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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MIKE YELLEN,

Plaintiff and Appellant,

v.

WELLS FARGO AUTO FINANCE,

Defendant and Respondent.

D059870

(Super. Ct. No.
37-2008-00062167-CU-MC-EC)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed.

Plaintiff Mike Yellen appeals a judgment after the court granted the request of defendant Wells Fargo Auto Finance (Wells Fargo) to dismiss Yellen's action as a terminating sanction for abuse of the discovery process and not complying with the court's discovery order. Yellen contends the court abused its discretion by granting Wells Fargo's request for dismissal because he ultimately complied with the court's order.

However, because it took Yellen more than a year to comply with the order, we conclude the court did not abuse its discretion in dismissing the action. We affirm the judgment.

FACTS

On February 27, 2008, Yellen filed an unverified complaint against Wells Fargo alleging that it overcharged him in connection with a September 2006 vehicle loan transaction. Yellen claimed Wells Fargo charged him for insurance even though he already had insurance for the vehicle and had shown Wells Fargo evidence of the insurance. Yellen's complaint also alleged Wells Fargo did not reimburse him for certain loan payments made after his vehicle was damaged in 2007. He claimed Wells Fargo informed him that all loan payments made after the vehicle damage occurred would be reimbursed but they never were. Yellen calculated that Wells Fargo owed him \$8,897.84, but he requested punitive and compensatory damages in the amount of \$250,000. Although Yellen requested punitive damages, he did not provide facts or allege that Wells Fargo's actions were done with oppression, fraud, or malice. Yellen filed his complaint in propria persona and has continued to represent himself throughout the course of the litigation.

Yellen did not respond to form interrogatories and written requests for admission served by Wells Fargo on March 31, 2009. On September 4, 2009, Wells Fargo informed Yellen of the consequences of not responding to the form interrogatories and requests for admission, and gave him an extension to respond to September 30, 2009. On September 25, 2009, Wells Fargo received from Yellen an unverified response to the

requests for admission, but no response to the form interrogatories. Wells Fargo sent Yellen another letter on October 2, 2009, informing him again of the consequences of not complying with its requests and providing him an additional week to respond. The letter also included an offer to request more time if needed. Yellen never requested any additional time and never responded to Wells Fargo's requests.

Wells Fargo filed motions with the court seeking to compel responses to the form interrogatories, to admit the unverified responses to the requests for admission, and for sanctions. Wells Fargo also requested that Yellen's failure to timely respond to all form interrogatories be deemed a waiver to all objections to the interrogatories. On February 19, 2010, the court issued an order granting Wells Fargo's motions. The court ordered that Yellen send verified responses to the form interrogatories on or before March 10, 2010. Yellen did not comply with the court order and instead submitted unverified responses on May 6, 2010, consisting primarily of objections, not responses, to the interrogatories. Yellen objected to 12 of the 14 form interrogatories sent to him, including those asking for his date of birth and current residence. Wells Fargo sent another letter to Yellen on June 1, 2010, informing him of his failure to comply with the court order and providing him with another opportunity to provide complete verified responses. Yellen never responded to this letter.

On April 5, 2011, Wells Fargo filed a motion seeking dismissal of Yellen's action as a terminating sanction. On May 10, 2011, one day after Yellen was to serve his opposition, Yellen mailed his opposition to Wells Fargo's motion for dismissal. Attached

to his opposition was an additional copy of his original responses to the form interrogatories and a verification form dated May 4, 2011. The court issued a tentative ruling in favor of Wells Fargo, basing its decision on Yellen's "failure to respond to discovery, providing inadequate answers and unmeritorious objections, failure to respond to all meet and confer efforts, as well as [Yellen's] willful failure to obey [the court's] order." At a hearing on May 20, 2011, the court heard arguments from the parties, ultimately adopted its tentative ruling, and entered judgment dismissing Yellen's action.

DISCUSSION

Yellen contends the court abused its discretion by granting Wells Fargo's motion for terminating sanctions. Yellen argues he did not abuse the discovery process and complied with all court orders.

Code of Civil Procedure section 2023.010 delineates certain misuses of the discovery process, including, "(d) Failing to respond or to submit to an authorized method of discovery. [¶] (e) Making, without substantial justification, an unmeritorious objection to discovery. [¶] (f) Making an evasive response to discovery. [¶] (g) Disobeying a court order to provide discovery. [¶] (h) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery."

If either party misuses the discovery process, the court has the authority to impose certain sanctions, including monetary, issue, and terminating sanctions. (Code Civ. Proc., § 2023.030.) A court has broad discretion to grant terminating sanctions (*American*

Home Assurance Co. v. Société Commerciale Toutélectric (2002) 104 Cal.App.4th 406, 435 (*American Home*)), but to do so must find (1) there was a failure to comply and (2) the failure was willful. (*Kayne v. The Grande Holdings Limited* (2011) 198 Cal.App.4th 1470, 1474; *Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904.)

The sanction should be tailored to the party's abuse (*Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1619) and should not be imposed as a punishment. (*Rail Services of America v. State Comp. Ins. Fund* (2003) 110 Cal.App.4th 323, 331-332.) Trial courts typically consider "the totality of the circumstances" before imposing a terminating sanction. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1246.) They evaluate the "conduct of the [offending] party to determine if the actions were willful[,] the detriment to the propounding party[,] and the number of formal and informal attempts to obtain the discovery." (*Ibid.*) Terminating sanctions are appropriate if there is a continuous "lack of cooperation in providing straightforward information" (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1106), the party provides only "evasive and quibbling" responses to repeated discovery requests (*Collisson*, at pp. 1617-1618), or " 'the evidence shows that less severe sanctions would not produce compliance with the discovery rules.' " (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992, quoting *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.)

A party choosing to act as his or her own attorney is " 'treated like any other party' " and is not given more " 'consideration than other litigants and attorneys.' "

(*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247; *Williams v. Pacific Mutual Life Ins. Co.* (1986) 186 Cal.App.3d 941, 944.) " "[T]he in propria persona litigant is held to the same restrictive rules of procedure as an attorney." " " (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267; *Monastero v. Los Angeles Transit Co.* (1955) 131 Cal.App.2d 156, 161.) Therefore, the litigant acting in propria persona "has no greater opportunity to cast off an unfavorable judgment than he or she would if represented by counsel." (*Burnete*, at p. 1267.)

We review the trial court's order granting terminating sanctions for an abuse of discretion. (*Lang v. Hochman, supra*, 77 Cal.App.4th at p. 1244.) "[T]he issue before us is not what sanction we would have imposed" (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 491, disapproved on another ground by *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4), but whether the court's order suggests "manifest abuse exceeding the bounds of reason." (*American Home, supra*, 104 Cal.App.4th at p. 435.)

Yellen asserts the court's order granting terminating sanctions was an abuse of discretion because he complied with all of the court's orders, including sending verified responses to Wells Fargo's form interrogatories. Although technically correct, Yellen's assertion is misleading. Wells Fargo sent Yellen its first and only set of form interrogatories on March 31, 2009. Yellen did not respond to the interrogatories by the required date and ignored two meet and confer letters Wells Fargo sent to him that offered explanations of the process and extensions of time to submit responses. The

court granted Wells Fargo's Motion for an Order Compelling Answers to Form Interrogatories on February 19, 2010, providing Yellen until March 10, 2010, to respond to the interrogatories. The court also granted Wells Fargo's other motions, including a motion for sanctions. Yellen did not comply with the court's order compelling responses; instead he provided answers on May 6, 2010, which were not verified and consisted primarily of objections. Wells Fargo sent a final meet and confer letter to Yellen on June 1, 2010, offering him yet another extension of time and providing him an explanation of why his responses were not adequate. It also informed Yellen that if he provided responses by June 15, 2010, Wells Fargo would not file another motion. Yellen ignored this last letter and Wells Fargo filed its motion for terminating sanctions on April 5, 2011. Yellen finally sent a verification form for his original responses to Wells Fargo on May 10, 2011.

Based on this chronology, the court could properly find Yellen abused the discovery process. Since Wells Fargo's first request for discovery in March of 2009, Yellen has never provided adequate responses to those interrogatories, failing to comply with the court's first order and ignoring Wells Fargo's three generous offers to resolve the problems with discovery. The court noted at the last hearing that one or two "bite[s] at the apple is fine," but not the third or fourth that Yellen was requesting. Yellen had more than two years and several chances to provide the appropriate responses and forms but instead decided to willfully deny the discovery process of "straightforward information," providing instead evasive and unverified responses to even the most straightforward form

interrogatories. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.*, *supra*, 163 Cal.App.4th at p. 1106; *Collisson & Kaplan v. Hartunian*, *supra*, 21 Cal.App.4th at pp. 1617-1618.)

The court could also reasonably infer that less severe sanctions would not compel Yellen to comply with the rules of the discovery process. (*Doppes v. Bentley Motors, Inc.*, *supra*, 174 Cal.App.4th at p. 992.) Despite the court's initial monetary sanction against Yellen, he did not comply with the court's first order and blatantly disregarded the verification form as "one piece of paper." This shows he is not likely to comply with lesser sanctions and he still does not understand the importance of the discovery process.

Although Yellen argues he did not violate the court's order compelling answers because his objections did not need to be verified, his argument is unsupported by the law or the record. Even had Yellen provided responsive and verified answers to the interrogatories, he still would have violated the order by submitting his responses a month late. Yellen disregards the fact that he has prolonged this discovery for years, a fact emphasized by the court in making its decision to grant sanctions.

The fact that Yellen is not an attorney and may not understand court hearings, "rules [and] regulations and stuff like that" is of no consequence to the court's determination. (*Nwosu v. Uba*, *supra*, 122 Cal.App.4th at pp. 1246-1247; *Burnete v. La Casa Dana Apartments*, *supra*, 148 Cal.App.4th at p. 1267.) His decision to act as his own attorney does not give him the "opportunity to cast off an unfavorable judgment." (*Id.* at p. 1267.)

In considering the totality of the circumstances, we cannot conclude the trial court acted outside the "bounds of reason." (*American Home, supra*, 104 Cal.App.4th at p. 435.) Accordingly, there was no abuse of discretion in granting Wells Fargo's motion for terminating sanctions.

DISPOSITION

The judgment is affirmed. Wells Fargo is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.