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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TEMEKIA NEWCHURCH,

Plaintiff,

v.

ADP DEALER SERVICES, INC.,

Defendant and Respondent;

MARK B. PLUMMER,

Objector and Appellant.

G049776

(Super. Ct. No. 30-2012-00613521)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David R. Chaffee, Judge. Reversed.

Law Offices of Mark B. Plummer and Mark B. Plummer for Objector and Appellant.

Brown Gitt Law Group, Thomas P. Brown IV and Ani M. Akopyan for Defendant and Respondent.

INTRODUCTION

The trial court sanctioned appellant Mark Plummer because he did not file a substitution of attorney form with sufficient dispatch or make a motion to withdraw as plaintiff's counsel that would very likely have prejudiced his client. Plummer represented plaintiff Temekia Newchurch in a lawsuit against her employer Automatic Data Processing, Inc. (ADP). Newchurch's deposition apparently seriously compromised her case, and ADP's counsel demanded that it be dismissed. Newchurch refused, despite Plummer's advice to the contrary, and secured new counsel.

ADP brought a motion for sanctions under Code of Civil Procedure section 128.7.¹ After several postponements and rehearings, the trial court granted the motion against Plummer for \$10,443, on the grounds that two of the three causes of action alleged in Newchurch's complaint lacked evidentiary support. The court cited Plummer's failure to substitute out as Newchurch's attorney for nearly three months after her deposition as the basis of the sanctions.

We reverse. Section 128.7, unlike section 128.5 but like Federal Rule of Civil Procedure, rule 11, is grounded on signing, presenting, and advocating a pleading before a court. It does not authorize sanctions for generalized bad behavior. There was no evidence that Plummer presented or advocated any pleading to the trial court during the time it identified as the crucial period: between Newchurch's deposition and the substitution of counsel. In addition, the court impermissibly disregarded the safe-harbor provision of section 128.7 in favor of a close-enough approach, which we do not have the power to approve.

¹

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

FACTS

Newchurch, represented by Plummer, filed a complaint against ADP in November 2012; the causes of action were breach of contract, fraud, and retaliation.² ADP answered in March 2013.

ADP deposed Newchurch in late May 2013. Apparently her testimony thoroughly scuttled her case, and Plummer advised her before she left the deposition site that she should either authorize him to try to settle for nuisance value or get another attorney. Newchurch decided she wanted to get another attorney.

ADP's counsel sent Plummer a letter dated July 3, 2013, demanding that he dismiss the action, in light of Newchurch's deposition testimony, and threatening a motion for sanctions.³ Plummer replied by e-mail the next day, informing counsel that Newchurch was seeking new representation and he had no authority to respond.

Newchurch and her new attorney executed a substitution of attorney form on July 30, 2013; Plummer signed on August 3.⁴ Newchurch's new counsel served and attempted to file it on August 14, but it was rejected the next day. The revised form was served on ADP's counsel on August 21 and was successfully filed on August 26.

ADP served the sanctions motion on Plummer on July 26, 2013, and filed it on August 19. ADP also filed a motion for summary judgment on July 25. Plummer filed a one-sentence opposition to the sanctions motion on September 11, 2013, stating that he was not Newchurch's counsel "at the 'critical time in question'" and citing a case. Newchurch's new counsel filed papers opposing the summary judgment motion.⁵

² The complaint is not part of the record on appeal. We divine the causes of action from the trial court's ruling on ADP's summary judgment motion, which was also not part of the original record.

³ This letter was evidently e-mailed to Plummer as an attachment on July 3.

⁴ The form also contains a handwritten note at the bottom: "Picked up file on 08/03/13" and the initials "T.N."

⁵ The opposition was quite voluminous. Newchurch filed a declaration of 377 pages, a 326-page "compendium of authorities" and a 61-page opposition to the separate statement.

Both the summary judgment motion and the sanctions motion were heard on October 11, 2013.⁶ The trial court granted summary judgment as to all three causes of action: retaliation, breach of contract, and fraud.

The trial court granted the sanctions motion on the second and third causes of action (breach of contract and fraud) and denied it on the retaliation claim. The court held that the contract and fraud claims lacked evidentiary support.⁷ Plummer's protest that he was not Newchurch's attorney lacked merit, because he was her attorney in May 2013, when her deposition was taken, and had not substituted out until nearly three months later. As to the safe-harbor period provided by section 128.7, subdivision (c)(1), the court reasoned that "Plummer did not substitute out as Plaintiff's attorney until August 14, 2013. While the safe harbor time period had not expired – there were two days left – when Plummer substituted out, he had the benefit of a majority of the time to dismiss the 2d and 3rd causes of action and failed to do so." The court ruled that Plummer and his former client would have to pay ADP's fees and costs related to the second and third causes of action from July 3, the date of the letter demanding dismissal of the entire action. ADP was ordered to file a declaration stating the amount of these fees, and the matter was continued to November 8 for a hearing on the amount of sanctions.

ADP filed the declaration on October 17, claiming \$35,445 in fees and costs for the two causes of action. Plummer filed a "motion for reconsideration" on October 22, giving a detailed description of events between May 23, the date of Newchurch's deposition, and his subsequent replacement as her counsel. He basically laid the blame on Newchurch for misrepresenting facts to him, upon which he had based

⁶ The record does not include a transcript of this hearing.

⁷ Although it is not entirely clear from the order, the court appears to have taken Newchurch's May 23 deposition as the incident revealing the lack of evidence to support the contract and fraud claims to Plummer. This conclusion is reinforced by the court's identifying the July 3 letter, which based the dismissal demand on Newchurch's performance at her deposition, as marking the date after which to calculate the fees and costs constituting the sanctions.

the complaint; he did not learn the truth until she testified at her deposition, after which he advised her to dismiss the complaint or get a new lawyer. He attached a series of e-mails between himself and his client during the relevant period to substantiate his assertions.⁸

The court heard the continued sanctions motion on November 22, 2013. Plummer did not appear, sending another lawyer to stand in for him. The amount of sanctions stood at \$20,000 at that point. Newchurch's new counsel argued that she was not at fault and that Plummer could have moved to withdraw if he felt that the case was a loser. The court stated, "Not only could have, should have." Counsel also represented that Newchurch was financially incapable of paying any sanctions.

Toward the end of the hearing, ADP's counsel suggested that the court send everyone to a mandatory settlement conference so that all the issues could be worked out.⁹ The court agreed and continued the hearing on sanctions so that the parties could engage in settlement discussions. The hearing was set for December 6, then continued again to December 13, after an apparently successful settlement conference.

On December 13, the court imposed sanctions of \$15,000 on Plummer. Newchurch was not sanctioned, having settled with ADP the previous week. This order was vacated for lack of notice of the hearing to Plummer.

The court made its final ruling on the sanctions motion against Plummer at a hearing on December 20, 2013.¹⁰ The final amount of sanctions was \$10,443. The order was signed and filed on January 6, 2014. The entire case was dismissed pursuant to the settlement on February 25, 2014.

⁸ Newchurch filed her own declaration on October 28, blaming Plummer for her predicament and pleading poverty.

⁹ Newchurch's new counsel had apparently filed some other proceeding on her behalf before this hearing.

¹⁰ The transcript of this hearing is not part of the record. Plummer was present at this hearing.

DISCUSSION

We begin by registering our disapproval of the state of the record on appeal. The complaint is missing. The October 11 order in which the trial court described the conduct warranting sanctions and explained their basis is missing. (See § 128.7, subd. (b)(3).) Subsequent orders are missing, as are some important declarations.

Although we could dismiss this appeal for an inadequate record (see *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1509-1510; *People v. Clifton* (1969) 270 Cal.App.2d 860, 862), we will instead address the merits, as the imposition of significant – and reportable (Bus. & Prof. Code § 6068, subd. (o)(3)) – sanctions on an attorney for behavior such as Plummer’s raises serious questions for the profession. Moreover, everyone involved here exhibited what may be a common misunderstanding of the purpose and scope of section 128.7.

“The availability of sanctions under section 128.7 in connection with undisputed facts is a question of law subject to de novo review.” (*Li v. Majestic Industrial Hills LLC* (2009) 177 Cal.App.4th 585, 591; see also *Optimal Markets, Inc. v. Salant* (2013) 221 Cal.App.4th 912, 921-922.) The propriety and the amount of a sanctions award after a violation has been determined are left to the trial court’s discretion. (*Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 422.) An interlocutory judgment awarding sanctions over \$5,000 against an attorney for a party is appealable. (§ 904.1, subd. (a)(12).)¹¹

Section 128.7 was enacted to bring California sanctions practice into line with Federal Rules of Civil Procedure, rule 11. (*Goodstone v. Southwest Airlines Co.* (1998) 63 Cal.App.4th 406, 419.) The most striking innovation was the introduction of the safe-harbor period, when a pleading could be withdrawn before the sanction motion

¹¹ Plummer needs to update his law library. California Rules of Court, rule 13 is now rule 8.883(a)(2)(B). The old numbering system was discontinued as of January 1, 2007. The relevant portion of rule 13 became rule 14 in 2002.

was filed with the court. (*Id.* at p. 423-424.) But the statute introduced an additional departure from prior law: the emphasis on pleadings or papers “presented” to the court and a signature as a certification of their merit as the foundation of sanctionable conduct. Thus oral misconduct, no matter how egregious, is not subject to sanctions under section 128.7 unless it amounts to advocating some previously filed paper. (See *Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc.* (1997) 60 Cal.App.4th 352, 368-369 [trial misconduct involving motions in limine not sanctionable under section 128.7].)

Section 128.7, subdivision (b), provides: “By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [¶] (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. [¶] (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. [¶] (4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.” Section 128.7, subdivision (c)(1), forbids filing a motion for sanctions with the court “unless, within 21 days after service of the motion . . . , the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.”

The court’s award of sanctions against Plummer was flawed for several reasons, both procedural and substantive. The most obvious procedural defect was the disregard of the full 21-day safe-harbor period, in favor of “a majority of the time to

dismiss” the offending causes of action. “‘Close’ is good enough in horseshoes and hand grenades, but not in the context of the sanctions statute.” (*Hart v. Avetoom* (2002) 95 Cal.App.4th 410, 414.) “In sum, the central principle to be distilled from section 128.7’s language and remedial purpose . . . is that the safe harbor period is mandatory and the full 21 days must be provided absent a court order shortening that time if sanctions are to be awarded.” (*Li v. Majestic Industrial Hills LLC, supra*, 177 Cal.App.4th at p. 595.)

The sanctions order suffers from a substantive defect as well. Section 128.7, subdivision (c)(1), requires a pleading or paper that does not meet the statutory standards to be “withdrawn or appropriately corrected,” and, in fact, ADP’s counsel had demanded dismissal of Newchurch’s complaint in the July 3 letter to Plummer, based on her testimony in her May 23 deposition. But Plummer could not “withdraw,” that is, dismiss, the complaint; by July 3 his client had specifically told him she wanted to obtain new counsel and was actively looking for someone to take over the case. (See *Bowden v. Green* (1982) 128 Cal.App.3d 65, 73-74 [unauthorized dismissal renders judgment invalid].)

Plummer could have made a motion to withdraw as Newchurch’s counsel. Section 284, subdivision 2, permits an attorney to substitute out “[u]pon the order of the court” after giving notice to the client. Plummer could have made the motion after being served with the motion for sanctions, but there was no guarantee the court would have granted it, even if it could have been heard before the safe-harbor period expired. Rule 3-700 of the Rules of Professional Conduct prohibits an attorney from withdrawing from employment “until [the attorney] has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including . . . allowing time for employment of other counsel”¹² (See *Vann v. Shilleh* (1975) 54 Cal.App.3d 192, 197 [counsel’s

¹² Rule 3-700(C)(1)(a) permits, but does not require, an attorney to move to withdraw if the client “insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.” Section 128.7, subdivision (b)(2), describes one of the representations an attorney makes by signing a pleading in virtually identical language.

withdrawal three days before trial unethical].) ADP had filed a motion for summary judgment on July 25, well before filing the sanctions motion, and the clock was ticking on filing the opposition, as Plummer warned Newchurch in some alarm. The trial court may well have denied the motion rather than leave Newchurch without counsel in the face of a pending summary judgment motion.

Moreover, as experienced counsel is well aware, a motion to withdraw as counsel for any reason other than a failure to pay fees raises a red flag. It alerts both the court and opposing counsel to the likelihood of a newly discovered flaw in the party's case. "Accordingly, an attorney should not seek nonconsensual withdrawal immediately upon determination that the case lacks merit, but should delay to give his client an opportunity to obtain other counsel or to file a consensual withdrawal." (*Kirsch v. Duryea* (1978) 21 Cal.3d 303, 311 [motion to withdraw could jeopardize chance to settle].) That is precisely what Plummer did.

In any event, *not* making a motion to withdraw or *not* substituting out cannot support a sanctions award against an attorney under section 128.7. The attorney has to *do* something: sign a paper, then submit it, file it, or advocate it. The register of actions contains no entry of any pleading or paper filed with or submitted to the court by Plummer after it became clear, from Newchurch's deposition, that her claims lacked evidentiary support, and he did not advocate any previously filed pleading or paper. The only filings between May 23, when the deposition took place, and August 26, when the substitution of attorney form was finally accepted for filing (after having been rejected more than 10 days earlier), were ADP's motion for summary judgment and its sanctions motion. The evidence Plummer filed with his motion for reconsideration revealed that he spent most of that time trying to persuade Newchurch that she had no case and trying to get out of representing her.

Section 128.7 imposes sanctions for very specific behavior. It differs from section 128.5 in its focus.¹³ Section 128.5 focused on the monetary loss suffered by a *party* as a result of another party’s “bad-faith actions” or frivolous or delaying tactics. Section 128.7 focuses on the court – the statute is violated when a party presents some paper to the court that does not meet the statutory standards. The underlying purpose is to protect the *court* from improperly filed papers. That is the effect of the safe-harbor provision. The party requesting sanctions has to go to the expense of preparing the motion and serving it, but the court does not have to deal with it – or even see it – if the other side withdraws or corrects the offending paper in time. If the paper is withdrawn, the moving party cannot recover the fees expended in making the motion.

Plummer did not engage in the behavior prohibited by section 128.7. He should not have been sanctioned.

DISPOSITION

The sanctions order against appellant is reversed. Appellant shall recover his costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.

¹³

As of January 1, 2015, section 128.5 is back in full force, at least until January 1, 2018.