Filed 12/17/18 Hanna v. City of Long Beach 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

CATRINA A. HANNA, Plaintiff and Respondent, v. CITY OF LONG BEACH, Defendant and Appellant.	B281878 Los Angeles County Super. Ct. No. BC566138

APPEAL from an order of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Affirmed.

Charles Parkin, City Attorney, Monte H. Machit, Assistant City Attorney, Haleh R. Jenkins, Deputy City Attorney; Alderman & Hilgers and Allison Hilgers for Defendant and Appellant.

Gusdorff Law, Janet R. Gusdorff; The Rager Law Firm and Jeffrey A. Rager for Plaintiff and Respondent.

INTRODUCTION

Plaintiff and respondent Catrina A. Hanna (Hanna) sued her former employer, defendant and appellant City of Long Beach (City), claiming the City failed to investigate complaints that she had been sexually harassed while working at one of the City's libraries. Less than two weeks before trial was scheduled to begin, the City sought to disqualify Hanna's attorney because he had verified the complaint Hanna filed with the Department of Fair Employment and Housing (DFEH), a document that had been in the City's possession for nearly two years by that time, and the City intended to call him as a witness to testify about statements included in that document. The City also sought to disqualify Hanna's attorney because he had contacted employees whom the City claimed were represented by the Long Beach City Attorney's Office for purposes of Hanna's lawsuit. The court denied the City's requests to disqualify Hanna's attorney and the case went to trial. Ultimately, the jury found in favor of the City on all of Hanna's claims.

After the court entered judgment in the City's favor, Hanna moved for an award of monetary sanctions against the City and one of its attorneys under Code of Civil Procedure[1] sections 128.5, 128.7, and 1008, based on, among other things, the City's attempts to disqualify Hanna's attorney on the eve of trial. The court granted the motion for sanctions under section 128.5, finding the City and its counsel jointly and severally liable for $12,000 in reasonable expenses that Hanna and her attorney

---

[1] All undesignated statutory references are to the Code of Civil Procedure.

incurred in defending against the City's disqualification requests. We affirm the court's sanctions order.

FACTUAL AND PROCEDURAL BACKGROUND

1. Hanna Sues the City

The City hired Hanna to work as a librarian in its public libraries in May 2007. In April 2014, Hanna resigned, citing a "hostile work environment," which she claimed was created by the City's failure to properly respond to her repeated complaints that she had been sexually harassed by a transient man near the library where she worked.

On November 4, 2014, Hanna filed a verified complaint with the DFEH (DFEH Complaint). The DFEH Complaint detailed Hanna's work record with the City and the nature of her employment-related claims against the City. Hanna's attorney, Jeffrey A. Rager, typed his name on the complaint's verification page, declaring under penalty of perjury that the statements made in the complaint were "true and correct."[2] The same day Hanna filed the complaint, the DFEH closed its investigation of Hanna's claims and issued her a "Right to Sue" notice.

On December 11, 2014, Hanna filed a lawsuit against the City. Hanna attached the DFEH Complaint to her complaint filed in the superior court, which she served the City with on December 17, 2014.[3] In May 2015, Hanna filed the operative first

---

[2] Rager also attested he had "read the foregoing complaint and know[s] the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true."

[3] The City did not include the December 11, 2014 complaint in the appellant's appendix it filed on appeal, but the trial court found that

amended complaint, alleging 15 employment-related causes of action against the City. The DFEH Complaint was also attached to the first amended complaint; this pleading was served on the City's counsel, Haleh Jenkins, on May 8, 2015. Between February 2015 and October 2016, the parties engaged in "substantial scorched-earth type discovery and other heavy law and motion practice, resulting in over 24 volumes of court files."

2. The City's Attempts to Disqualify Hanna's Attorney

On September 30, 2016, less than two weeks before trial was scheduled to begin, Jenkins, on the City's behalf, served Rager with a subpoena to appear as a witness at Hanna's trial.[4] And on October 3, 2016, the City filed an ex parte application "for an order to specially set [a] motion to disqualify" Rager as Hanna's trial attorney. Jenkins signed the application as the City's attorney.

According to the City's ex parte application, Rager was disqualified under rule 5-210 of the State Bar Rules of Professional Conduct (Rule 5-210) because the City intended to call him as a witness to testify about the contents of Hanna's DFEH Complaint that he had verified. Since Hanna's deposition testimony was contradicted by statements included in her DFEH Complaint, the City intended to call Rager as a witness to impeach Hanna. The City, however, did not explain why it believed Rager's testimony would be relevant to any issues that

---

Hanna had served that pleading, along with the DFEH Complaint, on the City on December 17, 2014. The City does not dispute that finding on appeal.

[4] At the time the City served Rager with the subpoena, trial was scheduled to begin on October 11, 2016.

would be raised at trial, nor did it identify what statements Hanna made during her deposition that contradicted the statements included in her DFEH Complaint. And although the City had been in possession of the DFEH Complaint since December 2014, it did not explain why it waited until September 2016 to attempt to disqualify Rager. The court denied the City's ex parte application on October 3, 2016.

Although the court denied the City's ex parte application, on October 7, 2016, Jenkins—on the City's behalf—filed a "Trial Brief to Disqualify Jeffrey A. Rager as Counsel for Plaintiff." First, the City reasserted its argument that Rager should be disqualified under Rule 5-210 because the City intended to question him at trial about the contents of Hanna's DFEH Complaint. Notably, the City did not present any new evidence or legal theories to support its claim that Rager should be disqualified based on his verification of the DFEH Complaint.

Second, the City argued the court should disqualify Rager under rule 2-100 of the State Bar Rules of Professional Conduct (Rule 2-100) because he had contacted several City employees who the City claimed were represented by the City Attorney's Office for purposes of Hanna's lawsuit.[5] Jenkins had informed Rager in April 2015 that the City took the position that all of its

---

[5] The City claimed an attorney-client relationship existed between all of its current employees and the City Attorney's Office based on Article VI, Section 603, of the Long Beach Municipal Charter, which in relevant part provides that "the City Attorney [is] the sole and exclusive legal advisor of the City, the City Council and all City commissions, committees, officers, and *employees* with reference to all of their functions, powers and duties under [the] Charter, State and Federal Law … ." (Italics added.)

current employees were represented by the City Attorney's Office for purposes of Hanna's lawsuit. In May 2016, Rager contacted Sergeant Martin Arroyo, who was employed by the City, to solicit a declaration. Jenkins sent Rager a letter on May 18, 2016 reminding him that because Sergeant Arroyo was represented by the City Attorney's Office, Rager could not contact Sergeant Arroyo directly.

Jenkins also claimed she had learned that Rager had recently contacted three other current City employees. Specifically, Jenkins testified in her declaration filed in support of the trial brief that she had "learned that Mr. Rager recently contacted Lauren Nguyen and based on information and belie[f], also understand[s] that he recently contacted Liz Rogers and Tara Gilbert. All three are current employees of the City of Long Beach. Mr. Rager did not have the permission of the City Attorney's office or the court to contact these individuals." Neither Jenkins nor the City made any attempt to explain the nature of Rager's contacts with those three employees. Nor did the City attempt to explain in its trial brief what effect, if any, Rager's attempts to contact any of the four City employees had on the City's ability to defend itself against Hanna's lawsuit.

On October 7, 2016, the same day the City filed its trial brief, the court clerk notified the parties that the final status conference scheduled for October 11 had been continued to October 12, 2016. On October 11,[6] the City contacted the court by telephone to request a one-day continuance of the final status conference because Jenkins, who is Jewish, intended to observe Yom Kippur on October 12, 2016 and, as a result, would be

---

[6] The court was closed on October 10, 2016 for a court holiday.

unable to attend the conference. The court denied the City's request for a continuance.

On October 12, 2016, the City filed a declaration signed by Jenkins requesting a one-day continuance of the final status conference. In her declaration, Jenkins explained she was the only attorney in her office who was familiar enough with Hanna's lawsuit to be able to "argue the motions in limine and address the final status conference documents."

The court commenced the final status conference on October 12, 2016. Although the court called the case in the morning, it postponed the conference until after lunch to allow the attorney appearing for Jenkins to familiarize herself with the City's October 7, 2016 trial brief. After hearing argument on the City's requests to disqualify Rager as Hanna's attorney, the court stated that it "had to look at [the City's requests] with a lot of skepticism" and was inclined to deny them. After discussing other evidentiary issues with the parties, the court continued the final status conference to October 13, 2016.

On October 13, 2016, the court resumed the final status conference, at which Jenkins and another attorney representing the City appeared and argued in favor of the court granting the City's requests to disqualify Rager as Hanna's attorney. The court reiterated that it believed the City's requests to disqualify Rager lacked merit, but it proposed a compromise to allow the City to question Hanna about the contents of the DFEH Complaint without requiring Rager to appear as a witness. Specifically, the court proposed that Hanna agree to adopt the statements set forth in the DFEH Complaint as her own so that the City could cross-examine her about any discrepancies

between those statements and her deposition testimony. Both parties accepted the court's proposal.

3. The City Prevails at Trial

On October 13, 2016, a jury trial commenced. On November 1, 2016, the jury reached a verdict, finding in favor of the City on all of Hanna's remaining causes of action. The court entered judgment in favor of the City on November 23, 2016.

4. The Court Sanctions the City and Jenkins

On December 2, 2016, Hanna filed a motion for sanctions against the City and Jenkins. Relevant to this appeal, Hanna argued the City's requests to disqualify Hanna's attorney on the eve of trial warranted an award of sanctions under section 128.5 because the City's actions were frivolous, made in bad faith, and intended to delay the litigation of Hanna's claims.[7]

The City opposed Hanna's motion and requested section 128.7 sanctions against Rager. In support of the City's opposition and request for sanctions, Jenkins submitted a sworn declaration explaining why she waited until the eve of trial to seek to disqualify Rager as Hanna's counsel. Jenkins claimed she did not discover that Rager had verified Hanna's DFEH Complaint until late September 2016 because she had been in trial on a different case from September 6 through September 28, 2016. Although Jenkins testified that she "had used the DFEH complaint … in every prior employment case during trial to impeach a [p]laintiff

---

[7] Hanna also moved for sanctions under sections 128.7 and 1008, arguing the City improperly sought reconsideration of two separate court rulings in violation of section 1008, subdivision (d). The court denied Hanna's requests for sanctions under sections 128.7 and 1008. That aspect of the court's ruling is not challenged on appeal.

… ," she had "always assumed the DFEH complaint [in this case] had been signed by [Hanna]."

On March 7, 2017, the court issued a written ruling granting in part and denying in part Hanna's motion for sanctions.[8] The court granted the motion under section 128.5, based on the City's "bad faith filing on the eve of trial of identical motions to disqualify [Hanna's attorney]."

The court first addressed the City's attempts to disqualify Hanna's attorney based on his verification of Hanna's DFEH Complaint, finding the City's actions were "frivolous" and "solely intended to cause unnecessary delay in dealing with other trial matters … [and] trial itself." The court found Jenkins's claim that she did not discover that Hanna's attorney had signed the DFEH Complaint's verification page until late September 2016 "not credible and self-serving." The court rejected Jenkins's claim because: (1) the City had been in possession of the DFEH Complaint for nearly two years, and had engaged in extensive discovery for about 20 months, by the time Jenkins claimed she discovered Hanna's attorney had signed the verification page; and (2) Jenkins's late discovery of the fact that Hanna's attorney had signed the verification page was inconsistent with her own practice of using a plaintiff's DFEH Complaint to impeach a plaintiff's credibility at trial when litigating employment-related lawsuits.

The court also found it was "completely unnecessary," "not objectively reasonable," and "risky and pointless" for the City to move to disqualify Hanna's attorney on the basis that he had

---

[8] The court also denied the City's counter-request for sanctions against Rager.

verified Hanna's DFEH Complaint because "the act of verifying the DFEH complaint is a recognized and permitted action on counsel's part." According to the court, "There [was] no evidence from all the discovery that [the City] conducted that would have shown [Hanna's attorney] was able to testify competently on any substantive claim his client had."

The court noted that Hanna's attorney suffered "substantial prejudice in having to deal with these nuclear disqualification motions at a time when he should have been concentrating on trial preparation. Under these circumstances, waiting until the eve of trial … and then bringing a motion restating the same ground disguised as a trial brief … to remove an adversary's counsel for a spurious reason is inexcusable." The court clarified that it did not intend to legitimize the City's claim that Hanna's attorney was a necessary witness by proposing to have Hanna adopt the statements made in the DFEH Complaint as her own. Rather, the court noted, its proposal "was an attempt to keep the case on track to its conclusion without further delay, removing an issue … that had no merit."

As for the City's attempt to disqualify Hanna's attorney based on his alleged improper contacts with its employees, the court found the City's "conduct to fall within the litigation conduct proscribed by [section] 128.5 for essentially the same reasons detailed above. As with the suspicious timing involving the DFEH complaint, some of … Rager's complained-of actions were known long before 10/7/16. 'Recent' contacts with two or three other City witnesses [were] raised without any detail. So drastic a remedy sought at such a late date should have been more reasonably considered and was simply not justified. It

appears to have been made as retaliation for [Hanna's] 71-individual [section] 1987 notice[s] to appear."

The court also found that compliance with the 21-day safe harbor provision in section 128.7 "would serve no purpose at this time and thus lacks merit," and, in any event, "sufficient notice and opportunity to be heard" had been provided by Hanna to the City and Jenkins. The court imposed monetary sanctions against the City and Jenkins, jointly and severally, awarding $12,000 to Hanna and Rager for the reasonable expenses they incurred in responding to the City's requests to disqualify Rager as Hanna's trial attorney. The City timely appealed the court's sanctions order.[9]

DISCUSSION

The Trial Court's Sanctions Order

1. Applicable Law and Standard of Review

Under section 128.5, the trial court has discretion to award "reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."[10]

---

[9] Jenkins has not filed a separate notice of appeal.

[10] The current version of the statute applies only to cases filed on or after January 1, 2015. (See § 128.5, subd. (i) ["This section applies to actions or tactics that were part of a civil case filed on or after January 1, 2015."].) Since this case was filed in December 2014, the previous version of the statute, which was in effect from January 1, 2015 through August 6, 2017, applies to this case. (See Stats. 2014, ch. 425, § 1 (A.B. 2494) [former § 128.5].) Because none of the differences between the two versions of the statutes are implicated in this case, we hereafter refer to the former version of the statute as "section 128.5."

(Former § 128.5, subd. (a).) The statute defines "frivolous" as "totally and completely without merit or for the sole purpose of harassing an opposing party." (§ 128.5, subd. (b)(2).) An attorney or party "who files a frivolous motion to disqualify or harass an opponent to delay the litigation can, of course, be sanctioned by being required to pay the attorneys fees and costs incurred by the other party." (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 301, fn. 5.)

We review a grant of sanctions under section 128.5 for abuse of discretion. (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 1001.) "We do not independently determine whether appellant's conduct was frivolous or in bad faith, and we may not substitute our judgment for the judgment of the court below. [Citation.] ' " ' "To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice … ." ' " ' [Citations.]" (*Ibid.*)

2. The trial court did not abuse its discretion by sanctioning the City under section 128.5.

The City argues the court abused its discretion in requiring the City and Jenkins to pay Hanna's and Rager's reasonable expenses incurred in defending against the City's attempts to disqualify Rager as Hanna's attorney on the eve of trial. We disagree.

2.1. Disqualification Under Rule 5-210

The City first contends the court erred in finding the City's requests to disqualify Rager under Rule 5-210 were frivolous, made in bad faith, and solely intended to cause unnecessary

delay. Specifically, the City asserts its disqualification requests do not support an award of sanctions under section 128.5 because the City had a reasonable basis to believe Rager would have been a material witness at Hanna's trial due to the fact that he verified Hanna's DFEH Complaint and calling Rager as a witness was "an essential part of Jenkins' trial strategy." The City further contends insufficient evidence supports the court's finding that the City acted in bad faith by waiting until the eve of trial to seek to disqualify Rager under Rule 5-210.

Under Rule 5-210, "A member shall not act as an advocate before a jury which will hear testimony from the member unless: [¶] (A) The testimony relates to an uncontested matter; or [¶] (B) The testimony relates to the nature and value of legal services rendered in the case; or [¶] (C) The member has the informed, written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal."

Consistent with Rule 5-210, the trial court has discretion to disqualify an attorney if it is necessary for that attorney to serve as both an advocate and a witness at trial. (See *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1208–1209.) "Whether an attorney ought to testify ordinarily is a discretionary determination based on the court's considered evaluation of all pertinent factors including, inter alia, the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters

may be independently established." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 913 (*Comden*).)

Here, the court acted well within its discretion when it found the City's requests to disqualify Rager under Rule 5-210 were frivolous and intended solely to delay trial. This finding was proper because, among other things, the City failed to present any evidence showing why Rager would have been a necessary witness at trial. To be sure, in its ex parte application and trial brief, the City claimed it intended to call Rager as a witness to impeach Hanna because he had verified Hanna's DFEH Complaint, which included statements that were contradicted by her deposition testimony. But the City presented no evidence showing how Hanna's deposition testimony contradicted any of the statements included in her DFEH Complaint, nor did the City attempt to explain why those purported contradictions were important to its defense. The City also failed to explain why it could not have established whatever issues it intended to question Rager about through Hanna's testimony or some other form of evidence. The City, therefore, failed to make a legitimate attempt to demonstrate: (1) how Rager's testimony would have been relevant to any issues raised at trial; (2) whether Rager's testimony would have carried any significant weight in resolving those issues; and (3) whether the City could have established the matters Rager would have testified about through an alternative form of evidence, such as through another witness's testimony. (See *Comden*, *supra*, 20 Cal.3d at p. 913.) Consequently, the City could not reasonably have expected the court to grant its request to disqualify Rager from serving as Hanna's trial counsel.

In addition, the record supports the court's finding that the City's requests to disqualify Rager under Rule 5-210 were made

in bad faith. As the court noted in its ruling, it is undisputed that the City had been in possession of Hanna's DFEH Complaint for nearly two years by the time the City sought to disqualify Rager in early October 2016. And between February 2015 and October 2016, the City had engaged in extensive discovery, including conducting an "extremely lengthy and detailed" deposition of Hanna.[11] In addition, Jenkins testified that in every other employment-related case she had taken to trial, she used each Hanna's DFEH Complaint to impeach Hanna. While Jenkins also claimed she did not discover that Rager had verified Hanna's DFEH Complaint until late September 2016, the court rejected that statement as "not-credible and self-serving," a determination we will not second-guess on appeal. (See *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201 ["[A] trial court's credibility findings cannot be reversed on appeal unless that testimony is incredible on its face or inherently improbable."].) Based on this evidence, the court reasonably could have found that the City was aware that Rager had verified Hanna's DFEH Complaint well before trial was scheduled to begin and that it acted in bad faith by waiting until the eve of trial to seek to disqualify Rager.

---

[11] The City has not included a copy of the transcript of Hanna's deposition in the record on appeal. Accordingly, we presume the court's characterization of the nature and length of the deposition is accurate. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [" 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' "].)

2.2. Disqualification Under Rule 2-100

The City also contends the court erred in finding the City's attempt to disqualify Rager because he had directly contacted several City employees before trial was frivolous, made in bad faith, and intended only to cause unnecessary delay in litigating Hanna's claims. Specifically, the City argues the court abused its discretion in basing its ruling on a finding that the City failed to make any attempt to show Rager's contacts with City employees would have had a prejudicial impact on the City's efforts to defend against Hanna's claims. According to the City, a showing of prejudice is not required before an attorney may be disqualified under Rule 2-100 for making ex parte contact with a represented party.

Under Rule 2-100, an attorney representing a client "shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Rules Prof. Conduct, rule 2-100(A).) Rule 2-100 defines a "party" as: "(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or [¶] (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on part of the organization." (Rules Prof. Conduct, rule 2-100(B).)

"[D]isqualification is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or

the appearance of impropriety." (*Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 219.) A party seeking disqualification of another party's trial counsel must show the attorney's improper contacts "*will have a 'continuing effect' on judicial proceedings.*" (*Baugh v. Garl* (2006) 137 Cal.App.4th 737, 744 (*Baugh*), italics added.) Thus, contrary to the City's position on appeal, the moving party must show that the attorney's improper contacts will have a prejudicial impact on the litigation. (See *Jackson v. Ingersoll-Rand Co.* (1996) 42 Cal.App.4th 1163, 1166 [the purpose of disqualification "is not to punish ethical transgressions, but to prevent continuing, detrimental effects upon the proceedings"].)

The court reasonably found the City's request to disqualify Rager for allegedly violating Rule 2-100 fell "within the litigation conduct proscribed by" section 128.5. Even assuming the City established that the four employees Rager contacted were represented parties under Rule 2-100, the City made no attempt to demonstrate how Rager's contacts with those employees would have had any lasting effect or prejudicial impact on the litigation of or defense against Hanna's claims.

For example, the City claimed the court should disqualify Rager because he contacted Lauren Nguyen, Liz Rogers, and Tara Gilbert, who were "current employees of the City of Long Beach." The only evidence the City offered to support this claim was a statement by Jenkins in a sworn declaration that she had "recently learned" Rager contacted Nguyen and that "based on information and belie[f]" she "underst[oo]d" Rager had also contacted Rogers and Gilbert. But the City did not submit any statements by those employees, or any other evidence, establishing what positions those employees held with the City,

when Rager contacted them, or what Rager communicated with those employees about. Without such evidence, the City could not show what "continuing effect," if any, Rager's communications with those three employees would have had on the City's defense against Hanna's lawsuit.

To the extent the City sought to disqualify Rager based on his communication with Sergeant Arroyo, the City also failed to show how that communication would have affected the City's defense. Although Jenkins claimed she had learned that Rager had contacted Sergeant Arroyo "to solicit a declaration," the City presented no evidence establishing for what purpose Rager sought to have the sergeant submit a declaration.

In sum, because the City made no attempt to show what effect, if any, Rager's communications with the four City employees would have had on the underlying proceedings, the City could not have prevailed on its request to disqualify Rager as Hanna's counsel under Rule 2-100. (See *Baugh*, *supra*, 137 Cal.App.4th at pp. 744–745 [affirming the trial court's denial of the defendant's request to disqualify plaintiff's attorney under Rule 2-100 because the defendant failed to show the attorney's communications would have had a "continuing effect on the proceedings"].) Based on the City's failure to present any evidence to support that aspect of its request to disqualify Rager, the court reasonably found the City's request was frivolous, made in bad faith, and intended to unnecessarily delay the litigation of Hanna's claims.

2.3. The Court did not conduct the proceedings on the City's disqualification requests in an arbitrary manner.

In addition, the City argues the court conducted the proceedings on the City's requests to disqualify Rager in an "arbitrary manner," which prevented the City and Jenkins from "making a full showing of evidence and argument" to support the City's disqualification requests. Specifically, the City contends the court "knowingly prevented Jenkins" from making such a showing by scheduling the final status conference on Yom Kippur, which required the City to send a deputy city attorney who was unfamiliar with Hanna's case to that hearing. As a result, the City argues, the court's sanctions order violated the City's due process rights.

We find nothing improper about the manner in which the court conducted the proceedings on the City's requests to disqualify Rager. The court allowed the City two opportunities to seek to disqualify Rager within a little more than a week before trial was scheduled to begin. The court did not place any limitations on what evidence the City could present to support those requests, nor did it otherwise restrict the City's filing of its requests. Although on October 7, 2016, the court continued the final status conference at which it intended to rule on the City's second set of requests to disqualify Rager from October 11 to October 12, the same day as Yom Kippur, there is nothing in the record that shows the court knew at the time it continued the conference that Jenkins would not be able to attend due to her observance of Yom Kippur. In any event, the court did not issue a final ruling on October 12. Instead, the court continued the final status conference to October 13. Jenkins appeared on October 13,

and the court allowed her to argue in favor of the City's requests to disqualify Rager before issuing its rulings. The court, therefore, afforded the City an adequate opportunity to present evidence and argue in favor of its requests to disqualify Rager. (See *Ellis v. Roshei Corp.* (1983) 143 Cal.App.3d 642, 648–649 ["A trial court is empowered to exercise its supervisory power in such a manner as to provide for the orderly conduct of the court's business and to 'guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings.' [Citation.]"].)

2.4. Compliance with the 21-day Safe Harbor Provision

Finally, in its reply brief, the City asserts that Hanna's failure to comply with the 21-day safe harbor period in section 128.5 mandates reversal of the court's sanctions order. "Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. To withhold a point until the closing brief deprives the respondent of the opportunity to answer it or requires the effort and delay of an additional brief by permission." (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

Here, the City concedes that its 21-day safe harbor argument was not made in its opening brief. It contends, however, that until *Nutrition Distribution, LLC v. Southern SARMs, Inc.* (2018) 20 Cal.App.5th 117 (*Nutrition Distribution*), "[p]revious decisions had not made clear that compliance with the 21-day safe harbor was an absolute requirement for imposing sanctions pursuant to section 128.5." While we agree with the City that *Nutrition Distribution* was decided after the City filed its opening brief in November 2017, there is no sound reason why

the City's safe harbor argument could not have been raised in its opening brief.

First, in "urgency legislation enacted August 7, 2017 (Stats. 2017, ch. 169, § 1), the Legislature amended section 128.5 'to clarify the previous legislative intent.' (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 984 (2017–2018 Reg. Sess.) as amended Apr. 20, 2017, p. 1, italics omitted.) Specifically as it relates to the issue presented by this appeal, rather than simply cross-referencing subdivision (c) of section 128.7, as it formerly had, section 128.5, subdivision (f), was amended to import (with minor language modifications) the conditions and procedures contained in that provision, including in subdivision (f)(1)(B) a 21-day safe harbor provision '[i]f the alleged action or tactic is the making or opposing of a written motion or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading that can be withdrawn or appropriately corrected … .' " (*Nutrition Distribution*, *supra*, 20 Cal.App.5th at p. 129, fns. omitted.) That is, several months *before* the City filed its opening brief, the Legislature *clarified*, through the August 2017 amendments, that a 21-day waiting period applies to a motion for sanctions under section 128.5 that is directed to improper actions or tactics that can be withdrawn or appropriately corrected. (*Id.* at p. 120.) Second, the City raised Hanna's purported noncompliance with the 21-day safe harbor period in the trial court in its January 2017 opposition to the motion for sanctions, or a year before *Nutrition Distribution* was decided. The City has therefore forfeited the argument, raised for the first time in its reply brief, that the sanctions order should be reversed because it was deprived of the safe harbor period in section 128.5.

Hanna's Motion for Sanctions on Appeal

On appeal, Hanna moves for sanctions against the City on the ground that the City's appeal from the trial court's March 7, 2016 sanctions order is frivolous and because the City has included material in its appellant's appendix that is not reasonably material to the issues raised on appeal. Hanna requests sanctions in the form of "any relief this Court deems appropriate, including but not limited to monetary sanctions … in an amount that will fairly compensate [Hanna] for defending this appeal … ."

An appellate court may impose monetary sanctions on a party or attorney when it determines that an appeal is frivolous or taken solely to cause delay. (§ 907; Cal. Rules of Court, rule 8.276(a).) "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Although we are affirming the trial court's sanctions order, we do not believe the City's appeal was completely devoid of merit. We therefore deny Hanna's motion for sanctions on appeal.

DISPOSITION

The order is affirmed. Hanna shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P.J.

DHANIDINA, J.