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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MARTA RODRIGUEZ,

Plaintiff and Appellant,

v.

THOMAS BRILL,

Defendant and Respondent.

F063770

(Super. Ct. No. S-1500-CV-259482)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

SD Smith PLLC and Steven D. Smith for Plaintiff and Appellant.

Clifford & Brown, Robert D. Harding and Nicholas J. Street for Defendant and Respondent.

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Plaintiff Marta Rodriguez appeals from the judgment entered in favor of defendant Thomas Brill, asserting the trial court erred when it dismissed her complaint as a sanction for her failure to respond to discovery requests and to comply with a prior trial court

order compelling her to do so. We conclude the trial court acted within its discretion and affirm the judgment.

Rodriguez also attempts to appeal from the *constructive denial* of her motion for relief from the judgment pursuant to the provisions of Code of Civil Procedure section 473, subdivision (b).¹ The trial court ruled on this motion after the notice of appeal had been filed. Since the matter was stayed pursuant to section 916, subdivision (a), the trial court acted in excess of its jurisdiction and its order denying the motion is void. We therefore remand the matter to the trial court to permit it to reconsider the motion.

FACTUAL AND PROCEDURAL SUMMARY

The record in this case is far from complete. For example, a copy of the complaint is not included in the record. We were able to glean from the record the following sequence of events, which we believe are accurate.

Brill is an attorney in the Bakersfield area. He and Rodriguez lived together as husband and wife for a number of years. When they separated, Rodriguez filed this action against Brill, asserting that Brill promised to support her for the rest of her life and, in exchange, she gave up many opportunities to obtain the education and training she would need to support herself.

Trial in the action commenced at some point in the past. However, a mistrial was declared after a witness called by Rodriguez volunteered information that had been ruled inadmissible in a motion in limine. The trial was rescheduled, but the trial court specifically prohibited additional discovery.

When the second trial commenced, the trial court concluded that its order prohibiting additional discovery had been erroneous. It then gave the parties the option of proceeding to trial or continuing the trial and conducting additional discovery.

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

Rodriguez elected to continue the trial. This decision started in motion the following events, which are chronicled in the record before us.

On December 17, 2010, Brill served on Rodriguez a set of special interrogatories, commonly referred to as contention interrogatories, asking Rodriguez to state all facts that supported the contentions in her complaint, name all the individuals who could testify about those facts, and identify the documents that supported those contentions. At the same time, Brill also served on Rodriguez a request for production of documents seeking the documents that supported her contentions.

On January 19, 2011, Brill's counsel granted Rodriguez an extension to January 31, 2011, to respond to these discovery requests, which was confirmed by a letter dated January 20, 2011. Another extension was granted to February 23, 2011.

Rodriguez failed to respond to the discovery requests and on March 7, 2011, Brill filed a motion to compel responses to both requests (hereafter the motion to compel), with a hearing scheduled for April 4, 2011.

Rodriguez did not oppose the motion to compel, nor did she appear at the hearing. The trial court granted the motion and ordered Rodriguez to serve responses, without objection, within 10 days of service of the notice of the order. The notice of order was served on April 4, 2011.

Rodriguez did not respond to this order and on April 18, 2011, Brill filed a motion seeking either evidentiary sanctions or dismissal of the action (hereafter motion for dismissal) as a sanction for Rodriguez's failure to respond to the discovery requests and failure to comply with the order of the trial court. A hearing was set for May 11, 2011.

Instead of filing an opposition to the motion for dismissal, Rodriguez filed a document entitled "Notice of Motion and Motion in Opposition to Defendant's Motion for Dismissal and/or Evidentiary Sanctions," seeking relief under section 473, subdivision (b), which apparently was treated by all parties as an opposition to Brill's motion. Brill filed a timely reply. The day before the May 11 hearing, after normal

office hours, Rodriguez served a proposed response to the interrogatories (via e-mail), but failed to respond in any manner to the request for production of documents. Counsel for both parties attended the hearing. The matter was taken under submission.

On May 16, 2011, the trial court granted the motion for dismissal and ordered the complaint stricken as a sanction against Rodriguez for failing to respond to discovery. Judgment was entered accordingly.

On or about July 13, 2011, Rodriguez filed a motion for relief from the judgment pursuant to section 473, subdivision (b) (hereafter motion for relief), asserting that the failure to respond to the discovery and the trial court's order dismissing the action was the result of the neglect of her attorney. Plaintiff's papers included a declaration of her counsel acknowledging his negligence. Brill opposed the motion. Rodriguez filed an untimely reply and, shortly before the August 10, 2011, hearing, provided unverified answers to the interrogatories, as well as an unverified response to the request for production of documents in an attempt to comply with the trial court's April 4, 2011, order.²

On August 10, 2011, the trial court held a hearing on the motion for relief. It accepted for consideration Rodriguez's late filed reply but provided Brill an opportunity to file a response to the reply, without further hearing.

On October 13, 2011, Rodriguez filed a notice of appeal from "dismissal as discovery sanction under CCP 2023.030, constructive denial of [the] 7/15/2011 motion to vacate."

² These documents are dated August 8, 2011 (special interrogatories) and August 9, 2011 (request for production of documents). Neither document was verified, nor was either document accompanied by a proof of service. Therefore, it is unclear whether the documents were served or filed with the court, or both, or neither.

It also appears that Rodriguez may have served verifications to the responses at the hearing.

On November 3, 2011, the trial court denied Rodriguez's motion for relief from the judgment.

DISCUSSION

I. TERMINATING SANCTION

Rodriguez seeks relief from a judgment entered against her in the action she filed against Brill. The judgment was entered after the trial court struck the complaint as a sanction against Rodriguez for failing to comply with a prior order compelling her to answer the interrogatories and request for production of documents served on her by Brill.

Rodriguez's actions, trial court pleadings and briefs have caused much confusion, which began with Rodriguez's opposition to the April 2011, motion for dismissal. Instead of opposing the motion, or arguing factors in mitigation, Rodriguez filed a document purportedly seeking relief pursuant to section 473, subdivision (b) for excusable neglect by her attorney.³

While it is clear Rodriguez was seeking to avoid a terminating sanction, it is not possible to determine exactly what relief Rodriguez was seeking pursuant to section 473. This section provides relief, in certain circumstances, from a judgment, dismissal, order, or other proceeding taken against her.

To the extent that Rodriguez was seeking relief from whatever sanction the trial court would be imposing in the motion pending before it for sanctions, the request was premature. To the extent Rodriguez was seeking mandatory relief from the prior April 4, 2011, order compelling responses based on attorney negligence, it was inappropriate. The mandatory provisions of section 473, subdivision (b) are limited to

³ Rodriguez's counsel initially stated at oral argument that his appeal was limited to the section 473, subdivision (b) issue of attorney neglect, but later expanded his case to include all grounds included in that section.

setting aside judgments, not other orders, and no judgment had been entered at that point in time. To the extent Rodriguez was seeking relief from the prior order awarding attorney fees to Brill, it was irrelevant. In other words, it was a nonsensical opposition because there was no judgment, dismissal, order or other proceeding for which relief could be granted that was relevant to the motion before the trial court.

What Rodriguez should have attempted in her opposition was to minimize any monetary or evidentiary sanctions and avoid a terminating sanction. To accomplish this, before the May 11 hearing Rodriguez should have filed responses to the discovery propounded by Brill in a manner consistent with the prior court order.

Rodriguez did not take this commonsense approach to her counsel's inaction. The prior order on Brill's motion to compel required Rodriguez to respond to all interrogatories, without objection, and to produce the documents requested in the request for production of documents. Instead, Rodriguez served an unverified response to the interrogatories on the night before the hearing that contained numerous objections. Rodriguez did not serve a response to the request for production of documents.

We suspect it was this conduct that compelled the trial court to deviate from its tentative ruling on the motion for dismissal. The trial court's tentative ruling, issued before it was aware of the discovery responses prepared by Rodriguez, was to deny the request for a terminating sanction but grant evidentiary sanctions that would preclude Rodriguez from producing any evidence not previously disclosed in discovery. After argument, including review of the responses produced by Rodriguez, the trial court ordered the complaint stricken and the case dismissed with prejudice. The trial court noted that Rodriguez served her unverified interrogatory responses in an unauthorized manner, after business hours, the evening before the hearing, which contained objections, in violation of the prior order. In addition, the trial court noted that many of the objections were frivolous.

The trial court's frustration is evident in this portion of the minute order: "The plaintiff disregarded requested and unrequested grants of extensions of time for service of responses; ignored efforts to meet and confer initiated by defense counsel when defense counsel was not required to do so; ignored the motion to compel; ignored the court's order compelling responses without objection; and ignored the applicable law as to the service and content of responses when finally deciding to serve something. [¶] It is almost five (5) months since the service of the interrogatories. Repeated formal and informal efforts have been made to obtain the discovery, still to no avail. The terminating sanction is warranted and granted." (Some capitalization omitted.)

In her brief filed with this court, Rodriguez apparently seeks to attack this order and the resulting judgment on two grounds. First, she appears to assert the trial court abused its discretion in dismissing the complaint and entering judgment for Brill. Rodriguez argues that a lesser sanction, such as that contained in the tentative ruling, should have been imposed instead of a terminating sanction. Second, she asserts she should have been granted relief pursuant to section 473, subdivision (b).

As we have already discussed, there was no section 473 relief available when the trial court made this May 16, 2011, order, so this argument is rejected. Accordingly, the only issue is whether the trial court erred in choosing a terminating sanction for Rodriguez's failure to respond to the discovery and failure to obey the trial court's order.

"We review discovery orders for an abuse of discretion. [Citation.] Sanction orders are 'subject to reversal only for arbitrary, capricious or whimsical action.' [Citations.]" (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102 (*Liberty Mutual*)).

One of the principal purposes of the Civil Discovery Act (§ 2016.010 et seq.) is to allow a party to obtain information possessed by his or her adversary in order to further the efficient and economical disposition of actions on their merits. (*Caryl Richards, Inc.*

v. Superior Court (1961) 188 Cal.App.2d 300, 303 (*Richards*.) The Civil Discovery Act is to be liberally construed to accomplish its purposes. (*Ibid.*)

Sanctions are listed in increasing severity in section 2023.030 of the Civil Discovery Act and include monetary sanctions, issue sanctions, evidentiary sanctions, a terminating sanction, or a contempt of court. (*Id.*, subds. (a)-(e).) “The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to impose punishment. [Citations.]” (*Richards, supra*, 188 Cal.2d at p. 304.) Rodriguez asserts the trial court abused its discretion, while Brill argues the opposite. Each party cites cases that support his or her position. For example, Rodriguez cites *Thomas v. Luong* (1986) 187 Cal.App.3d 76 [failure to respond to interrogatories and appear at deposition, although the defendant offered to stipulate to liability for auto accident], as well as *Richards, supra*, 188 Cal.App.2d 300 [refusal to disclose chemical composition of product that allegedly injured the plaintiff]. In each case, the appellate court reversed the judgment entered after the trial court struck the offending party’s pleading, concluding the trial court abused its discretion when it failed to impose a lesser sanction, such as an evidentiary sanction.

Brill cites *Liberty Mutual, supra*, 163 Cal.App.4th 1093 (failure to provide factual basis for allegations of breach of contract and failure to comply with court order to do so) and *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, disapproved on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, footnote 4, (failure to provide factual basis for breach of contract claims, failure to produce documents, failure to respond to requests for admission, and failure to comply with court order to do so). In these cases, the appellate court upheld the imposition of a terminating sanction for discovery abuses similar to this case.

These cases establish that a trial court has broad discretion in deciding what remedy is appropriate when a party is not complying with their discovery obligations. We find a quote from *Liberty Mutual* to be particularly relevant. In resolving this issue, the question we must answer “““is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose.”” [Citations.]” (*Liberty Mutual, supra*, 163 Cal.App.4th at pp. 1105-1106.)

We conclude the trial court did not act in an arbitrary or capricious manner in imposing the sanctions in this case. Rodriguez repeatedly ignored her obligations to respond to discovery after she requested a continuance of the trial to permit additional discovery. She ignored all attempts by Brill’s attorney to resolve the dispute. She ignored the motion to compel and the trial court’s order thereon. When she finally attempted to comply, she ignored the trial court’s order prohibiting any objection to the interrogatories and failed to provide any response to the request for production of documents. Simply put, Rodriguez did nothing for almost five months to respond to the discovery. Under these circumstances we conclude the trial court did not abuse its discretion.

II. MOTION FOR RELIEF

After judgment was entered in favor of Brill on June 9, 2011, Rodriguez moved for relief from the judgment pursuant to section 473, subdivision (b), arguing that the judgment must be set aside based on plaintiff counsel’s declaration of negligence. As stated above, the hearing on the motion was held before the notice of appeal was filed, but the trial court did not issue an order denying the motion until after the notice of appeal was filed. The parties have fully briefed the issue, but we conclude that since the trial court lost subject matter jurisdiction when the notice of appeal was filed, its order denying the motion is void.

Section 916, subdivision (a) provides that the filing of a notice of appeal “stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein.” “The purpose of the automatic stay provision of section 916, subdivision (a) ‘is to protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.’ [Citation.]” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189.) An order to vacate the judgment is an order *upon the judgment* that is encompassed within section 916, subdivision (a). (*Takahashi v. Fish and Game Com.* (1947) 30 Cal.2d 719, 725-726; *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438.) The trial court has no power to act, even with the consent of the parties. (*Takahashi, supra*, at pp. 725-726.) When the trial court does act, it lacks subject matter jurisdiction and its order is void. (*Varian Medical Systems, supra*, at p. 196.)

DISPOSITION

The judgment is affirmed. The order denying Rodriguez’s motion for relief from the judgment pursuant to section 473, subdivision (b) is void, and the matter is remanded to the trial court for consideration of that motion.⁴ Brill is awarded his costs on appeal.

Franson, J.

WE CONCUR:

Gomes, Acting P.J.
Kane, J.

⁴ Counsel for Brill admitted at oral argument that remand on this issue was “technically correct.”