Filed 4/23/18 Owens v. Los Angeles County MTA CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 FOUR

KENNETH CHARLES OWENS, Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSIT AUTHORITY, Defendant and Respondent.	B276821 (Los Angeles County Super. Ct. No. BC565405)

APPEAL from a judgment of the Superior Court of Los Angeles County, Benny C. Osorio, Judge. Affirmed.

Kenneth Charles Owens, in pro. per., for Plaintiff and Appellant.

O'Reilly & McDermott, Paul O'Reilly; Greines, Martin, Stein & Richland, Alison M. Turner and Carolyn Oill for Defendant and Respondent.

Appellant Kenneth Charles Owens appeals from the judgment of dismissal in favor of respondent Los Angeles County Metropolitan Transit Authority (MTA) following an order issuing a terminating sanction against appellant for discovery abuse. We affirm.

BACKGROUND

The record on appeal is sparse. On December 1, 2014, appellant sued MTA alleging a single cause of action for negligence. The operative pleading is his first amended complaint, which is difficult to decipher. Construing the record as a whole, it appears that appellant's claim related to an incident in January 2014 in which he allegedly was a passenger on an MTA bus when the driver stopped abruptly, causing him to fall and be injured.

Following a substantial period of delay not explained in the record, trial was set for May 4, 2016. On January 27, 2016, the trial court granted MTA's unopposed motion (the motion is not part of the record on appeal) to compel appellant to respond to form interrogatories, which had been served on appellant on December 16, 2014. The order, which did not mention sanctions, directed appellant to provide responses within 20 days.

On February 23, 2016, MTA filed a motion to dismiss the complaint as a terminating sanction for discovery abuse. The motion stated that despite the court's order of January 27, 2016, appellant had failed to respond to the form interrogatories (the only discovery request made in the case). Trial remained set for May 4, 2016, and MTA had been unable to prepare without the responses. Appellant filed no

opposition to the motion. On March 29, 2016, the trial court dismissed the action pursuant to Code of Civil Procedure sections 2023.030, subdivision (d)(3), which authorizes dismissal as a terminating sanction for misuse of the discovery process, and 2023.010, subdivision (g), which defines misuse of the discovery process to include "[d]isobeying a court order to provide discovery." Judgment was entered June 20, 2016, and notice of judgment was served on appellant June 24, 2016. Appellant filed a timely notice of appeal on August 11, 2016.

DISCUSSION

Appellant's notice of appeal erroneously states that it was taken from the judgment or order entered March 29, 2016. That was the date on which the court granted the motion for a terminating sanction and dismissed the action, not the date of the appealable judgment following the dismissal. MTA argues that we may dismiss the appeal: appellant's notice of appeal would be untimely if from a March 29, 2016 order or judgment, and appellant's opening brief (which does not mention the notice of appeal at all) fails to comply with California Rules of Court, rule 8.204(a)(2)(B), which requires an opening brief to "[s]tate that the judgment appealed from is final, or explain why the order appealed from is appealable." We decline to dismiss the appeal on this basis. "[N]otices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59.) Here, it is apparent that appellant is appealing from the judgment of dismissal

entered June 20, 2016; his notice of appeal from that judgment was timely filed. Although the notice incorrectly states the date of the judgment appealed from, MTA has not been misled. We therefore decline to dismiss the appeal on this ground.

Nonetheless, there are other fatal problems with appellant's appeal. In neither his opening or reply brief does appellant make any cognizable argument, supported by an adequate record, citations to the record, and relevant legal authority, challenging the dismissal of his case for discovery abuse. In his opening brief, he recites his version of the incident which forms the basis of his negligence claim, but does not discuss the dismissal of his complaint. In his reply brief, he states that at the time his case was dismissed (March 29, 2016), he was housed at Metropolitan State Hospital, but nothing in the record supports that assertion. "Appellant must affirmatively show error by an adequate record; error is never presumed. [Citation.] Indeed, a judgment or order of the lower court is presumed correct. [Citation.] Moreover, parties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat [the] issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.) Based on the inadequacy of the record and appellant's briefing, we conclude that he has forfeited any challenge to the dismissal of his action.

Even were we to somehow deem appellant's briefing as containing a cognizable challenge to the dismissal of his action, we would find no abuse of discretion. "A court has broad discretion in selecting the appropriate penalty [for a misuse of discovery], and we must uphold the

court's determination absent an abuse of discretion. [Citation.] We defer to the court's credibility decisions and draw all reasonable inferences in support of the court's ruling." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 (*Lopez*).) "Although in extreme cases a court has the authority to order a terminating sanction as a first measure [citations], a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective." (*Ibid.*) Here, it is true that the court imposed no prior sanction on appellant before the terminating sanction. The January 27, 2016 order compelling appellant to respond to MTA's form interrogatories neither orders or denies monetary (or any other) sanctions. We may infer that MTA did not ask for monetary or other sanctions, and the record suggests why: appellant was representing himself, is legally blind, and appears to lack financial resources. Imposition of monetary sanctions, which likely would not be paid, would not obtain compliance.

By the time of the motion for a terminating sanction on March 29, 2016, appellant had not complied with the order compelling responses to MTA's form interrogatories (the only discovery propounded in the case), and had not filed any opposition explaining why he had failed to respond. His operative pleading was far from clear as to the alleged factual basis of MTA's liability. Trial was scheduled for May 4, 2016, 36 days later. Under these circumstances, the trial court did not abuse its discretion in imposing a terminating sanction, because "the record clearly shows lesser sanctions would be ineffective" to obtain compliance

with appellant's discovery obligations, consistent with MTA's right to prepare for trial. (*Lopez, supra,* 246 Cal.App.4th at p. 604.)

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.