Filed 6/17/15 **HMA v. Gemini Aluminum CA2/8**

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HMA, INC. et al., Plaintiff, Cross-defendants and Respondents, v. GEMINI ALUMINUM CORPORATION, Defendant, Cross-complainant and Appellant.	B257558 (Los Angeles County Super. Ct. No. BC384924)

APPEAL from an order of the Superior Court of Los Angeles County. Joseph R. Kalin, Judge. Affirmed.

Roxborough, Pomerance, Nye & Adreani, Drew E. Pomerance and Jesse B. Levin for Defendant, Cross-complainant and Appellant.

Law Office of Thomas E. Elenbaas and Thomas E. Elenbaas for Plaintiff, Cross-defendants and Respondents.

Gemini Aluminum Corporation appeals from the order imposing monetary sanctions against it for its failure to produce subpoenaed documents and to have its president appear for a judgment debtor examination. We conclude that the trial court applied the correct standard when ruling on the motion and that its order was supported by substantial evidence. We therefore affirm the order.

FACTS AND PROCEDURAL HISTORY[1]

HMA, Inc. a supplier of raw aluminum, sued Gemini Aluminum Corporation for breach of contract when Gemini refused to pay approximately $1.8 million for aluminum purchased from HMA. Gemini cross-complained against HMA and others for fraud and breach of contract, alleging that it incurred additional manufacturing costs greater than the amount it owed because the aluminum was defective.[2]

In 2009, a jury awarded HMA more than $1.3 million for Gemini's breach of contract, but offset that by awarding Gemini fraud damages of $185,000 and punitive damages in the exact amount of its $1.3 million damage award to HMA. Gemini appealed and we reversed the judgment and remanded for a new trial because of pervasive discovery fraud perpetrated by HMA. (*Gemini Aluminum Corporation v. HiHo Metal Co., Ltd.* (Mar. 8, 2012, B219193) [nonpub. opn.] (*Gemini I*).) Gemini did not fare nearly so well at the 2012 retrial: the jury awarded HMA net damages of more than $1.2 million and the trial court awarded

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1 Our statement of facts is taken almost verbatim from our order dismissing Gemini's appeal from the judgment against it in *Gemini Aluminum Corp. v. HiHo Metal Co., Ltd.* (Aug. 25, 2014, B249998) [nonpub. opn.] (*Gemini II*). We do so because we dismissed the appeal under the disentitlement doctrine based on the same conduct that led to the sanctions order on appeal here.

2 When we refer to HMA, we include the individual cross-defendants/respondents, Jay Hoo, HiHo Metal Co., Ltd., and Dong Chul Ho.

prejudgment interest of more than $928,000, resulting in a total judgment of more than $2.2 million for HMA.

In April and May 2013, the trial court granted Gemini's requests to stay enforcement of the judgment pending Gemini's new trial motion and Gemini's attempts to secure funding for an appeal bond. Gemini never posted a bond and in July 2013 HMA served Gemini and its president, Allan J. Hardy, with a notice to appear for a judgment debtor examination and a subpoena to produce numerous documents related to Gemini's finances on September 12, 2013.

On September 10, 2013, Hardy moved to quash enforcement of the notice to appear, but Gemini did not move to quash the document production subpoena. Hardy did not appear for his September 12 judgment debtor exam and the trial court issued a $500 bench warrant. Hardy's exam was continued to October 23, 2013, and the motion to quash the subpoena was denied on October 8.

After we denied Hardy's writ petition from the order denying its motion to quash (case No. B251930), Gemini filed a written response to HMA's subpoena. Although Gemini raised numerous evidentiary objections, it promised to produce some responsive documents but refused to produce others it claimed contained confidential and proprietary information unless it first obtained a protective order.

Hardy appeared for his exam on October 23 but it was continued to October 31 because no room was available. The same thing occurred on October 31, and the trial court ordered Hardy to appear for a judgment debtor exam on both November 5 and December 11. A hearing on Hardy's motion to quash the document subpoena was set for December 4, 2013.

Hardy appeared for his exam on November 5, but despite his earlier statement that he would produce some documents, Hardy produced none, claiming he would not do so until a protective order was in place. The parties stipulated to continue both the hearing on the motion to quash and the judgment debtor exam to, respectively, December 11 and December 19, 2013.

On December 11, 2013, the trial court ordered the parties to meet and confer on a protective order, but also ordered Gemini to produce all responsive documents for the years 2012 through 2013. A hearing on the protective order issue was later set for December 30, 2013.

HMA's proposed protective order allowed Gemini to designate in good faith those documents or portions of testimony that it believed were confidential. Confidential information could be disclosed only to HMA's counsel and support staff, the parties, the author or recipient of documents, witnesses if needed to assist their testimony, and court personnel. Anyone other than an attorney of record or court personnel receiving confidential information would have to sign an acknowledgement that they were subject to the protective order. At the conclusion of litigation, counsel for HMA could retain one copy of the information for his records in a manner that protected its confidentiality and then return or destroy all other copies.

Gemini's proposed protective order did not include any good faith limitation on its ability to designate material as confidential. Instead, it said that all documents produced would be confidential and that Gemini could designate testimony as confidential simply by marking it as such. The information could be disclosed to only HMA's lawyer and support staff or the court, but not to the parties. Gemini also wanted HMA to post a $20 million bond, contending that any release of its proprietary and confidential information would destroy the business.[3]

On December 30, 2013, the trial court adopted HMA's proposed protective order. On January 30, 2014, we denied Gemini's writ petition asking us to overturn that order (case No. B253838). That same day, the trial court, apparently unaware of our ruling, continued Hardy's debtor exam and the hearing on Gemini's objections to the document subpoena until February 13, 2014.

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[3] Gemini originally asked for a $10 million bond but later increased the amount.

Hardy did not appear on February 13, 2014. His lawyer claimed he was too ill to attend. The trial court continued the debtor exam to March 13 and ordered Gemini to produce all documents requested in the subpoena by March 11, or make objections. Hardy was also ordered to produce a doctor's certification concerning his medical condition by March 13.

Gemini did not produce documents or make objections by March 11. Hardy did not appear on March 13 but his lawyer submitted a purported note from Hardy's doctor. Hardy would not allow anyone other than the trial court to see the note, however, and HMA agreed to let the court examine the note in camera. The trial court described the note as being written on a doctor's notepad, stating that Hardy was unable to attend. The note was not signed and, according to the trial court, "doesn't say anything about his medical condition and . . . it doesn't do anything really." Gemini's lawyer said no documents were produced because Hardy was the only person able to sift through them. The lawyer agreed the doctor's note was lacking and agreed to provide something with more detail, but noted that Hardy was very private about his medical condition. The trial court made the following orders: Gemini was to produce all responsive documents by April 2; the judgment debtor exam was continued to April 10, 2014, by which time Hardy was to provide a doctor's certification regarding his medical condition; and the bench warrant issued in September 2013 was held until the next hearing.

On April 9, 2013, Hardy submitted a brief in which he argued that he did not have to produce the court-ordered medical declaration because the order violated his constitutional right to medical privacy. HMA filed an opposition brief arguing that ordering a doctor's declaration was both appropriate and constitutionally permissible. HMA attached a June 2012 physician's declaration that the then 75-year-old Hardy submitted in connection with his motion for trial setting preference for the second trial. According to that declaration, Hardy suffered from cardiac arrhythmia and congestive heart failure, conditions that had serious consequences if left untreated.

At the April 10 hearing the trial court told Gemini's lawyer that all it needed was a physician's declaration stating Hardy was unable to appear, not the details of his condition. Gemini's lawyer said he stood by the note he submitted back in February and contended that asking for any more violated Hardy's right to privacy. The lawyer also said that Hardy was the only person capable of combing through the documents for trade secrets and other confidential information that HMA wanted to see. The trial court issued both an order to show cause for sanctions to be heard on April 30, and a bench warrant for Hardy, which it held until April 30.

In advance of the April 30 hearing, Hardy submitted written opposition to the sanctions motion, along with his declaration purporting to explain his medical condition. According to Hardy, he collapsed in late January 2014 while walking the hilly streets of San Francisco, aggravating the heart condition described in his doctor's June 2012 declaration. He claimed his condition had deteriorated, that he was in pain, that his medications required him to rest, and that he had difficulty concentrating and was easily fatigued. His doctor ordered him not to appear in court or participate in any litigation proceedings for at least six months. He spent all his available time in treatment "just trying to stay alive." The effort the trial court put him to in crafting this declaration put him at great risk.

Hardy said that the "declaration" he supplied in February 2013 came from a Dr. Garg, who was his "vein and artery surgeon." According to Hardy he had no control over what was written, but he believed Garg's statement was sufficient. Hardy said he had strong beliefs in his right to privacy and zealously guarded his medical condition because it was no one's business except for him and his doctor. He concluded by accusing the trial court of being biased against him, particularly in regard to age and disability bias.

Hardy did not appear at the April 30 hearing and did not provide a doctor's declaration. In response to Gemini's argument that, even though the company was still operating, only Hardy had the knowledge necessary to cull through the

subpoenaed documents, HMA argued that a review by Hardy was unnecessary because a confidentiality order was in place and because Gemini's lawyers should be able to review the documents to determine whether to assert they were in fact confidential.

As for Hardy's medical condition the trial court asked why Hardy did not get a declaration from his treating physician to verify what Hardy himself revealed about his condition in his latest declaration. Gemini's lawyer replied: "The only thing I can answer in respect to that is that my client, for whatever reasons now, has a strong belief in not allowing – he can't control what the doctor is going to say. [¶] The doctor is going to say whatever the doctor is going to say, and he has a strong belief in the privacy of his medical condition and not having other people talk about it. [¶] So he's willing to disclose some of it here in his declaration because these are his words. But at this point he feels that by providing a doctor's certificate, he doesn't know what the doctor is going to say, that the doctor will disclose too much of it and it will impinge upon his right of privacy. [¶] That is my client's belief. I can't elaborate any further or explain it beyond what I just have." The trial court said it had serious doubts about Hardy's good faith and issued a bench warrant for Hardy and set bail at $10,000. It also awarded HMA sanctions of nearly $18,900 for Gemini's refusal to produce the subpoenaed documents. (Code Civ. Proc., §§ 708.170, subd. (a)(2) [failure to appear at judgment debtor exam without good cause], and 1987.2 [failure to produce subpoenaed documents in bad faith or without substantial justification].)[4] The trial court's written order stated that sanctions were awarded because Gemini acted without substantial justification.

In May 2014, shortly after filing its respondent's brief in *Gemini II*, HMA brought a motion to dismiss the appeal, contending that – based on Gemini's and Hardy's refusal to comply with court orders and other attempts to obstruct

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[4] All further undesignated section references are to the Code of Civil Procedure.

enforcement of HMA's judgment – we should dismiss the appeal under the disentitlement doctrine. We agreed and in *Gemini II*, *supra*, dismissed Gemini's appeal in August 2014. Gemini's petition for review from that order was denied on November 19, 2014. (Case No. S221674.)

In the meantime, Gemini appealed from the sanctions orders, contending that the trial court erred by using the substantial justification standard instead of finding a lack of good cause when imposing sanctions for his non-appearance at the judgment debtor exam, and that there was insufficient evidence of sanctionable conduct in any event.

DISCUSSION

1. *The Trial Court Applied the Correct Standard*

The trial court sanctioned Gemini under two provisions: (1) for Hardy's failure to appear at the judgment debtor examination (§ 708.170); and (2) for failure to produce the documents that HMA had subpoenaed (§ 1987.2). Sanctions may be imposed under the former if the failure to appear was "without good cause." (§ 708.170, subd. (a)(2).) Sanctions may be imposed if the opposition to a motion for a subpoena to produce documents (§ 1987, subd. (c)) was either "in bad faith or without substantial justification" (§ 1987.2, subd. (a)).

The trial court's written order states that it was awarding sanctions under both provisions because Hardy's conduct in refusing to appear or to produce documents was without "substantial justification." Gemini contends that the trial court erroneously imported the section 1987.2 "substantial justification" test into its section 708.170 order and that we must therefore reverse that portion of the trial court's order. To the extent we engage in statutory construction, we review the trial court's order de novo. Otherwise, we apply the abuse of discretion standard. (*People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071.)

Gemini contends that "good cause" for purposes of nonappearance sanctions under section 708.170 is a lower and more amorphous standard than the "substantial justification" standard that the trial court relied on when imposing sanctions under section 1987.2. As Gemini points out, "substantial justification" in this context has been interpreted to mean a justification that is " 'clearly reasonable because it is well grounded in both law and fact.' [Citation.]" (*Evilsizor v. Sweeney* (2014) 230 Cal.App.4th 1304, 1312.)

Gemini cites three decisions for the proposition that "good cause" is a lower and more flexible standard than substantial justification. None is applicable. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74 [construing good cause in the context of the allowable scope of discovery]; *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 378 [same]; *People v. Kirkland* (1994) 24 Cal.App.4th 891 [considering whether there was good cause for prosecutorial delay].)

Gemini also contends that construing good faith as the equivalent of substantial justification violates the rules of statutory interpretation for two reasons. First, section 1987.2 permits sanctions for conduct that was either in bad faith or without substantial justification, placing both on the same footing. Therefore, Gemini contends, good cause cannot be equated with bad faith and must be something else. Second, the Legislature chose separate phrases in the two provisions, requiring that we interpret good cause differently from substantial justification.

Gemini is incorrect when it contends that bad faith and a lack of substantial justification are equally high standards of conduct. Imposing sanctions under section 1987.2 for a bad faith failure to produce subpoenaed documents requires a determination of the offending party's subjective intentions, while no such finding is required under the substantial justification prong. (See *In re Woodham* (2001) 95 Cal.App.4th 438, 446 [comparing sanctions requirements of section 128.5,

which turns on bad faith, and section 177.5, which applies the substantial justification standard].)

Gemini also errs by relying on "good cause" decisions outside the sanctions realm. Section 177.5 authorizes the imposition of money sanctions for any violation of a court order "done without good cause or substantial justification." Decisions interpreting this provision appear to have lumped the two phrases together under the catch-all of having a valid excuse. (*In re Woodham*, *supra*, 95 Cal.App.4th at p. 446, citing *Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075, 1080; *People v. Tabb* (1991) 228 Cal.App.3d 1300, 1311.)

The trial court imposed sanctions under sections 708.170 and 1987.2 based on the same conduct: Hardy's refusal to supply a physician's declaration to justify his failure to comply with the judgment debtor discovery requests. In order to find that Gemini acted without substantial justification for purposes of section 1987.2, the trial court necessarily found that its failure to produce the subpoenaed documents was clearly unreasonable because it was not well grounded in either law or fact. (*Evilsizor v. Sweeney, supra,* 230 Cal.App.4th at p. 1312.) We fail to see why a finding of no substantial justification does not equate with an absence of good cause or a valid excuse. We therefore hold that the trial court did not err when it used the wrong nomenclature to describe the standard it applied.

2. *The Trial Court's Order Was Correct Under Any Applicable Standard*

Gemini next contends that under any applicable legal standard we must reverse. This argument consists of two subparts: (1) the trial court's failure to apply the correct legal standard when imposing section 708.170 sanctions was a due process violation that requires reversal; and (2) there is no evidentiary support for the sanctions imposed under either provision.

As to the first, the contention is inapplicable because, as just discussed, the trial court did not apply the wrong standard. We alternatively conclude that even if the trial court erred, its error was harmless.

Procedural due process violations are subject to harmless error analysis, and we will not reverse unless a different result was reasonably probable. (*Thornbrough v. Western Placer Unified School District* (2013) 223 Cal.App.4th 169, 200.) Gemini's opening appellate brief did not discuss this issue. Instead, Gemini cited decisions where the trial court's failure to provide a sufficiently detailed sanctions order prevented meaningful appellate review, thereby requiring reversal for that due process violation. (*First City Properties, Inc. v. MacAdam* (1996) 49 Cal.App.4th 507, 516; *Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1028-1030.) Because the record permits a meaningful review, we conclude the harmless error standard applies.

The second contention is nothing more than a rehash of the issues raised by Gemini in opposition to HMA's motion to dismiss (*Gemini II*) under the disentitlement doctrine: Hardy's health condition excused him from attending his deposition or compiling the subpoenaed documents, and the request for medical documentation in the form of a physician's affidavit violated his privacy rights.

We reject respondent's contention that our previous order of dismissal in *Gemini II* is res judicata of these issues. However, our earlier reasoning applies with equal force here. As we said in *Gemini II*, "the heart of the matter is Hardy's obligation, if any, to supply a physician's declaration under penalty of perjury attesting to his medical condition and inability to take part in any litigation activity. Under Article I, section 1 of the California Constitution our citizens enjoy a right of privacy that extends to medical records. [(*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1198.)][5] That right can be waived when a party places his medical condition at issue. (*Bearman v. Superior Court* (2004) 117 Cal.App.4th 463, 473.) Such waivers are 'narrowly construed and not lightly

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[5] We originally cited *Lewis v. Superior Court* (2014) 226 Cal.App.4th 933, 946, for this proposition. However, the California Supreme Court has since granted review of *Lewis*. We have therefore replaced our original citation with another that stands for the same proposition.

found.' (*Ibid.*) Even so, the privacy right may be outweighed when the state has enough of an interest in discovering the truth in legal proceedings. (*Manela v. Superior Court* (2009) 177 Cal.App.4th 1139, 1150.) [¶] . . . [¶]

". . . [W] e have no doubt that Hardy's privacy rights were outweighed once he tendered the issue of his medical condition as an excuse for his failure to comply with court orders to produce documents and appear for his debtor's exam. No party should be able to excuse compliance with trial court orders based on his medical condition without sufficient proof that the condition exists.[6] An unsigned note on a physician's notepad that, as the trial court described it, said nothing about Hardy's medical condition, was clearly insufficient. Instead, a declaration under penalty of perjury from a treating physician was required. Not only did Hardy refuse to provide such a declaration, he rejected the trial court's offer to accept a declaration that said nothing about his medical condition apart from his inability to appear.

"Hardy's lawyer told the trial court that Hardy refused to do more because Hardy believed he had no control over what his doctor might say in a declaration. However, such declarations are commonly prepared by a party's lawyer after discussing the matter with the physician, giving Hardy complete control over the declaration so long as it accurately reflected the doctor's medical opinions. Hardy's stance therefore raises the troubling question whether his physician would

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6 "In a similar vein, a party seeking trial preference based upon his medical condition must supply "clear and convincing medical documentation" of that condition. (§ 36, subd. (d).) [Hardy did submit such a declaration earlier in this case, and attempts to rely on it as medical proof of his inability to take part in discovery proceedings in and around April 2014. However, all that note says is that Hardy suffered from arrhythmia and congestive heart failure which, "*[i]f left untreated, . . . could have extremely serious effects on all aspects of his health.*" That declaration predates the discovery disputes by nearly two years and says nothing about Hardy's ability to take part in litigation proceedings. It merely states that without treatment, his health was in jeopardy. The physician states that he was treating Hardy, and presumably those risks had not materialized as a result.]"

not confirm Hardy's health claims. That suspicion is only fueled by his refusal to obtain the required declaration after providing his own declaration that set forth his supposed condition in some detail.[7]

. . . Here, the trial court imposed sanctions and issued a bench warrant for Hardy based on conduct that was surely willful and appears designed to stall enforcement of HMA's judgment."

In short, Hardy's refusal to provide a physician's declaration to support his claim that he is medically unable to appear for his judgment debtor exam or provide the subpoenaed documents is unwarranted.[8] This supports a finding that he in fact had no medical condition that prevented him from complying with HMA's judgment debtor discovery requests and that his failure to comply is willful. On these facts the trial court was amply justified in finding that Gemini's conduct was without good cause, and was without substantial justification.

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[7] Even after HMA's motion to dismiss was filed in *Gemini II* Hardy still refused to budge. In his declaration in opposition to HMA's dismissal motion, Hardy contended that he had "nothing to do" with the doctor's note he presented in February 2013 and that he "did not, and could not, tell the doctor what to say." Regardless, he contended that note was adequate, that he "zealously guard[s] [his] medical condition," and "that it is no one's business and that the only people that have a right to know about my physical condition are my doctor and myself." In his supplemental letter brief, he contended that his condition has worsened, but still declined to support his claim with a physician's declaration.

[8] Gemini contends that the doctor's note Hardy supplied on March 13 complied with the trial court's April 10 statement that all it wanted was a doctor's note stating that Hardy was unable to attend. As a result, Gemini contends, any further intrusion into Hardy's medical privacy was unwarranted. Gemini also contends that the doctor's name stamp on the March 13 note complied with the signature requirement. As respondent points out, Hardy allowed only the trial court to see the note and it is not in the record. According to the trial court, that note was unsigned and "doesn't say anything about his medical condition and . . . it doesn't do anything really." We therefore reject these contentions.

DISPOSITION

The order imposing sanctions on Gemini under Code of Civil Procedure sections 708.170 and 1987.2 is affirmed. Respondents shall recover their appellate costs.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.