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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GREASE MONKEY RACING, INC., et
al.,

Plaintiffs, Cross-defendants, and
Respondents,

v.

FORTUNE MARKET MEDIA, INC., et
al.,

Defendants, Cross-complainants,
and Appellants.

B235291 (cons. w/B236390)

(Los Angeles County
Super. Ct. No. BC385305)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rita Miller, Judge. Affirmed.

Law Offices of Carlos F. Negrete and Carlos F. Negrete for Defendants and Appellants.

Law Offices of George A. Kaufman and George A. Kaufman for Plaintiffs and Respondents.

Plaintiffs in this case are Grease Monkey Racing, Inc. (Grease Monkey), doing business as Sigalsport, a sports car racing team, and Grease Monkey's owner and president, Gene Sigal. The trial court imposed terminating sanctions on defendants and appellants Fortune Market Media, Inc., Fortune Market Financial Network, Inc., BZCOM Marketing, Inc., Galinda Vaynter, Vadim Vaynter, Arthur Kats, and Ryan Tomlinson (collectively defendants). The court found that defendants engaged in a pattern of willful discovery abuse. It entered a default judgment against defendants. The court also dismissed with prejudice defendants' cross-complaint, which was brought against plaintiffs and several other cross-defendants not parties to the discovery, Trista Sigal, Emmanuel Lupe, and ELO, Inc. (collectively the nonpropounding cross-defendants). Defendants contend the imposition of terminating sanctions was an abuse of discretion, the trial court erred in allowing the nonpropounding cross-defendants to benefit from the sanctions, and it failed to follow proper procedures in setting the monetary amount of the default judgment. Because we conclude the court's orders were not an abuse of discretion and the default judgment was properly entered, we shall affirm the judgment and orders under review.

FACTUAL AND PROCEDURAL SUMMARY

The first amended complaint (the charging pleading) alleges 12 causes of action based on several agreements entered into by plaintiffs and defendants. In December 2006, defendants Galina and Vadim Vaynter, owners of defendant BZCom Marketing, Inc. (BZCom), entered into a written agreement with plaintiffs, by which BZCom would sponsor and finance the Grease Monkey race team. In October 2007, after financial difficulties arose for the Vaynters, the parties entered into a subsequent agreement under which Grease Monkey would be absorbed into Fortune Market Media, Inc. (FMM), a company recently purchased by the Vaynters and run by their sons-in-law, defendants Kats and Tomlinson. In November 2007, FMM became publicly traded. The agreement required defendants to provide specified funding to FMM. Galina Vaynter issued a promissory note to plaintiffs with respect to this agreement.

Over the following months, defendants assured plaintiffs that the agreed upon funds would be provided. However, payments were not made, and defendants failed to fulfill their outstanding contractual obligations.

The first amended complaint alleges causes of action for fraud, negligent misrepresentation and breach of contract based on the BZCom agreement. It makes identical claims arising out of the merger agreement. A cause of action for breach of the promissory note also was included in the first amended complaint. A series of claims for negligent interference with prospective economic advantage and invasion of privacy also were alleged. In August 2008, a cross-complaint was filed by defendants against plaintiffs and other associated parties.

In September 2008, the trial court made its first discovery ruling, ordering defendants to provide responses to various discovery requests and to produce requested documents. The court declined to impose any sanctions at that time. The following week, the trial court granted plaintiffs' motion to compel the depositions of Galina Vaynter, Kats, and Tomlinson. This time, monetary sanctions were imposed on defendants.

In October 2008, the Honorable Alan B. Haber (ret.) was appointed as a discovery referee.¹ Judge Haber issued his first report in January 2009. In it, he found the evidence before him established a failure on the part of defendants to comply with the trial court's order requiring production of responsive documents by a specific date. This failure lacked "any justification on the part of the defendants." Judge Haber recommended monetary sanctions against defendants. He also recommended additional monetary sanctions due to defendants' failure to respond in a timely manner to special and form interrogatories, noting that defendants had been "extremely slow in responding" to "reasonable" and "relevant" requests from plaintiffs. Judge Haber's recommendations were adopted by the court.

¹ The minute order indicating Judge Haber's appointment is dated October 1, 2009. Based on the chronology of the case, we assume this was in error, and the minute order should have indicated the appointment was made in 2008.

Judge Haber issued a second report later that month regarding further discovery disputes. He recommended that the trial court order defendants FMM and Vadim Vaynter to turn over requested financial documents. He further recommended that defendants Tomlinson, Kats, and the Vaynters be ordered to produce documents requested by plaintiffs, citing the relevance of the documents requested. Judge Haber also recommended that the court order plaintiffs to respond to discovery requests from defendants, but this recommendation was limited to a portion of defendants' requests, those he found appropriate. Judge Haber concluded that the volume of interrogatories served by defendants was "unduly burdensome." The court adopted Judge Haber's recommendations.

Judge Haber issued a third report in June 2009. He recommended that defendants Galina Vaynter and Tomlinson be ordered to attend another date for deposition and that monetary sanctions be imposed upon them. He further recommended that the court order defendant BZCom to produce its general ledger, noting there had been "no meaningful response" to plaintiffs' requests for that document, and advising the court to impose monetary sanctions. Judge Haber recommended that defendant FMM be ordered to produce shareholder information and lists due to its lack of "significant responses" to outstanding requests. This was accompanied by a recommendation for monetary sanctions against defendant FMM. Judge Haber also stated that plaintiffs were entitled to information regarding payments between defendants and that defendants should be ordered to provide a detailed privilege log for documents withheld together with an explanation for failing to produce them. Monetary sanctions were recommended against all defendants. Judge Haber also recommended certain documents be turned over by plaintiffs to defendants. The trial court adopted Judge Haber's recommendations.

Judge Haber's final report was submitted in December 2009. He summarized the history of discovery and the evidence before him up to that point. Judge Haber found defendants continuously objected to and failed to respond to plaintiffs' discovery requests despite court orders to comply. Examples were given, including defendants' failure to "respond appropriately" to the discovery request for general ledger information for all

defendant entities. Judge Haber made findings of fact regarding defendants' behavior. He found "continuous disobedience" of court orders over the previous year and a half, "continuous unmeritorious objections," and failure to respond to authorized methods of discovery. Judge Haber found the evidence established that defendants' conduct lacked justification, constituting a "substantial misuse of the discovery process." This resulted in substantial delay and economic costs. Although monetary sanctions had been repeatedly ordered against defendants, none had been paid. Judge Haber concluded that although he understood terminating sanctions were a drastic measure, given defendants' "egregious conduct," such an order was fair and justified in this case. He recommended that defendants' answer to the complaint be stricken and default judgment entered against them. He also recommended dismissal of defendants' cross-complaint.

The trial court ordered the parties to prepare binders laying out the relevant evidence for a hearing on the motion and recommendation for terminating sanctions. It heard argument and received and reviewed extensive evidence over four days of hearing that extended from late 2010 into early 2011. The trial court concluded terminating sanctions were warranted due to defendants' "continuous and willful misuse of the discovery process," including repeated failure to respond to authorized means of discovery and to obey court orders and employing "oppressive and burdensome discovery." It determined defendants' actions during the litigation fell within the behavior described by Code of Civil Procedure section 2023.010 as conduct subject to sanctions.² The trial court therefore ordered that defendants' answer to the first amended complaint be stricken and default entered. It also dismissed the cross-complaint with prejudice.

A prove-up hearing was held on the default. Plaintiffs submitted a request for judgment and a declaration itemizing the damages sought. This included damages for breach of contract on the three agreements underlying the action, plus interest and attorney fees. The amounts were calculated based on the first amended complaint, the

² All further statutory citations are to the Code of Civil Procedure.

agreements attached to them (including the payment schedule agreed upon by all parties), subtracting amounts already paid by defendants and defendants' expected commission per the contract. Punitive damages were waived by plaintiffs. No damages were sought on the claims for negligent interference with prospective economic advantage and invasion of privacy. After considering the documents presented and the first amended complaint, the trial court awarded \$3,291,454.40 to plaintiffs. Any duplication in the award on the contract and fraud causes of action was eliminated. This appeal followed.

DISCUSSION

I

Defendants contend the trial court abused its discretion in imposing terminating sanctions. They argue the court exceeded the bounds of reason by taking so drastic a measure without making its own factual findings regarding specific discovery abuses and identifying which specific defendants were responsible for them. They support this contention by pointing to the trial court's failure to find defendants willfully committed the abuses.

Section 2023.030 is the applicable discovery sanctions statute. Subdivision (d) provides the court with the power to impose a terminating sanction by orders dismissing the action or rendering a judgment by default against any party engaging in the misuse of the discovery process. Section 2023.010 lists examples of conduct amounting to misuse of the discovery process. These include employing discovery in a manner that causes unwarranted annoyance or oppression, failing to respond or submit to authorized methods of discovery, making unmeritorious objections to discovery, disobeying court orders to provide discovery, or making evasive responses to discovery. (§ 2023.010, subds. (c)-(g).) “[A]bsent unusual circumstances, such as repeated and egregious discovery abuses, two facts are generally prerequisite to the imposition of a nonmonetary sanction. There must be a failure to comply with a court order and the failure must be willful. (*Biles v. Exxon Mobile Corp.* (2004) 124 Cal.App.4th 1315, 1327.)” (*Lee v. Lee* (2009) 175 Cal.App.4th 1553, 1559.)

The trial court has broad discretion when imposing a discovery sanction and its order will be upheld on appeal absent a manifest abuse of discretion, i.e., a ruling that exceeds the bounds of reason. (*Lee v. Lee, supra*, 175 Cal.App.4th at p. 1559.)

Defendants argue they complied in good faith and the court failed to make a specific finding of willfulness regarding the abuses. Thus, they contend terminating sanctions were an abuse of discretion. We disagree.

First, the court did find that the offending conduct was willful, as well as without justification. The question on review is not whether a less drastic sanction might have been imposed, but rather whether the trial court abused its discretion in imposing the sanction it chose. (*Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1619-1620.) Defendants' claim of "good faith compliance" finds little if any support in the record. Rather, the record shows that defendants engaged in continuous misconduct as identified by Judge Haber and the trial court. Monetary sanctions were imposed time and again to no evident effect. The discovery abuse did not end. None of the sanctions were paid. This supports the trial court's conclusion that additional monetary sanctions would have been inadequate. In addition, defendants were given an opportunity at the hearing on the motion for terminating sanctions to propose a sanction short of terminating sanctions, including evidentiary or issue sanctions. They presented no valid, alternative remedy.

Defendants contend the trial court abused its discretion by failing to make findings regarding specific discovery abuses and the individual defendants responsible for them. First, the statutes dealing with discovery sanctions do not require the court to "recite in detail" the reasoning behind imposing terminating sanctions. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 261.) Indeed, "the trial court is not required to make findings at all." (*Ibid.*) Here, the trial court reviewed Judge Haber's reports, the court's file of the case, the voluminous materials submitted by the parties, and conducted a four day hearing on the motion for sanctions. The trial court probed into each of the discovery issues cited and consistently stopped the hearing to properly identify which defendants engaged in the abuses alleged. It found all defendants engaged in a continuous pattern of

discovery misuse including employing discovery in a manner that caused unwarranted annoyance and oppression, failing to respond or submit to authorized methods of discovery, making unmeritorious objections to discovery, disobeying court orders to provide discovery, and making evasive responses to discovery. (§ 2023.010, subs. (c)-(g).)

The trial court called defendants' attention to their repeated "foot dragging" and "stonewalling" regarding their discovery obligations, leading to delay and eventual suspension of the trial date. It concluded the abuse was willful and without justification. (*Biles v. Exxon Mobile Corp.*, *supra*, 124 Cal.App.4th at p. 1327.) In addition, defendants' replacement counsel admitted at the hearing on the terminating sanctions motion that he could not provide an explanation or justification for defendants' failure to appropriately respond to the interrogatories propounded, even after a court order. The trial court afforded defendants many opportunities to comply with the discovery orders over the years of this litigation. Based on the record before the trial court, including the reports submitted by Judge Haber, we find it was not an abuse of discretion to impose terminating sanctions on all defendants for their willful misconduct and failure to obey court orders over the course of this litigation.

Defendants further argue plaintiffs suffered no prejudice as a result of the alleged abuses, and thus, terminating sanctions were unwarranted. However, the trial court repeatedly inquired into and received evidence regarding the negative impact of defendants' conduct on plaintiffs' claims and defenses. Judge Haber's reports and the trial court's orders specifically cite the prejudice suffered by plaintiffs as a result of defendants' discovery abuse. A major issue in this litigation was the financial dealings of defendants, which were relevant to both the initial complaint and the cross-complaint. In order to prove their case and defend against the cross-complaint, plaintiffs needed information about what funds defendants could access, what the financial dealings between them were, and information regarding the sale and resale of stock from the newly formed defendant corporation. Plaintiffs, as well as the remaining cross-defendants, were significantly restricted from putting on their case and defending against

the cross-complaint as a result of defendants' obfuscation and misconduct. We find sufficient prejudice to warrant the sanctions imposed.

II

In addition to plaintiffs, defendants named several other parties in their cross-complaint : Trista Sigal; Emmanuel Lupe; and ELO, Inc. The cross-complaint alleged that Lupe, acting as an individual and through his company, cross-defendant ELO, acted as agent for plaintiffs and managed the day-to-day affairs of plaintiff Grease Monkey. It further alleged Trista Sigal influenced and controlled the activities and affairs of plaintiff Grease Monkey. Defendants contend the court abused its discretion by striking the cross-complaint against these additional cross-defendants who did not propound the discovery leading to the sanctions. They argue the nonpropounding cross-defendants were not prejudiced in any way by the discovery disputes at issue and that there was not a sufficient unity of interest between plaintiffs and the nonpropounding cross-defendants to justify dismissal of the cross-complaint.

A party to litigation who is not directly involved in the discovery leading to sanctions may nonetheless benefit from those sanctions under certain circumstances. (See *Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 301-302.) These circumstances include instances where the nonpropounding party and a co-party are so aligned that it would be a "useless duplication of effort for both parties to pursue the same discovery and invoke the same remedies." (*Id.* at p. 301.) So long as their interests are close enough that the other party suffers prejudice as a result of the discovery abuse, discovery sanctions can justifiably be awarded. (*Ibid.*, fn. 46.)

Defendants argue the position of the nonpropounding cross-defendants did not justify the order. They overlook the significant overlap between the information needed and requested by plaintiffs to prove their own case and that information needed to defend against the cross-complaint. It would have been useless to force each of the nonpropounding cross-defendants to propound the same discovery on defendants in order for them to benefit from the sanctions imposed. Defendants themselves detail how tightly unified the interests of the various cross-defendants were with the named

plaintiffs. The cross-complaint itself alleged there existed “such a unity of ownership and interest” between plaintiffs and the nonpropounding cross-defendants that the “individuality and separateness of the entities ceased to exist.” As stated above, plaintiffs and the remaining cross-defendants were significantly restricted from putting on their case and defending against the cross-complaint as a result of defendants’ misconduct. Given the common prejudice and the sufficient unity of interest between plaintiffs and the nonpropounding cross-defendants, we find dismissal of the cross-complaint a proper exercise of the trial court’s discretion.

Defendants further argue that only one form of terminating sanctions is authorized in a particular matter. Thus, they contend it was error for the trial court to strike the answer as well as dismiss the cross-complaint. However, courts have the discretion to impose terminating sanctions through various orders. (§ 2023.030, subd. (d).) “[T]he court may impose a terminating sanction by striking out the pleading of [a] party *and/or* rendering a judgment by default against that party.” (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516, italics added; see also *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1240-1241 [striking defendant’s answer and dismissing the cross-complaint based on egregious discover misuse].) The trial court’s order below, striking defendants’ answer and dismissing their cross-complaint is a proper exercise of its discretion.

III

Defendants contend the trial court failed to follow proper default prove-up procedure, resulting in prejudicial, reversible error. They argue the monetary default judgment was not supported by the record and that the allegations in the complaint, used in determining the award, were not properly pleaded. We disagree.

When a defendant’s answer is struck as a sanction for misuse of discovery, it is treated as if no answer was filed in the first instance; default judgment can be entered in favor of the plaintiff. (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1500, 1521.) Properly pleaded allegations of a complaint are treated as true upon default; a plaintiff has no further obligation to provide evidence supporting them. (*Kim v. Westmoore*

Partners, Inc. (2011) 201 Cal.App.4th 267, 281.) The general rule that the complaint's demand sets a ceiling on recovery upon default is applicable here. (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 60; § 580.) The purpose for that limitation is to ensure defaulting defendants are on notice of their potential liability. (*Matera v. McLeod*, at p. 61.)

We review the evidence provided to the trial court at the default judgment hearing to determine whether the damages awarded are unconscionable and without justification. (*Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1150.)

The first amended complaint laid out allegations concerning three agreements entered into between plaintiffs and defendants. The allegations included specific dollar amounts and were based on plaintiffs' own personal participation in the agreements. Additionally, the prayer for relief adequately put defendants on notice as to their potential liability. (*Matera v. McLeod, supra*, 145 Cal.App.4th at p. 61.) The punitive damages sought in the first amended complaint would likely have been the most contentious issue, since no specific dollar amount was alleged, but plaintiffs waived their right to such damages, making the issue moot. The trial court reviewed the allegations, accepted them as true, and reviewed plaintiffs' demands at the default judgment hearing. It properly avoided duplicative awards and awarded damages well below the figures stated in the first amended complaint. We conclude the record adequately supports the default judgment for \$3,291,454.40.

DISPOSITION

The judgment is affirmed. Respondents to have their costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.