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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

SYED ALI HUSAIN et al.,

Petitioners,

v.

THE SUPERIOR COURT OF MARIN
COUNTY,

Respondent;

MCDONALD'S CORPORATION, et al.,

Real Parties in Interest.

A136692

(Marin County
Super. Ct. No. CIV 096177)

Syed Ali Husain and Khursheed Husain petition for a writ of mandate directing the Marin County Superior Court to vacate its midtrial order granting terminating sanctions to real parties in interest, McDonald's Corporation, McDonald's USA LLC, and Mwaffak Kanjee (collectively McDonald's), including the striking of the Husains' complaint and their answer to McDonald's cross-complaint. We temporarily stayed further proceedings in the trial court, ordered real parties to file opposition to the petition, and elected on our own motion in the interests of judicial economy to decide the merits of the issues presented in the petition. We thereafter issued an order to show cause, deemed the opposition to the petition the return to the order to show cause, and heard oral argument on the merits. We now grant the petition, and order issuance of a peremptory writ directing the trial court to vacate the order striking the Husains' complaint and

answer to the cross-complaint, and to enter a new and different order denying terminating sanctions, reinstating the Husains' pleadings, and setting the matter for a new trial.¹

I. BACKGROUND

The Husains have owned McDonald's franchises since the early 1980's. By 2005, they held five McDonald's franchises in San Francisco and Daly City. In June 2005, the Husains entered into an agreement with third parties to purchase an additional seven McDonald's restaurants in Marin County. The underlying dispute in this case centers on whether McDonald's made an enforceable promise to the Husains to provide new 20-year franchises to them for three of the restaurants whose franchise terms were due to expire in 2009 and 2010. The Husains sued McDonald's to enforce the alleged promise, and McDonald's cross-complained to compel the Husains to restore the three disputed restaurants to McDonald's. Both sides moved for preliminary injunctions, the Husains to prevent McDonald's from terminating their rights to operate the restaurant locations and McDonald's to force the Husains to cease operations at the three locations and vacate the premises. The trial court granted the Husains a preliminary injunction allowing them to continue operating the restaurants during the litigation, which this court affirmed in *Husain v. McDonald's Corp.* (2012) 205 Cal.App.4th 860.

A. *Initial Motion for Terminating Sanctions*

In their original verified complaint, the Husains alleged as the basis for a breach of contract cause of action that McDonald's franchising manager, Jodi Breen, had offered in writing to renew the franchise terms for each of the three restaurants in January 2006 and that Mr. Husain had timely signed and mailed the Breen letters back to her indicating his willingness to accept the new terms on January 21, 2006. The Husains also alleged a separate and distinct contract theory that McDonald's agreed to renew the subject franchise terms as part of an assignment agreement it entered into with them in 2005. Copies of the Breen letters purportedly executed by Mr. Husain were attached as exhibits

¹ By separate order filed this date, we have dismissed the appeal on file in *Husain v. McDonald's Corporation* (case No. A136623), previously stayed by order filed November 26, 2012, as moot.

to the complaint. McDonald's contends Mr. Husain never communicated his acceptance of the offers contained in the Breen letters and the offers expired by their own terms. In later sworn declarations, Mr. Husain averred under penalty of perjury that he mailed the signed Breen letters back to Breen by delivering them for mailing to the United States Post Office at Capuchino Station on January 21, 2006. He attached to his declarations a copy of a form United States Postal Service certificate of mailing filled out with Breen's mailing address and stamped with a Capuchino Station postmark dated January 21, 2006. Mr. Husain testified under oath to his timely mailing of the Breen letters in a deposition and at the preliminary injunction hearing.

McDonald's obtained evidence the Capuchino Station post office was in fact closed to customers on January 21, 2006, and it would have been impossible for Husain to mail the Breen letters from that office on that date.² Further, McDonald's obtained evidence the particular form of postmark stamp on the certificate of mailing Husain presented to the court did not exist in 2006 and was not in use until 2008. The Husains subsequently dropped the contract cause of action based on the Breen letters.

Based on its evidence of perjury and evidence fabrication, McDonald's moved for terminating sanctions against the Husains in June 2012. The Husains opposed the motion and came forward with declarations from other postal customers contradicting McDonald's evidence about the form of the postmark stamp and when it came into use. The trial court denied the motion for sanctions, finding McDonald's would at most be entitled to the dismissal of the cause of action the Husains had already dismissed, even if it found they had forged the certificate of mailing. The court also found there was a factual dispute about the asserted falsification that could not be decided in law and motion proceedings.

² When confronted with the fact the post office was not open on January 21, 2006 at the preliminary injunction hearing, Mr. Husain changed his account of what happened on that date and stated he waited outside the post office and flagged down a letter carrier to take his letter inside and stamp his certificate of mailing with a postmark. McDonald's rebutted this story with evidence the necessary postal stamp could not have been accessed by an employee on a date when the post office was closed.

B. Renewed Motion for Terminating Sanctions

Four weeks into a jury trial in this case, after the Husains completed their case-in-chief, McDonald's presented a renewed a motion for terminating sanctions, contending Mr. Husain had (1) presented falsified invoices purporting to be from Blackrock Paving and used the invoices to substantiate an overstated amount of investment expenses in response to an interrogatory asking him to itemize amounts he alleged he invested in his Marin franchises, and testified untruthfully about the documents during the trial; (2) falsified the certificate of mailing pertaining to the Breen letters; and (3) violated a court order on a motion in limine not to refer to Mrs. Husain's breast cancer. McDonald's contended terminating sanctions were authorized both by Code of Civil Procedure³ section 2023.030 for discovery misconduct, and by the court's inherent powers when a lesser sanction could not guarantee a fair trial.

The trial court found the Husains had committed perjury and provided false evidence in discovery and in the trial, including (1) false testimony concerning the mailing of the Breen letters, (2) the production of false invoices in discovery, and (3) false testimony about his investment in the Marin franchises in interrogatory responses and at trial. The court also found Mr. Husain willfully and repeatedly violated its orders on McDonald's motions in limine by stating his wife had "recurring breast cancer" and later in the trial, after being admonished by the court about the first statement, by twice impliedly referencing his first statement about his wife's breast cancer, saying on the witness stand without prompting, "I was going through a lot at the time," and "the judge punish me for this [*sic*]." The court ordered terminating sanctions under section 2023.030, subdivisions (a) and (d)(3)⁴ of the Civil Discovery Act

³ All statutory references are to the Code of Civil Procedure unless otherwise indicated.

⁴ Section 2023.030 authorizes discovery sanctions to be imposed "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of [the Civil Discovery Act]." Subdivision (a) allows an award of the opposing party's reasonable costs including attorney fees as a monetary sanction for "misuse of the discovery process." Subdivision (d)(3) provides in relevant that "[t]he court may impose

(§ 2016.010 et seq.) and under its inherent powers, finding “[n]o lesser sanction would be appropriate or would ensure compliance and a fair trial.”

The court ordered the Husains’ complaint to be dismissed with prejudice, and their answer to McDonald’s cross-complaint stricken. The court also dissolved the preliminary injunction in favor of the Husains and granted McDonald’s an injunction preventing the Husains from continuing to use its trademarks and occupy its restaurants pending entry of a final judgment. The Husains were given seven days to vacate the three restaurants, and the court scheduled a prove-up hearing to determine McDonald’s damages. The restaurants were turned over to McDonald’s on September 25, 2012. This petition and a related appeal by the Husains followed.

II. DISCUSSION

Because a terminating sanction is a drastic measure that denies a party the right to a trial on the merits, our courts have limited its use to only the rarest and most extreme cases of litigation misconduct when no lesser sanction can preserve the fairness of the trial and restore balance to the adversary system. (*Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 916–917; *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 761, 764 (*Slesinger*)). While we do not in any way sanction the Husains’ litigation conduct, we do not find the circumstances shown here present one of those rare cases in which “any remedy short of dismissal [is] inadequate to preserve the fairness of the trial.” (*Slesinger*, at p. 764.)

A. *Discovery Abuse*

The trial court found the Husains “willfully violated the discovery laws and this Court’s discovery orders” by committing perjury in an interrogatory response following a court order compelling a response.⁵ For the reasons discussed below, we do not believe

a terminating sanction [against a party] by . . . [¶] . . . [¶] . . . [a]n order dismissing the action, or any part of the action, of that party.”

⁵ Apparent references in the court’s order to additional discovery order violations—perjured deposition testimony and more than one false interrogatory response—are not borne out by the record, and McDonald’s opposition does not identify

terminating sanctions were authorized by the Civil Discovery Act in the circumstances presented here.

As noted earlier, section 2023.030 by its terms only authorizes discovery sanctions to be imposed to the extent authorized by other provisions of the Civil Discovery Act. Section 2023.030 thus must be read together with sanctions provisions found in the statutes governing particular methods of discovery, such as document production, depositions, and interrogatories. (See *London v. Dri-Honing Corp.* (2004) 117 Cal.App.4th 999, 1004 [§ 2023.030 “and the particular discovery method statute [at issue] . . . must be read together to determine what types of sanctions can be imposed and when”].) The discovery statutes pertaining to document production, depositions, and interrogatories—sections 2031.310, 2025.450, and 2030.290, respectively—do not authorize terminating sanctions unless a party fails to obey an order compelling document production (§ 2031.310, subd. (i)), deposition attendance (§ 2025.450, subd. (h)), or further document production (§ 2030.290, subd. (c)). (See also *Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, 1581 [Civil Discovery Act requires “disobedience to a court order before a matter could be terminated”]; accord, *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1398–1399; *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327.) *Biles* also observes that nonmonetary discovery sanctions are those “ “ “ “suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks,” ’ ’ ’ ” and may not be ordered to “ “ “ “impose punishment. ” ’ ’ ’ ” (*Id.* at p. 1327.)

This case does not involve anything that can fairly be characterized as disobedience of a discovery order. McDonald’s had propounded an interrogatory asking the Husains to identify “each item comprising the \$1,682,090.27 you *alleged* to have invested in the Marin Franchises.” (Italics added.) In April 2011, the Husains responded by referencing invoices they had produced in discovery, and attaching as an exhibit to

any violation of a court discovery order other than the Husains’ response to a single interrogatory.

their response an 18-page computer printout listing hundreds of expenses and invoice numbers from multiple vendors, most of which were in small amounts.⁶ The printout listed three purported Blackrock Paving, Inc. (Blackrock) invoices for \$81,000, \$73,000, and \$82,000, reflecting the largest dollar amounts on the list, and the previously produced documents referenced in the response included the purported Blackrock invoices. One month *later*, the court granted McDonald's motion to compel a further response to the interrogatory, finding the Husains' response had "inappropriately cross-reference[d] other discovery responses." The Husains' responded to the order compelling a further response by serving an amended response directly incorporating the contents of the computer printout attached to their previous response, and appending to it copies of all of the supporting documents that had been referenced in their original response. McDonald's subsequently obtained evidence from Blackrock's president that it had never sent Husain estimates or invoices in the amounts stated, and that Husain had in fact been billed for and paid to Blackrock an amount \$115,000 lower than the total of the amounts stated in the purported Blackrock invoices he had produced.

Neither the interrogatory in question nor the order compelling a further response to discovery in fact required the Husains to produce documentation to support their claimed expenses. The interrogatory required the Husains to *identify* their *alleged* expenses and the court's discovery order required them to identify the alleged expenses directly in their response to the interrogatory, rather than by cross-referencing other discovery responses. The Husains' amended response did in fact identify the expenses comprising the \$1,682,090.27 the Husains *alleged* to have invested in the Marin franchises, and did enumerate those *alleged* expenses in a manner fully complying with the court's order. While the Husains' *allegation* was, we assume, knowingly inflated by about 7 percent, and three of the documents gratuitously offered in support of it were clearly doctored,

⁶ The Husains' response stated: "[P]laintiffs have produced documents establishing such investments and additional[ly] state that such documents are now Bates numbered AH0005486 to AH0006300 and have been produced. In addition plaintiffs have attached a summary of items invested in Marin as attachment A hereto."

these deceptions cannot reasonably be characterized as a failure to provide the discovery McDonald's sought or disobedience of the discovery order. Moreover, the true facts—the actual amount of the Husains' investment expenses, and whether it was 7 percent higher or lower than claimed—was of little or no consequence to the litigation.

In fact, McDonald's motion for terminating sanctions did not even argue the Husains had violated any discovery order. The closest it came was the contention Mr. Husain "perpetuated" his previous falsehoods concerning the Blackrock expenses and invoice "after" the court ordered a further response.⁷ This is a far cry from the flagrant disobedience of court discovery orders or complete failure to provide essential discovery we find in the case law upholding terminating sanctions for discovery violations.

The cases on which McDonald's relies—*Liberty Mutual Fire Ins. Co. v. LCL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, and *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486—all involved willful disobedience of discovery orders, as well as more egregious, pervasive, and material violations of the opposing party's discovery rights than are presented here. While we do not minimize the significance of making false and perjurious allegations in litigation, or rule out the possibility that terminating sanctions could properly be imposed for knowingly providing false or fabricated discovery responses in a particularly egregious case, we do not find this to be such a case.

B. Court's Inherent Powers

Nor do we believe terminating sanctions can be justified as an exercise of the court's inherent supervisory power over judicial proceedings. McDonald's made no showing the Husains' misconduct deprived it of a fair adversary trial in any sense. As noted, the certificate of mailing concerned a cause of action that was no longer in issue at the trial, having been withdrawn by the Husains before the court denied McDonald's

⁷ The falsification actually predated this litigation. Mr. Husain had presented the doctored invoices to McDonald's in 2008, seeking and obtaining reimbursement for them. This aggravates the wrong, but removes it even further from classification as a discovery violation.

initial motion for terminating sanctions. In fact, it was McDonald's itself that brought the certificate of mailing and Mr. Husain's prior testimony about it back into the case, making effective use of this material to cross-examine Mr. Husain and expose his falsehoods to the jury. As previously noted, the false Blackrock invoices overstated the Husains' investment in the Marin restaurants by \$115,000 out of the \$1.7 million they had claimed they invested, a matter of little significance to the contract interpretation issue at the center of the case. Nonetheless, McDonald's was able to exploit this discrepancy as well, by vigorously cross-examining Mr. Husain about it at the trial and properly placing his credibility in doubt. It is hard to see how McDonald's position in the litigation was disadvantaged by these developments. Finally, Mr. Husain's violations of the court's in limine order not to refer to his wife's illness, while indefensible, could not have so impaired McDonald's ability to defend itself as to throw the fairness of the trial into question. The trial court immediately admonished the jury to disregard Mr. Husain's comments. While some sanction would have been appropriate for Mr. Husain's disregard of the court's order, we cannot agree that nothing short of dismissal could have alleviated the prejudice to McDonald's.

We simply do not find here the kind of "deliberate and egregious misconduct" that "render[ed] any sanction short of dismissal inadequate to protect the fairness of the trial." (*Slesinger, supra*, 155 Cal.App.4th at p. 762.) *Slesinger*, the case on which the court and McDonald's principally relied, was a "portrait of litigation misconduct run riot," which included the plaintiff's use of a private investigator to steal confidential and privileged documents from the defendant's dumpsters and private offices from which it gained insight into the defendant's litigation strategy. (*Id.* at pp. 740–741, 772.) After an evidentiary hearing, the trial court concluded no lesser sanction than dismissal of the plaintiff's case could protect the defendant against the plaintiff's use of the illicitly-obtained information, a determination the Court of Appeal affirmed. (*Id.* at p. 740.)

Here, lesser sanctions would have fully protected McDonald's right to a fair trial. As noted, the court afforded McDonald's perhaps the most effective sanction of all—giving it wide latitude to expose Mr. Husain's fabrications and perjury to the jury through

cross-examination. An adversary trial is in fact the opportunity to expose perjury. (See *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11 [“ ‘[W]hen [the aggrieved party] has a trial, he must be prepared to meet and expose perjury then and there. . . . The trial is his opportunity for making the truth appear’ ”].) Beyond that, there is a panoply of lesser sanctions—instructing the jury on inferences to be drawn from a witness’s false testimony and offering of false documents, initiating contempt proceedings, referring the matter for perjury prosecution, or imposing monetary, issue, or evidence sanctions—that the court could have pursued in lieu of terminating the case. We find no indication in the record any sanctions short of termination were proposed to or considered by the trial court. On the facts appearing, we do not believe terminating sanctions were appropriate.

III. DISPOSITION

Let a peremptory writ of mandate issue, commanding respondent Marin County Superior Court to set aside those portions of its order filed September 21, 2012, in *Husain v. McDonald’s Corporation* (Super. Ct. Marin County, case No. CIV 096177), granting terminating sanctions, dismissing the Husains’ third amended complaint with prejudice, striking the Husains’ answer to McDonald’s amended cross-complaint, and scheduling a prove-up hearing regarding McDonald’s damages, and to enter a new and different order denying terminating sanctions, reinstating the Husains’ third amended complaint and answer to McDonald’s amended cross-complaint, and scheduling a trial date. The stay previously imposed shall remain in effect until the remittitur issues.

Each side shall bear its own costs in this writ proceeding.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.