

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ELKE LESSO,

Plaintiff and Respondent,

v.

PIOTR ANDRZEJEWSKI,

Defendant and Appellant.

B225538

(Los Angeles County
Super. Ct. No. GD041694)

APPEAL from an order of the Superior Court of Los Angeles County, Amy Pellman, Judge. Affirmed.

Law Offices of William J. Kopeny, William J. Kopeny for Defendant and Appellant.

Law Office of Gerald Philip Peters, Gerald P. Peters for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Piotr Andrzejewski (husband) appeals from an order imposing monetary sanctions against him in favor of plaintiff and respondent Elke Lesso (wife) and denying his request for sanctions. Husband contends that the trial court abused its discretion in failing to conduct an evidentiary hearing. Husband also contends that documents executed by or on behalf of wife after the sanctions hearing supports husband's contentions that wife's counsel at the time of the sanctions hearing was dishonest, and the invoices for wife's attorney fees submitted in support of the motion for sanctions were inflated and require an evidentiary hearing. Husband contends that based upon wife's post sanctions hearing documents, she should be estopped from arguing on appeal that the sanctions order was proper. Husband also argues that his declaration was in the proper form for purposes of his request for sanctions. Wife disputes husband's contentions and also argues that the appeal should be dismissed pursuant to the disentitlement doctrine, the notice of appeal limits husband's relief, husband waived his right to an evidentiary hearing by not personally appearing at the hearing, and husband is not prejudiced as a result of the trial court failing to conduct an evidentiary hearing. We decline to dismiss the appeal and affirm the order.

FACTUAL AND PROCEDURE BACKGROUND

On September 28, 2007, wife filed a petition against husband for marital dissolution. During the litigation of the dissolution action, on February 25, 2010, wife filed a noticed motion for an order granting terminating sanctions and awarding reasonable attorney fees against husband, supported by the declarations from wife and her counsel, John R. Fuchs. The motion was based upon wife's claim that husband refused to appear for his deposition, produce financial documents showing the location and use of community funds, and provide full, complete and accurate responses to discovery. In addition, wife contended that husband failed to make mandatory disclosures, including regarding the sale of 11 parcels of real property in Poland and the use of community property proceeds to trade stock; husband concealed accounts under

the names of other people; husband violated court orders for payment of money to wife and to appear in the trial court; and husband's uncooperative conduct frustrated the California's policy to promote settlement and reduce litigation costs.

In March 2010, husband¹ filed an opposition to the motion for sanctions, which included a request for an evidentiary hearing. Husband's opposition also sought \$35,000 in sanctions against wife. Husband submitted a 15 page "declaration" in support of the opposition attaching numerous exhibits, and also requesting an evidentiary hearing and \$35,000 in sanctions be awarded against wife. Husband's declaration concluded, "I declare that the forgoing is true and correct and that this declaration was executed under the penalty of perjury on this 15th day of March 2010 at Warszawa, Poland."

At the March 30, 2010, hearing, Fuchs appeared personally, and husband appeared telephonically from Poland. Husband represented that he was ill and requested that the hearing be continued. The trial court continued the hearing to April 7, 2010, and the trial court permitted husband to appear telephonically at the continued hearing because husband provided the trial court with a doctor's note that husband was unable to fly to appear personally at the hearing "until after May 2010," because of husband's illness.

At the April 7, 2010, continued hearing, Fuchs appeared personally, husband appeared telephonically, and the hearing was conducted on the papers submitted without husband's objection. The trial court advised husband that, "I really did not need to consider [husband's declaration], because it was inadmissible as it was an out-of-state declaration and did not refer to the law of California. . . . [¶] It was really not admissible. However, because you are appearing pro per, the court gave you the greatest benefit of the doubt and did review your declaration."

At the hearing, the trial court denied wife's motion as to her request for terminating sanctions, and granted the motion as to the request for attorney fees and sanctions. The trial court did not rule on husband's request for sanctions. The trial court

¹ Throughout the pendency of wife's motion for sanctions, husband acted in propria persona.

reserved a determination of the amount of attorney fees to be awarded, pending receipt of a declaration from Fuchs, wife's counsel at the time, detailing the hourly rate, the time spent, and the nature and extent of the work done. The trial court advised husband that he may file an opposition to that declaration, and scheduled a hearing for May 3, 2010, at which time the trial court stated it would issue a written ruling.

The trial court issued an order that at the April 7, 2010, hearing the trial court granted wife's motion for monetary sanctions. The trial court's order states that it "recit[ed] a litany of willful violations by [husband of several court orders] and his disclosure and discovery obligations, including without limitation: [¶] (A) [c]ontinuing to trade stocks in violation of the [automatic temporary restraining order] ATRO and [an] injunction against doing so; [¶] (B) [c]reating a stock trading account in the name of [husband's] friend . . . in order to continue trading stocks in violation of the ATRO and the injunction against doing so; [¶] (C) [s]elling 11 properties in Poland in violation of the ATRO and the injunction against doing so; [¶] (D) [r]efusing to promptly disclose the sale of these 11 properties and to account to [wife] for the location and use of the proceeds; [¶] (E) [t]ransferring more than \$700,000 USD into an account in the name of his mother, in violation of the ATRO, then refusing to disclose the transfer and refusing to produce financial documents evidencing the transfer; [¶] (F) [r]efusing to promptly and accurately disclose the existence and value of all cash, real property and other assets being concealed in Poland; [¶] (G) [i]ntentionally abusing the discovery process; [¶] (H) [b]eing potentially in contempt of the court for more than two years, as a result of his intentional conduct in this proceeding; and [¶] (I) [r]efusing to cooperate in efforts to resolve this proceeding and unnecessarily increasing the attorneys fees being incurred by [wife] in this proceeding."

Following the April 7, 2010, hearing, Fuchs filed a declaration attaching his billing invoices to wife for the previous 12 months totaling approximately \$600,000, explaining why the billed amount justified monetary sanctions to be awarded against husband, and requesting sanctions of at least \$300,000 be awarded against husband. The record includes a document executed on April 26, 2010, purporting to be husband's

opposition, attaching 16 exhibits, and unsupported by a declaration. The opposition does not contain a “filed stamp,” and the case summary included in the record does not indicate that it was filed. This purported opposition requested an evidentiary hearing and did not request that husband be awarded sanctions against wife or Fuchs.

Thereafter, husband filed a 32 page “amended” opposition executed on April 27, 2010. The amended opposition is virtually identical to the opposition dated April 26, 2010, except it is in declaration format signed by husband “under penalty of perjury under the laws of the State of California” and it does not attach the 16 exhibits.

In the amended opposition, husband requested an evidentiary hearing and contended, *inter alia*, that Fuchs overbilled for his services, husband complied with the discovery requests and had not concealed any community assets from wife, Fuchs failed to communicate and frustrated all good faith settlement conferences, and wife improperly used community property funds and was sanctioned for failing to attend her deposition and respond to discovery. Husband did not request he be awarded sanctions against wife or Fuchs.

On May 3, 2010, a hearing occurred on wife’s sanctions motion and two other matters. Fuchs appeared personally and husband appeared telephonically from Poland. There were three interruptions during the hearing because husband’s telephone call to the trial court was disconnected. The following exchange occurred at the hearing: “[Trial court:] Motion for terminating sanctions: now, again, the court’s tentative is to deny [wife’s] request for terminating sanctions. To grant [wife’s] request for \$300,000 payable to [wife] from husband’s share of community property, and to deny husband’s request for sanctions. [¶] . . . [¶] . . . [D]id you [husband] want to be heard? [¶] [Husband:] Yes, Your Honor. I mean, have you—you know, this is unbelievable what you just did. There’s no hiding anymore. Just because I’m Polish—or I’m still an American citizen, I need—my constitutional rights guarantees [*sic*] me to be equally treated as the other part [*sic*] as [wife’s attorney]. This is outrage [*sic*]. First, you fully ignored again— [¶] [Trial court:] I’m sorry. It wasn’t \$300,000. It was \$100,000.”

The trial court attempted to clarify the amount of his monetary award against husband, when the second and third interruption occurred during the hearing because husband's telephone call to the trial court was disconnected. "[Trial court:] One second, [husband]. I just want to make sure I'm clear on the sanctions. The tentative was to sanction [husband] pursuant to 2107 for \$100,000. [¶] . . . [¶] [Fuchs:] On April 7th, you asked us to file a *Keech* declaration. [¶] [Trial court:] That's right. [¶] [Fuchs:] Which we did. And I asked in the *Keech* declaration—the fees over the last 12 months have been over \$500,000. I asked for \$300,000 based on that, because almost the entirety of the fees were [*sic*] trying to collect the [*sic*] \$594,000 that he now owes that he won't pay. [Trial court:] Right. I just want to be—let me just state my record so that we don't have any—let me be clear, [husband], and then you can certainly respond. Okay? [¶] Pursuant to Family Code [section] 2107, it provides that if a party fails to comply with any provision regarding mandatory disclosure requirements, the court shall in addition to any other remedy provided—(Interruption in Proceedings.) [¶] [Trial court:] Okay. [Husband] gets one more chance. Are you there, [husband]? Hello? [The bailiff:] He was there. [¶] [Trial court:] [Husband]? Okay. [¶] [Husband], are you there? [Husband:] Yes, I'm here, Your Honor. You started to read your order or your opinion. [¶] [Trial court:] So, I'm going to do it one more time. If the phone—if it cuts off one more time, then I'm going to stop and will simply send you my order in writing, because I don't have time for this. Do you understand? I've asked you to come in person and you're refusing to come back to the United States. (Interruption in Proceedings.) [¶] [Trial court:] That's it. We're in recess. I'm going to send you my order in writing. [¶] [Fuchs:] May I be heard— [¶] [Trial court:] I can't do it. I'm going to send it to you in writing. Okay? [¶] [Fuchs:] Okay."

On May 3, 2010, the trial court issued a minute order denying wife's request for terminating sanctions, and awarding \$300,000 in sanctions against husband, consisting of \$100,000 for abuse of discovery pursuant to Code of Civil Procedure section 2023.030, \$100,000 for failing to comply with mandatory disclosure requirements pursuant to Family Code section 2107, and \$100,000 for uncooperative conduct frustrating the policy

of the law to promote settlement and reduce litigation costs pursuant to Family Code section 271. The minute order also provided that husband's request for \$35,000 in sanctions was denied because husband's declaration—presumably referring to husband's declaration in support of his March 2010 opposition—was not filed under penalty of perjury under the laws of the State of California and, therefore, was inadmissible.

On July 1, 2010, husband filed a timely appeal of the order awarding sanctions. On January 21, 2011, a judgment of dissolution was entered.

DISCUSSION

A. Disentitlement Doctrine

Wife contends that husband's appeal should be dismissed pursuant to the disentitlement doctrine because husband "has a long history of willful misconduct, including repeated refusals to comply with discovery obligations and Court orders." We disagree.

Under the disentitlement doctrine, "A reviewing court has inherent power to dismiss an appeal when the appealing party has refused to comply with the orders of the trial court. [Citation.]" (*In re Z.K.* (2011) 201 Cal.App.4th 51, 63.) The doctrine prevents a party from seeking assistance from the court while that party "stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]" (*MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277.) The rule applies even if there is no formal adjudication of contempt. (*TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 379.)

"Appellate disentitlement 'is not a jurisdictional doctrine, but a discretionary tool that may be applied when the balance of the equitable concerns make it a proper sanction.' [Citation.]" (*In re Z.K.*, *supra*, 201 Cal.App.4th at p. 63.) The disentitlement doctrine "is particularly likely to be invoked where the appeal arises out of the very order (or orders) the party has disobeyed." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 2:340, p. 2-172 (rev. # 1, 2009).)

Wife contends the appeal should be dismissed because husband (1) stipulated to the jurisdiction of the trial court over marital properties in Poland, and in April and September 2009, attempted to obtain a trial court order that the trial court did not have jurisdiction over those properties; (2) failed to pay bills that the trial court ordered him to pay; (3) sometime before June 2009, filed an improper lis pendens on wife's separate property; (4) violated court orders for payment of money to wife; (5) violated the trial court's order by failing to appear in the trial court, resulting in the issuance of an arrest warrant; (6) failed to comply with discovery obligations; (7) traded stocks in violation of an ATRO and an injunction; (8) created a stock trading account in a friend's name in order to continue trading stocks in violation of the ATRO and injunction; (9) sold 11 properties located in Poland in violation of the ATRO and injunction; (10) refused to disclose promptly the sale of the properties located in Poland to wife and to account for the proceeds; (11) transferred more than \$700,000 to his mother, in violation of the ATRO, and then refused to disclose the transfer or product documents evidencing the transfer; (12) sometime before January 2010, took a community property Toyota Prius to Poland without disclosure to wife; and (13) evaded service of process in approximately December 2008, August 2009, and December 2009.

The overwhelming majority of the husband's alleged conduct that wife contends warrants dismissal of the appeal was the subject of wife's motion for sanctions, the order on which husband challenges in this appeal. It would be inequitable to dismiss the appeal on the basis of such alleged misconduct.

In addition, any alleged wrongful conduct by husband not asserted in the motion for sanctions does not in this case warrant dismissal of husband's appeal. This includes wife's contention that husband (1) attempted in 2009 to obtain a trial court order that the trial court did not have jurisdiction over those properties, despite previously stipulating to it, (2) filed an improper lis pendens on wife's separate property sometime before June 2009, took a community property Toyota Prius to Poland sometime before January 2010, without disclosure to wife, and (3) evaded service of process in approximately December 2008, August 2009, and December 2009. Also, wife does not contend that husband

disobeyed the order imposing sanctions that is the subject of this appeal. We therefore decline to dismiss husband's appeal pursuant to the disentitlement doctrine.

B. Evidentiary Hearing

1. Standard of Review

We review a trial court's refusal to conduct a non-required evidentiary hearing for abuse of discretion. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414; *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 483; *Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075, 1082.) A trial court abuses its discretion when it exceeds the bounds of reason by making a determination that is arbitrary, capricious, or patently absurd. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

2. Analysis

Husband contends that the trial court "denied him [due] process and . . . abused its discretion in failing to conduct an evidentiary hearing" We disagree.

The trial court, without conducting an evidentiary hearing, granted wife's motion and awarded her \$300,000 in sanctions against husband. Husband contends that wife's motion for sanctions "was *essentially* a cause of action (or possibly three causes of action) for \$100,000, each in the form of specific types of statutory sanctions" (italics added), and therefore the hearing amounted to a trial in which he was entitled to present live testimony. Husband provides no authority for the proposition that wife's sanctions motion was a "cause of action." It was a motion.

Motions are usually decided based on declarations filed by the parties. (Code Civ. Proc., § 2009; Cal. Rules of Court, rule 3.1306.) Code of Civil Procedure section 2009 provides, "An affidavit may be used . . . upon a motion" California Rules of Court, rule 3.1306(a) provides "Evidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown."

A party requesting an evidentiary hearing must comply with California Rules of Court, rule 3.1306(b) which provides that, “A party seeking permission to introduce oral evidence . . . must file, no later than three court days before the hearing, a written statement *stating the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing.* (Italics added.) Husband did not comply with California Rules of Court, rule 3.1306(b); he did not file a written statement requesting an evidentiary hearing that set forth “the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing.”

Wife contends that even assuming husband made a proper request for the trial court to conduct an evidentiary hearing, because California Rules of Court, rules 3.670(d)² and 5.324(d)³ prohibit telephonic appearances at evidentiary hearings, husband waived his right to an evidentiary hearing by not personally appearing at the hearing. We disagree.

Rule 5.324(d) is not applicable here because the purpose of the rule concerns “title IV-D child support hearings and conferences.” (Cal. Rules of Court, rule 5.324(a)). Rule 3.670(d) specifically provides that it applies, “Except as provided in (e)(3).” Rule 3.670(e)(3)⁴ states that the trial court may permit telephonic appearances if it determines

² California Rules of Court, rule 3.670(d) provides in pertinent part, “Except as provided in (e)(3), a personal appearance is required for hearings, conferences, and proceedings not listed in (c), including the following: [¶] (1) Trials and hearings at which witnesses are expected to testify. . . .”

³ California Rules of Court, rule 5.324(d) provides “A telephone appearance is not permitted for any of the following . . . : [¶] (1) Contested trials, contempt hearings, orders of examination, and any matters in which the party or witness has been subpoenaed to appear in person; and [¶] (2) Any hearing or conference for which the court, in its discretion on a case-by-case basis, decides that a personal appearance would materially assist in a determination of the proceeding or in resolution of the case.”

⁴ California Rules of Court, rule 3.670(e)(3) provides, “The court may permit a party to appear by telephone at a hearing, conference, or proceeding under (d) if the court determines that a telephone appearance is appropriate.”

that a telephone appearance is appropriate. After husband requested an evidentiary hearing, the trial court permitted husband to appear telephonically at the hearing, and wife did not object. Husband, therefore, did not waive his right, had one existed, to an evidentiary hearing.

Had husband properly requested an evidentiary hearing, “[Code of Civil Procedure] section 2009 is construed as empowering the trial court to determine motions upon declarations alone and to allow the court discretion to refuse oral testimony. [Citations.]” (*Reifler v. Superior Court, supra*, 39 Cal.App.3d at p. 483.) “In most if not all of the matters to which “[Code of Civil Procedure] section 2009 applies, the underlying issue in question generally will be determined by the court on the basis of affidavits alone, and it will be only in an unusual case that live testimony by witnesses will be permitted.” (*People v. Johnson* (2006) 38 Cal.4th 717, 730.)

The court in *In re Marriage of Falcone and Fyke* (2012) 203 Cal.App.4th 964 rejected appellant’s contention that the trial court denied her due process because it heard her request for attorney fees and sanctions on the written submissions rather than live testimony. The court stated, “[C]ourts determine the reasonableness of attorney fees every day by ruling on motions. [Citation.] In those hearings, the court has before it evidence in the form of declarations only, not live testimony, and detailed billing records are not required to support an award.” (*Padilla v. McClellan* (2001) 93 Cal.App.4th 1100, 1106 [113 Cal.Rptr. 2d 680]; see, e.g., *In re Marriage of Borson* (1974) 37 Cal.App.3d 632, 636 [112 Cal.Rptr. 432] [‘motion’ that the husband be ordered to pay the wife’s attorneys]; *Armstrong v. Armstrong* (1947) 81 Cal.App.2d 322, 326-327 [183 P.2d 905] [award of attorney fees raised by motion on affidavits]; *Reifler v. Superior Court, supra*, 39 Cal.App.3d at pp. 483-484 [wife’s motion for attorney fees could be determined on declarations, subject to trial court’s discretion to allow oral testimony].) And “[T]he scope of a hearing on an application for sanctions is within the trial court’s discretion, as with motions generally.” (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 179 [110 Cal.Rptr. 2d 111].)”

Hearings on motions “ordinarily mean[s] the facts are to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court’s discretion. [Citations.] [¶] . . . There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony.” (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at pp. 413-414.) “[T]he scope of a hearing on an application for sanctions is within the trial court’s discretion, as with motions generally.” (*Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1028.)

“The ‘opportunity to be heard,’ in the context of a hearing on the issue of sanctions, does not mean the opportunity to present oral testimony.” (*Seykora v. Superior Court*, *supra*, 232 Cal.App.3d at p. 1082.) Rather, the trial court has discretion in conducting the proceedings, so long as the parties have a reasonable opportunity to present their side of the issue. (*Ibid.*)

The trial court provided husband with an opportunity to present his case by means of a written opposition supported by declaration. Husband, therefore, had an adequate opportunity to be heard.

Husband contends that he was entitled to an evidentiary hearing because of a substantial amount in sanctions were at issue—\$300,000, and wife’s motion concerned complicated issues. Husband does not state the nature and extent of the evidence proposed to be introduced. Husband argues that matters subject to judicial notice require oral testimony. As discussed *post*, we do not agree. Because husband did not properly request oral testimony, and good cause for such testimony was not established, the trial court did not abuse its discretion in not providing for oral testimony.

C. Documents Augmenting the Record

We granted husband’s request that we take judicial notice of, and augment the record to include, documents filed after the trial court’s order in question involving a dispute between wife and Fuchs. The documents are (1) wife’s notice of motions in limine and motions in limine filed on October 19, 2010, (2) wife’s opposition to the

motion of Fuchs⁵ to vacate order stating Fuchs is not a legitimate judgment creditor, (3) and Fuchs's civil complaint filed on July 14, 2010, commencing a new lawsuit, naming wife as a defendant and seeking to collect \$647,688.16 in attorney fees for the underlying marital dissolution proceeding and a separate civil action.

Husband contends that wife's contentions asserted in her documents further justified the need for an evidentiary hearing. We disagree.

Husband failed to establish that at the time of the hearing on wife's motion for sanctions against husband, wife knew of and had a basis for her later contentions made against Fuchs in the documents. In addition, in the documents, wife claimed that in 2001 and 2006, Fuchs was suspended by the state bar from the practice of law. Fuchs's discipline by the state bar is a matter of public record and, therefore, was at least constructively known by husband at the time of his opposition to the motion for sanctions and could have been raised by husband's declaration. In fact, husband argued in his amended opposition that in 2001 Fuchs had been disciplined by the state bar. The documents, therefore, do not justify the need for an evidentiary hearing.

Husband contends that wife's contentions asserted in her documents "supports [husband's] position set forth in the trial court" that Fuchs was dishonest and his invoices submitted in support of the sanctions motion were inflated. Husband, however, does not contend on appeal that the sanctions order was not supported by substantial evidence. Therefore, even if the documents support his positions regarding that Fuchs's honesty and invoices, they do not impact husband's claims on appeal regarding the invoices.

Even if we were to entertain husband's contention that the documents support his position, they do not. The documents concern a dispute between wife and her counsel regarding over \$600,000 in attorney fees billed by Fuchs on two matters. The documents filed by or on behalf of wife concern wife's response in the trial court to Fuchs listing his law firm as wife's judgment creditor on a writ of execution and an abstract of judgment. According to the documents, wife argued that Fuchs improperly claimed to be her

⁵ The documents that are the subject of husband's request to augment the record indicate that on June 23, 2010, Fuchs substituted out as counsel of record for wife.

judgment creditor based upon the trial court's issuance of an October 2009, order that husband pay wife \$375,000 in attorney fees.

Merely because wife made certain claims, after the sanctions order against husband that is the subject of this appeal, that Fuchs acted improperly, fraudulently, or in bad faith with regard to his pursuit of attorney fees against wife, does not mean that Fuchs so acted, and it therefore does not directly support husband's contentions in opposing the motion for sanctions. And, wife states that she disputes the amount of attorney fees, claimed to be over \$600,000, does not mean that the fees that were referred to in connection with the sanctions order in question were in fact unreasonable.

In addition, wife was not specific in the documents as to which of the fees she contended were unreasonable, and wife's motion for sanctions was based upon Fuchs's billing invoices to wife for 12 months totaling approximately \$600,000, not the full amount of attorney fees claimed by Fuchs against wife. Moreover, only \$300,000 of the approximately \$600,000 was awarded against husband. Wife's contention that she disputes Fuchs's claim that wife owes Fuchs over \$600,000 does not support husband's position at the time of the hearing on the sanctions motion that \$300,000 sought in sanctions was excessive.

Husband also contends that wife should be estopped from arguing on appeal that the sanctions order was proper because, subsequent to the sanctions order against husband, wife asserted in response to Fuchs's claim against wife for attorney fees that Fuchs "was not credible" and that she disputed the claimed fees. We disagree.

"The doctrine of judicial estoppel, sometimes called the doctrine of ""preclusion of inconsistent positions"" [citation], ""precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary."" [Citation.] The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first

position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.” [Citations.]’ [Citation.] [¶] Judicial estoppel is an equitable doctrine to protect against fraud on the courts. [Citation.] It has been said that ‘[b]ecause of its harsh consequences, the doctrine should be applied with caution and limited to egregious circumstances.’ (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 132 [46 Cal.Rptr.3d 7]; see also *Daar & Newman v. VRL International* (2005) 129 Cal.App.4th 482, 491 [28 Cal.Rptr.3d 566] [judicial estoppel is an ““extraordinary remed[y] to be invoked when a party’s inconsistent behavior will otherwise result in a miscarriage of justice””].)” (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 47-48.) “Even if the necessary elements of judicial estoppel are found, because judicial estoppel is an equitable doctrine [citations], whether it should be applied is a matter within the discretion of the trial court.” (*Id.* at pp. 46-47.)

Husband does not seek to estop wife from contending in this appeal that Fuchs was credible or that she did not dispute the claimed attorney fees against husband, but instead seeks to estop her generally from arguing on appeal that the sanctions order, which includes attorney fees, was proper. This is too broad of an application of estoppel. In addition, as noted above, wife’s contention that she disputed a portion of the approximately \$600,000 sought by Fuchs against her, does not establish that she disputed the \$300,000 in attorney fees awarded against husband. Husband also does not establish that wife contends that Fuchs generally was not credible. Wife instead claimed that Fuchs acted improperly, fraudulently or in bad faith with regard to his pursuit of the attorney fees against her. In any event, husband does not contend that there was not substantial evidence in support of the sanctions order. Thus, wife is not estopped on the basis of her alleged contentions in the subsequent proceeding.

Even if husband’s estoppel request is not overly broad and is applicable despite husband not contending that there was not substantial evidence in support of the sanctions order, husband has not established that such an estoppel is applicable in this appeal. Husband does not cite any authority, and we are aware of none, that where a

party takes one position in a proceeding in the trial court, and then takes an incompatible position in a second proceeding before the trial court, the party is estopped in an appeal of the first proceeding from taking the position asserted in that first proceeding.

Normally judicial estoppel binds the party to the first inconsistent position, it requires a showing that “the party was successful in asserting the first position.” (*Blix Street Records, Inc. v. Cassidy, supra*, 191 Cal.App.4th at p. 47.) ““Judicial estoppel . . . prevents a party from “asserting a position in a legal proceeding that is contrary to a position *previously* taken in the same or some earlier proceeding.”” (*Daar & Newman v. VRL International, supra*, 129 Cal.App.4th at pp. 490-491; italics added.) Because husband is seeking to bind wife to the second position she took—wife’s purported contention that Fuchs “was not credible” and her dispute of Fuchs’s claimed fees—husband should at least be required to show that wife was successful in asserting that second position. Husband, however, has not made such a showing.

D. Husband’s Request for Sanctions

Husband contends that the trial court erred in denying his request for \$35,000 in sanctions because he was denied an evidentiary hearing and the trial court “overlook[ed]” his declaration executed on April 27, 2010 complying with the requirements for out of state affidavits. We disagree.

At oral argument wife contended that husband did not appeal the order that the trial court denied husband’s request for sanctions because it was not designated in husband’s notice of appeal. Husband’s notice of appeal stated that he is appealing the order entered on May 3, 2010, and he described that order as an “ORDER AWARDING SANCTIONS (\$100,000).”

The May 3, 2010, order stated not only that the trial court granted wife’s request for sanctions, it also stated the trial court denied husband’s request for sanctions. Husband appealed from that order, including the trial court’s denial of husband’s request for sanctions, regardless of how husband chose to describe it.

The trial court denied husband's request for \$35,000 in sanctions because husband's supporting declaration was not filed under penalty of perjury under the laws of the State of California and, therefore, was inadmissible. The trial court did not err in denying husband's request for sanctions because the husband's only request for sanctions was contained in his March 2010 opposition, supported by husband's inadmissible declaration

Code of Civil Procedure section 2015.5⁶ requires that a declaration executed outside of California include the words "under the laws of the State of California." A declaration executed outside of California that fails to include the words "under the laws of the State of California" is inadmissible evidence. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 612; *County of Los Angeles v. American Contractors Indemnity Co.* (2007) 152 Cal.App.4th 661, 667, fn. 14.) Husband does not contend that the trial court erred in ruling that husband's declaration in support of this March 2010 opposition requesting sanctions was inadmissible.

⁶ Code of Civil Procedure section 2015.5 provides, "Whenever, under any law of this state or under any rule, regulation, order or requirement made pursuant to the law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be supported, evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution, or (2), if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California. The certification or declaration may be in substantially the following form: [¶] (a) If executed within this state: [¶] 'I certify (or declare) under penalty of perjury that the foregoing is true and correct': _____ (Date and Place) (Signature) [¶] (b) If executed at any place, within or without this state: [¶] 'I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct': _____ (Date) (Signature)"

Husband contends that the trial court erred because it did not consider his declaration executed on April 27, 2010, in ruling on his request for sanctions. Husband executed an opposition and an “amended” opposition on April 26 and 27, 2010, respectively, the latter of which contained husband’s declaration dated April 27, 2010, complying with the requirements for out of state affidavits. They, however, did not seek sanctions. They also were not in supplement to husband’s March 2010 opposition requesting sanctions. The trial court permitted them to be filed in response to Fuchs’s April 7, 2010, declaration. The admissibility of the April 27, 2010, declaration, therefore, does not provide a basis for the requested sanctions.

E. Other Contentions

Because we affirm the order for the reasons stated above, we do not reach wife’s contentions that husband is limited on appeal to challenging \$100,000 instead of the full \$300,000 in sanctions, waived his right to an evidentiary hearing by not personally appearing at the hearing, and is not prejudiced as a result of the trial court failing to conduct an evidentiary hearing.

DISPOSITION

The order is affirmed. Each party is to bear his or her own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.