notice to Murchison constituted notice to Arch. (*Hoogs v. Morse* (1866) 31 Cal. 128, 129 [a party is charged with notice of matters known to his attorney]; *Bierce v. Red Bluff Hotel Co*. (1866) 31 Cal. 160, 165 [notice to an agent of facts arising from or connected with the subject matter of the agency is constructive notice to the principal]; *Mabb v. Stewart* (1905) 147 Cal. 413, 421 [knowledge is imputed to plaintiff of facts which were communicated to plaintiff's counsel while he was attending to plaintiff's business].)

The trial court attached great significance to the fact that the service list attached to the notice of lien "does not indicate that [Murchison] was being served in [its] capacity as Arch's counsel." Be that as it may, Murchison had a dual attorney-client relationship with Allied Barton and Arch as a matter of law, as discussed above. Therefore, the notation on the service list that Murchison was being served as counsel for Allied Barton does not contradict Shtofman's allegation that he served Murchison, and by extension Arch, with notice of the lien.[7]

---

[7] In a footnote in its respondent's brief, Arch characterizes Shtofman's service of his lien on Murchison as "putative service" because Exhibit 4 to the SAC, a letter from Murchison to Lim, stated Shtofman's "proof of service indicates it was sent by U.S. mail [on 9/19/14], but we never received it." Murchison's assertion it did not receive the notice of lien is beyond the scope of our review of the judgment on the pleadings, which accepts as true the allegations of the SAC. At this juncture, the issue is

Having determined that Shtofman adequately pled that Arch had notice of his lien on Lopez's recovery, we turn to the particulars of the ninth and tenth causes of action.

a. *Shtofman is entitled to leave to amend the ninth cause of action.*

Shtofman asserts the ninth cause of action was mislabeled "constructive trust,"[8] but nonetheless states facts sufficient to state a cause of action for interference with contractual relations (interference with his lien rights).

"The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. [Citations.]"

---

simply whether Shtofman adequately pled that Arch had notice of the lien.

[8] "A constructive trust is 'not an independent cause of action but merely a type of remedy.' " (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82, quoting *Glue–Fold, Inc. v. Slautterback Corp*. (2000) 82 Cal.App.4th 1018, 1023, fn. 3.) A constructive trust " 'is not a true trust but an equitable *remedy* available to a plaintiff seeking recovery of specific property in a number of widely differing situations. The cause of action is not based on the establishment of a trust, but consists of the fraud, breach of fiduciary duty, or other act that entitles the plaintiff to some relief. That relief, in a proper case, may be to make the defendant a constructive trustee with a duty to transfer to the plaintiff.' [Citation.]" (*BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952, 967).

(*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

It is not for this court to refashion the ninth cause of action as a claim for intentional interference with contractual relations. However, in view of our determination that Shtofman adequately pled facts to show that Arch had knowledge of his lien on Lopez's recovery, Shtofman is entitled to the opportunity to amend the ninth cause of action to allege a claim against Arch for intentional interference with contractual relations.[9] [10]

---

[9] Because the elements of the ninth and tenth causes of action are different, we reject the trial court's ruling that the ninth cause of action "would improperly duplicate the tenth cause of action for interference, which is based on the same facts, rendering it subject to dismissal." We conclude that Shtofman is entitled to replead his ninth cause of action against Arch.

[10] In the midst of his contention that the ninth cause of action was well pled, Shtofman also asserts the trial court erred in striking his punitive damage allegations. This is not a proper method of appellate briefing, as California Rules of Court, rule 8.204(a) states in relevant part that a brief shall "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." Thus, any issue with respect to the grant of Arch's earlier motion to strike Shtofman's punitive damages allegations should have been briefed separately, not buried in the argument that the trial court erred in granting judgment on the pleadings. Therefore, Shtofman's argument the trial court erred in striking his punitive damages allegations requires no discussion. (See, e.g., *Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 377-378, fn. 3.)

b. *The tenth cause of action against Arch for intentional interference with prospective economic advantage is well pled.*

"Intentional interference with prospective economic advantage has five elements: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action. [Citation.]" (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512; see, e.g., *Siciliano v. Fireman's Fund Ins. Co.*, *supra*, 62 Cal.App.3d at p. 753 [cause of action stated by plaintiff attorney against insurer for interference with prospective economic advantage where insurer, with knowledge of attorney's lien, paid the full amount of the settlement to the attorney's former client].)

Shtofman adequately pled the elements of this tort. He alleged in relevant part that he represented Lopez pursuant to a written contingency fee retainer agreement that provided for a lien on any recovery; Arch had notice of the lien because Shtofman served notice of the lien on Arch's counsel, Murchison, on September 19, 2014; and Arch interfered with Shtofman's prospective economic advantage and his lien by failing and refusing to place his name on the $1.5 million settlement check.

In granting judgment on the pleadings on the tenth cause of action, the trial court ruled that in the "absence of facts that could establish that Shtofman served the notice on Arch, the SAC fails to plead Arch's knowledge of the relationship or intent to

disrupt it." As discussed, Shtofman adequately pled that he served the notice of lien on Arch by serving its counsel. Therefore, the tenth cause of action, as presently constituted, is sufficient to state a cause of action against Arch for intentional interference with prospective economic advantage.

II.

The appeal from the sanctions orders.

1. *This court lacks appellate jurisdiction over the $1,560 and $700 awards of monetary sanctions to Lopez.*

As indicated, on April 4, 2017, the trial court imposed a monetary sanction of $1,560 for Shtofman's failure to appear for deposition, and on April 13, 2017, the trial court sanctioned Shtofman in the sum of $700 on his application to set aside the April 4, 2017 order. Shtofman contends the trial court deprived him of due process by awarding those sanctions on an ex parte basis. However, neither of these two awards is appealable at this juncture because neither order exceeds $5,000. (Code Civ. Proc., § 904.1, subds. (a)(11), (a)(12).)[11] Further, multiple sanctions awards may not be aggregated to meet the statutory threshold for appealability. (*Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 44; Eisenberg, Cal. Prac. Guide: Civil Appeals & Writs (The Rutter Group 2018) § 2:82.2.) Therefore,

---

[11] Code of Civil Procedure section 904.1, subdivision (a), provides in relevant part that an appeal may be taken "(11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party *if the amount exceeds five thousand dollars ($5,000).* [¶] (12) From an order directing payment of monetary sanctions by a party or an attorney for a party *if the amount exceeds five thousand dollars ($5,000).*" (Italics added.)

the April 4, 2017 and April 13, 2017 sanctions orders cannot be combined with the May 25, 2017 sanctions of $5,400 to meet the $5,000 threshold for appealability.

Accordingly, no direct appeal lies from the April 4, 2017 and April 13, 2017 sanctions awards to Lopez. Appellate review of those rulings must await an appeal from the final judgment.[12]

2. *The May 25, 2017 sanctions order: the trial court did not abuse its discretion in awarding $5,400 to Lopez.*

With respect to the May 25, 2017 order, which is appealable, Shtofman contends the order, "which issued monetary sanctions in favor of [Lopez] . . . a third time, in the amount of $5,400, for violating its order dated April 4, 2017, was based on a void order, excessive and an abuse of the trial court's discretion." Shtofman's arguments with respect to the May 25, 2017 order are meritless.

Pursuant to the April 4, 2017 order, Shtofman was required to appear for his deposition at 9:00 a.m. on April 25, 2017. When Shtofman failed to appear for deposition in compliance with that order, Lopez brought a noticed motion for monetary, issue, and/or terminating sanctions. Thus, Lopez's motion for sanctions, which afforded Shtofman notice and an opportunity to be heard, was procedurally proper. (Code Civ. Proc., § 2023.030.)

Shtofman nonetheless argues the May 25, 2017 sanctions order is infirm because it was based on the April 4, 2017 sanctions order, which he asserts improperly imposed sanctions on an ex parte basis. (See *Alliance Bank v. Murray, supra*, 161 Cal.App.3d at pp. 5-6.) The argument is meritless because the

---

[12] We also note that Shtofman's notice of appeal did not specify the April 13, 2017 sanctions order.

sanctions that were imposed for Shtofman's noncompliance with the April 4, 2017 order were imposed pursuant to Lopez's noticed motion for monetary, issue and/or terminating sanctions, filed April 28, 2017. Thus, any error with respect to the April 4, 2017 ex parte order has no bearing on the propriety of the May 25, 2017 sanctions order.

Turning to the merits of the May 25, 2017 order, in reviewing an order awarding monetary sanctions, we are guided by the principle that " '[t]he power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply . . . and (2) the failure must be wilful [citation].' " (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36.)

It is undisputed that Shtofman failed to comply with the April 4, 2017 order compelling him to appear for deposition. Thus, the remaining issue is whether Shtofman's noncompliance was willful. In this context, a failure to comply may be deemed willful where "the party understood his obligation, had the ability to comply, and failed to comply." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 787.) A willful failure to comply "does not necessarily include a wrongful intention to disobey discovery rules." (*Ibid*.)

Here, the April 4, 2017 order directed Shtofman to appear for deposition at 9:00 a.m. on April 25, 2017, and the trial court was entitled to conclude that Shtofman understood his obligation to do so. Although Shtofman continues to assert that his failure to appear for the deposition at 9:00 a.m. was "inadvertent" in that he mistakenly assumed the deposition was set for 10:00 a.m., the

trial court declined to consider Shtofman's belated opposition papers. The trial court was within its discretion in doing so. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765 [trial court has broad discretion to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission].) Therefore, Shtofman's opposing declaration below, in which he stated "I made a mistake in assuming the deposition was set for 10:00 a.m." is not properly before this court.

In view of the fact that Shtofman had notice of the date and time set for his deposition but failed to appear, the trial court was entitled to find that Shtofman's failure to appear at the April 25, 2017 deposition was willful. In ruling on the matter of Shtofman's willful failure to comply with the order compelling his deposition, the trial court also noted that "Lopez presents evidence of Shtofman's unduly engaging in gamesmanship, committing delays, and violating orders throughout the discovery process." We note the record on appeal does not include Lim's moving declaration in support of the motion for sanctions. Shtofman, as the appellant, has the burden of providing an adequate record, and the failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Rhue v. Superior Court* (2017) 17 Cal.App.5th 892, 897 (*Rhue*).)

On this record, therefore, Shtofman has not demonstrated that the trial court abused its discretion by finding that his failure to appear for deposition was willful, or by imposing a monetary sanction.

The final issue is the amount of the sanction, $5,400, which Shtofman contends was excessive. As indicated, Lim's moving declaration was not included in the record on appeal, requiring

the issue of excessiveness to be resolved against Shtofman. (*Rhue*, *supra*, 17 Cal.App.5th at p. 897.) We also note that Lopez's moving papers requested $5,075 in attorney fees in connection with the motion (14.5 hours at the rate of $350 per hour) as well as $335 for the court reporter and other costs, for a total of $5,410. On this record, Shtofman fails to establish the trial court abused its discretion with respect to the amount of the award.

DISPOSITION

The judgment on the pleadings in favor of Arch is reversed and the matter is remanded for further proceedings consistent with this opinion. Shtofman's purported appeal from the April 4, 2017 order directing him to pay $1,560 in monetary sanctions to Lopez is dismissed. The May 25, 2017 sanctions order awarding $5,400 to Lopez is affirmed. Lim and Lopez shall recover their costs on appeal as against Shtofman. Shtofman and Arch shall bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

HANASONO, J.*

---

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