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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DWIGHT DIXON COLLINS,

Plaintiff and Appellant,

v.

ARMANINO LLP,

Defendant and Respondent;

ROBERT W. BROWER,

Objector and Appellant.

A143408

(Contra Costa County  
Super. Ct. No. MSC10-02950)

Plaintiff Dwight Dixon Collins (Plaintiff) and his attorney Robert W. Brower (Attorney) (collectively, Appellants) appeal from the trial court's order awarding sanctions to defendant Armanino LLP (Respondent).<sup>1</sup> We affirm.

BACKGROUND

Plaintiff and his wife sued Respondent and other defendants in connection with an allegedly fraudulent investment scheme, the details of which are not relevant to this appeal.

During discovery, Respondent filed a motion seeking appointment of a discovery referee. Respondent's motion stated Plaintiff had indicated his willingness to consent to

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<sup>1</sup> There is some ambiguity about whether Attorney is representing Plaintiff, in addition to himself, on this appeal. Respondent does not raise this concern, but treats both as appellants. Because only one of the issues raised on appeal pertains solely to Plaintiff and we do not reach this issue for other reasons, we will assume both Attorney and Plaintiff are appellants for purposes of the appeal.

a referee if Respondent paid the fees. Respondent objected to this arrangement in part because, according to Respondent's motion, "the referee is sought as a direct result of discovery abuse by plaintiffs." The motion, supported by a declaration from Respondent's counsel, described past discovery disputes with Plaintiff and Attorney, including improper conduct at Plaintiff's deposition that was eventually referred to a discovery facilitator and resulted in an order barring Attorney from certain conduct during the remainder of the deposition. The motion also stated Plaintiff had failed to respond to requests for production of documents and interrogatories served nearly six months prior. Plaintiff filed a "limited opposition" confirming he did not oppose the appointment of a referee but contending he was financially unable to share the costs.

The record on appeal does not include a reporter's transcript of the hearing, but a subsequent declaration by Respondent's counsel states he "advised the Court that [Respondent] would be willing to pay the referee costs and [the referee's] retainer if the Court included in the order that costs would be subject to reallocation if one party acted in bad faith"; Appellants did not agree; and the trial court vacated the pending motion and retained jurisdiction for future discovery disputes. (Underlining omitted.)

Shortly thereafter, Respondent filed a motion to compel discovery responses. The motion also sought monetary sanctions from Plaintiff for his failure to respond to discovery. The motion stated that this failure to respond "was the main purpose behind" Respondent's motion to appoint a discovery referee. Respondent sought sanctions in the amount of its expenses incurred in filing the motion to compel as well as the referee motion. Plaintiff's opposition disputed the characterization of his conduct as discovery abuse, contended the court lacked jurisdiction to compel certain responses, and argued sanctions were not appropriate.

The trial court issued a tentative ruling granting the motion to compel except as to one interrogatory.<sup>2</sup> The tentative ruling also provided: "Sanctions against Plaintiff and

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<sup>2</sup> Appellants do not challenge this portion of the order.

[Attorney] are awarded in the amount requested, \$5,263.” Neither Plaintiff nor Attorney contested the tentative ruling, which became the order of the court.

## DISCUSSION<sup>3</sup>

### I. *Notice to Attorney*

Appellants argue the award of sanctions against Attorney was impermissible because Respondent’s motion did not identify Attorney as a person against whom the sanction was sought. (See § 2023.040 [“A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought.”].) Respondent contends Attorney forfeited this claim. We agree the claim is forfeited because Appellants failed to raise it in the trial court.

Appellants do not dispute that, as a general matter, the failure to contest a tentative ruling can forfeit an argument on appeal if the argument was not previously raised in the trial court. “[W]hen a trial court announces a tentative decision, a party who failed to bring any deficiencies or omissions therein to the trial court’s attention forfeits the right to raise such defects or omissions on appeal.” (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 912 (*Porterville Citizens*); cf. *Jansen Associates, Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166, 1170 [attorney forfeited challenge to sanctions order based on lack of notice when, “[d]uring the sanctions hearing itself, upon being asked against whom sanctions were being imposed, the court answered ‘the attorney’ ” and the attorney “made no protest of any kind, did not in any manner raise the issue of lack of notice, and did not move for a continuance for an opportunity to be heard further”].)<sup>4</sup>

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<sup>3</sup> The order is immediately appealable. (Code Civ. Proc., § 904.1, subd. (a)(12) [authorizing appeals from “an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars”].) All undesignated section references are to the Code of Civil Procedure.

<sup>4</sup> A failure to object to a tentative ruling will not result in forfeiture if the argument was previously raised. (*Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1406 [finding no forfeiture where the appellant did not oppose the tentative ruling but had “raised the

Instead, Appellants point to California Rules of Court rule 3.1348(b).<sup>5</sup> Rule 3.1348, governing sanctions for failure to provide discovery, provides: “The failure to file a written opposition or to appear at a hearing or the voluntary provision of discovery shall not be deemed an admission that the motion was proper or that sanctions should be awarded.” (Rule 3.1348(b).) Appellants argue: “If not attending a hearing is not an admission that the motion was proper, then there is no waiver preventing an appeal on that issue.” We disagree.

The forfeiture rule is not based on construing a party’s silence as an admission. Rather, “[t]he purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.” (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) “It is unfair to the trial judge and the adverse party to attempt to take advantage of an alleged error or omission on appeal when the error or omission could have been, but was not, brought to the attention of the trial court in the first instance.” (*Porterville Citizens, supra*, 157 Cal.App.4th at p. 912.) Rule 3.1348(b) does not permit a party to make no opposition to a sanctions motion in the trial court, then appeal on numerous grounds that could have been raised below.<sup>6</sup>

Appellants also argue that we can exercise our discretion to excuse the forfeiture. (See *In re S.B., supra*, 32 Cal.4th at p. 1293.) However, Appellants have not persuaded us we *should* exercise it in this case. (*Ibid.* [“the appellate court’s discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue”].) We conclude Appellants have forfeited this claim and we decline to exercise our discretion to consider it.

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points he asserts on appeal [in briefs below]”; the appellant “is not, therefore, raising new arguments on appeal” and any objection to the tentative ruling “would have been futile”].) This is not such a case.

<sup>5</sup> All undesignated rule references are to the California Rules of Court.

<sup>6</sup> We grant Appellants’ unopposed March 24, 2015 request for judicial notice of a judicial council committee report proposing the adoption of the predecessor rule to rule 3.1348. We find nothing in this report weighing in favor of Appellants’ construction of the rule.

## II. *Sanctions For Referee Motion*

Appellants next contend the award of sanctions for Respondent's expenses in filing the referee motion is unauthorized by law and an abuse of discretion because Plaintiff's opposition was based solely on his inability to pay the referee's costs. We disagree.

"The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (§ 2023.030, subd. (a).) "Misuses of the discovery process" include "[f]ailing to respond or to submit to an authorized method of discovery." (§ 2023.010, subd. (d).) Respondent claimed Plaintiff's failure to respond to interrogatories was the primary reason behind the filing of the referee motion; in other words, Respondent claimed the expense of the referee motion was "incurred by [Respondent] as a result of" Appellants' discovery misconduct. (See § 2023.030, subd. (a).) The fact that Plaintiff's opposition was based on his inability to share costs is of no import here. Appellants have not demonstrated the award of sanctions for expenses incurred in connection with the referee motion was unauthorized by law.

"The court's discretion to impose discovery sanctions is broad, subject to reversal only for manifest abuse exceeding the bounds of reason." (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1293.) Appellants argue that Plaintiff's opposition to the referee motion was limited to his ability to pay costs, but do not answer Respondent's contention that Plaintiff's failure to respond to discovery necessitated the referee in the first place.<sup>7</sup> The trial court credited Respondent's claim. Appellants have not shown the award was an abuse of discretion.

## III. *Post-Order Events*

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<sup>7</sup> At oral argument, Appellants raised additional arguments about their position below with respect to the discovery referee. We decline to consider these late-raised contentions (*Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115); in any event, they do not demonstrate the trial court abused its discretion.

Appellants argue events occurring after the order issued render the order void as to Plaintiff. “It has long been the general rule and understanding that ‘an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.’ ” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Accordingly, we decline to consider Appellants’ argument regarding post-order events. We also deny Appellants’ February 13, 2015 request for judicial notice of these post-order events.

#### IV. *Motion for Appellate Sanctions*

On March 24, 2015, Respondent filed a motion in this court seeking sanctions against Attorney for filing a frivolous appeal.<sup>8</sup> “[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.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) “Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions.” (*Ibid.*)

We decline to award sanctions. Although we have rejected Appellants’ arguments, we do not find them so without merit as to be frivolous. We also find no evidence of bad faith; we will not infer bad faith, as Respondent urges, from the size of the appealed-from monetary sanctions.

#### DISPOSITION

The order is affirmed. Respondent is awarded its costs on appeal.

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<sup>8</sup> Pursuant to Rule 8.276(c), we provided written notice to Appellants that we were considering imposing sanctions.

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SIMONS, J.

We concur.

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JONES, P.J.

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BRUINIERS, J.