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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DARIN FONG and
DEBRA LYNN BOLLA.

DARIN FONG,

Respondent,

v.

DEBRA LYNN BOLLA,

Appellant.

G050729

(Super. Ct. No. 13D004343)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Erick L. Larsh, Judge. Reversed and remanded.

Law Offices of Saylin & Swisher, Brian G. Saylin and Lindsay L. Swisher for Appellant.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Respondent.

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I. INTRODUCTION

This is a frustrating case. It frustrated the trial judge, who ended up issuing terminating sanctions because of his inability to get a litigant to play by the rules, and it frustrates us because we cannot support his efforts to control the litigation before him. But we are not free to ignore the actual words he used in the order which led to the matter before us, and are forced to reverse.

After granting a motion for terminating sanctions, the trial judge, in open court, told the wife's attorney in this dissolution case that if her client was "present" for a deposition, he would not "give the sanctions of striking her response." As it turned out, the wife *was* physically present for her deposition. Even so, the trial judge struck her response because she did not bring documents with her. Given the history of this case, we completely understand the trial judge's frustration with the wife – it had taken no less than three separate proceedings to finally obtain her physical presence at a deposition. But we are forced to conclude, given the judge's plain language in open court, that it was legal error to strike the wife's response for not having brought documents with her.

II. FACTS

This divorce case involves two dentists, Darin Fong and Debra Bolla, who were married for 17 years, had a common dental practice, and no children. The petition for dissolution was filed by Darin¹ in early May 2013. By late June, the couple had agreed for Darin to buy out all Debra's share (whether community or separate in character) in the practice for \$400,000. That was the last time things went smoothly.

Even before the buy-out agreement, in the late summer of 2013, Darin's counsel sent Debra's counsel form interrogatories and a demand for production of documents. While those were never complied with, Darin's counsel took no action on

¹ The parties are easier to keep track of if we use first names, as is common in family law cases.

them. He would later tell the court he didn't follow up on those discovery requests because he wanted to keep attorney's fees down.

The next discovery event occurred in mid-October when Darin's counsel served a notice of deposition on Debra's counsel, scheduling a deposition for Monday November 25, 2013. The notice of deposition also contained a notice to produce Debra's financial records. More than a month went by. Darin's counsel heard nothing. Then, after 4 p.m. on Friday afternoon November 22, Debra's counsel faxed over a terse five-sentence letter saying Debra had moved out of state and would not be able to make it to the scheduled deposition. No explanation was given. The state to which Debra moved was not identified. Nor was there any explanation as to why Darin's counsel could not have been informed earlier about the cancellation. The letter did, however, hold out the promise of Debra's appearance in mid-January when Debra's own order to show cause hearing (OSC) for attorney fees and spousal support was scheduled.

Because Darin's counsel's office was closed that Friday afternoon, he didn't receive the last-minute fax until Monday morning. In response to Debra's no-show on Monday, Darin's counsel wrote to Debra's counsel to voice his (understandable) irritation, and pointed out that scheduling a deposition close to Debra's January OSC, would require a deposition in December. He asked that Debra's counsel immediately contact his office to "coordinate a continued date" for Debra's deposition.

That letter got no response. Darin's counsel wrote another letter on December 5, again asking to arrange a mutually convenient deposition date. That letter also got no response. He wrote two weeks later, on December 17. This at least prompted a recognition of receipt, which merely said Debra's counsel had "been out of the office on family issues for weeks" and would "be back [the] second week of January and will call you to set up a deposition if need be."²

² We note that Debra's counsel's letterhead revealed the existence of a partner and offices in San Diego and Woodland Hills.

Darin's counsel in fact waited until after the second week of January 2014, then, on January 16, sent Debra's attorney another letter, recounting the trouble he'd had in setting Debra's deposition, and saying the letter was his "final demand" to obtain her deposition by cooperatively setting a date. The next step would be a motion to compel. Again, he got no response, so, a week later, on January 23, he filed a motion to compel Debra's attendance at a deposition, plus production of financial documents. The hearing date was set for February 28.

Debra's attorney wrote on February 5 about the motion to compel. She asserted Debra was now residing in Illinois (and thus Darin's attorney was welcome to take the deposition there), and alluded to her "working on a global settlement for all issues," though the letter gave no hint of what such a settlement might look like. The next day Debra's attorney wrote to say that Debra was available the week of March 17th for her deposition. The point of the letter was to inquire as to whether it was necessary for Debra, given that offer, to file a formal response to Darin's motion to compel.

Darin acceded to Debra's attorney's request and continued the motion to compel to March 21. Meanwhile, the parties agreed to take Debra's deposition on March 19.

But again, Debra unilaterally canceled it. On March 17, two days before the rescheduled deposition, Debra's attorney called Darin's attorney to say Debra was ill, and still residing in Illinois. Darin's attorney did not agree to a postponement. He left his motion to compel on calendar.

Debra's attorney filed a response to the motion to compel on March 19. The point of the response was that on the morning of March 17, Debra called her attorney to say she was unable to fly. No details were given except to say she was "ill." Debra's own declaration in support of the response (Debra's only signature being on the faxed responsive declaration) was sparse in details: It mentioned she had moved out of state in October 2013 but didn't say where. The declaration's only explanation for not being able

to make the deposition scheduled for March 19 was: “Except for 3/17/94 wherein I was ill and unable to fly, it is a series of unfortunate and unexpected events that has caused a short delay in this case.”³ And she added she was “willing to submit to a new date for [her] deposition once it is mutually agreed upon.”

The March 21 hearing went forward, mainly consisting of Darin’s counsel recounting events up to that point. The motion to compel was granted, and after the usual calendar coordination discussions with the court, the order was left at simply having the deposition completed by April 30. A formal written order was prepared and signed by the trial judge on April 7, requiring Debra to appear at Darin’s counsel’s office for her deposition, and further requiring her to bring all the documents requested in the original notice of deposition sent October 17. The order also included a warning that failure to comply could expose Debra to sanctions up to and including entering Debra’s default. There was a monetary sanction of \$3,000 in Darin’s favor based on the fees he had incurred to obtain the order.

Debra and her attorney did not hasten to follow up on Debra’s promise to be deposed on a “new date . . . mutually agreed upon.” It wasn’t until April 14 – roughly three weeks after the March 21 hearing and a week after the April 7 formal order – that Debra’s counsel phoned Darin’s counsel to say Debra would be available on April 29, 2014. That date, of course, given the trial court’s April 30 deadline, was cutting things close indeed. For good measure, now that a firm date had been chosen, Darin’s lawyer re-served the deposition notice complete with document requests on April 15.

But Debra bailed again. On April 25, four days before the scheduled deposition, Debra’s attorney sent a letter to Darin’s attorney to the effect that Debra had

³ Debra’s own attorney was similarly vague as to why more than a month had gone by in the period after Debra had unilaterally canceled her November deposition to respond to opposing counsel. She mentioned a “family emergency in Arizona” and some unspecified “medical leave” until early February 2014. No details were offered as to the nature of the emergency or the basis for the leave. She also offered no explanation why her partner or someone in her office could not have at least gotten back to Darin’s attorney to let him know why she couldn’t respond in more detail.

been instructed by her physician not to fly for two weeks “due to her condition,” which the letter did not specify. The letter did include a brief attachment from a physician in Baton Rouge (this was the first indication that Debra was living in Baton Rouge and not Illinois) to the effect that Debra had “fluid behind her right eardrum and an upper respiratory infection and should not fly for 2 weeks.” And so Debra did not appear, as promised, on April 29. There was no attempt in the letter to suggest dates for a rescheduled deposition *after* the two week period referenced.

This third no-show prompted a motion from Darin to strike Debra’s responsive pleading and enter a default, filed on the court’s deadline to have had the deposition completed, April 30. The hearing date on that request was set for June 13, about six weeks ahead.

That gave Debra’s counsel a little time to try to take shelter from the oncoming storm engendered by Debra’s most recent cancelation. On May 29, Debra’s counsel’s office sent roughly 1,500 pages of financial records to Darin’s counsel’s office. At the June 13 hearing though, there was a dispute over precisely what had been produced (Darin’s counsel claimed the 1,500 pages were merely copies of what Darin himself had already sent), but that dispute was never developed; the court said it was not an issue before it then. No hearing was conducted to resolve what matters had or had not been produced, and no definitive ruling from the court was ever forthcoming. Rather, the trial judge asked Debra’s counsel (Debra wasn’t personally present of course) for a “solution” to the problem of Debra’s personal no-shows. The only suggestion counsel could make was to propose a video deposition.

Accordingly, the trial judge promised to grant the motion effective July 18, unless Debra was “present” for her deposition prior to that time. Because the colloquy is critical to our decision,⁴ we quote it now:

“The Court: *I’ll grant the motion on the 18th of July. Unless the deposition is taken.*

“[Darin’s counsel]: I’ll let the –

“The Court: And the deposition must be taken in California, scheduled by [Debra’s counsel and Darin’s counsel]. They’re asking me to bring it – you are supposed to both make yourselves available after you return from that Europe vacation from a week or ten-day period. And that is to be at [Darin’s counsel’s] office. [¶] Ms. [Debra’s counsel], have your client *present. If your client’s present, I will not give the sanctions of striking her response.*” (Italics added.)

A formal written order was also filed that very day, and, corresponding to the judge’s language from the reporter’s transcript, did not say anything about Debra bringing any documents to the (then-prospective) deposition. But the court did order another \$3,000 in attorney fees to be paid to Darin as a monetary sanction. A compliance review was set for July 18.⁵

On July 18, the compliance review was held. Debra had shown up for a deposition on July 14, but didn’t bring any documents with her.⁶ As at the previous hearing, it also was revealed that Debra had not paid the monetary sanctions previously ordered.

⁴ Under the circumstances of this case, the court’s statements in open court would take precedence over any conflicting language that might have made its way into a minute order. (See *In re P.A.* (2012) 211 Cal.App.4th 23, 30, fn. 4 [“We rely on the reporter’s transcript based on the rule that ‘[c]onflicts between the reporter’s and clerk’s transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter’s transcript unless the particular circumstances dictate otherwise.’ [Citation.]”].)

⁵ The trial judge also noted Debra had not paid the \$3,000 monetary sanctions previously ordered.

⁶ The precise date of the deposition was not mentioned at the July 18 hearing – *that* bit of information (i.e., it took place July 14) would only come out in a motion for new trial filed when Debra hired her present appellate attorneys.

The deposition did establish, among other things, that Debra had at least one bank account that was previously undisclosed, i.e., she had a bank account but she didn't produce the relevant documents concerning it. Debra's counsel's response was to say that at the deposition she told Darin's lawyer she had "ordered additional bank statements that I would be providing to him." Debra's counsel also told the trial judge that "it's kind of hard to obtain documents from this client" and in fact said she'd been forced to order documents herself. Despite a plea for more time to obtain documents, the court, though sympathetic to Debra's lawyer ("It's not because of your efforts") was unmoved. Said the court: "I don't know what to do to make that litigant comply. She has just not followed court orders. And I've given her many, many opportunities to do that." And with that, Debra's default was entered, no last chances.

A judgment soon followed, filed September 4, 2014. Debra's appeal does not attack the merits of that judgment (e.g., as somehow based on a lack of substantial evidence) so we need not discuss it in detail. However, Debra did hire new attorneys who filed a timely notice of appeal from the judgment on September 15, 2014, filed a motion for new trial four days later on September 19.⁷ The new trial motion was denied on November 14, 2014,⁸ with the proviso of allowing an amended judgment "as to the omitted assets based upon the agreement of the parties."⁹

⁷ It's permissible to file a motion for new trial even *after* filing a notice of appeal from the judgment. (See *Neff v. Ernst* (1957) 48 Cal.2d 628, 634 (*Neff*) ["A motion for new trial is recognized to be a matter collateral to the judgment and the trial court retains jurisdiction to hear and determine a motion for new trial after an appeal has been taken from the judgment."].) The idea is that if the new trial motion is successful, the appeal from the judgment is held "ineffective." (*Ibid.*)

⁸ We grant Debra's motion to augment the record to include the minute order of November 14 disposing of Debra's new trial motion.

⁹ No notice of appeal was filed from any amended judgment. That could have been fatal. As the *Neff* court notes, "When the court denies a motion for new trial and, as authorized by section 662 of the Code of Civil Procedure, enters a substantially modified judgment, that judgment becomes the final judgment of that court and the appeal from the prior judgment becomes ineffective." (*Neff, supra*, 48 Cal.2d at p. 634.) However, Darin has made no argument that the amended judgment was "substantially" different from the previous one, so the appeal from the September 4, 2014 judgment remains viable.

III. DISCUSSION

There are times when a family law judge's lot is not a happy one. We have recounted a long, sorry history of Debra's recalcitrance and repeated failure to come to California to have her deposition so as to show just how reasonable were the trial judge's basic instincts to be done and grant terminating sanctions at the hearing on July 18. If the issue were a matter of trial court *discretion*, we would likely affirm the judgment.

However, this was not really a discretionary call. A legal prerequisite for granting terminating sanctions is willful *violation* of a court order coupled with what is generally called a "history of abuse." (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390; *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516; *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992 *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.) But here we are unable to find a violation of the trial court's order of June 13, much less a willful one. It is undisputed that Debra was indeed present for her deposition in California prior to July 18. And it is clear, from the record, that the trial court did not order Debra to bring documents with her for the deposition contemplated by July 18. While that may have been his intent, it remained inchoate.

Nor can we affirm based on Debra's violation of the previous order of April 7 (because she failed to come to California to have her deposition taken by April 30), for two reasons. One, Darin made no attempt to demonstrate the no-show by April 30 was actually willful. The only evidence on the point was the physician's note attesting to a respiratory illness which, as far as we can determine from the record, the court accepted as genuine. Two, the trial court did not, in fact, grant terminating sanctions in response to the April 7 order. It only granted a monetary sanction by way of an attorney fee order. And we cannot affirm based on Debra's failure to pay *that* attorney fee order. Case law is clear that because fee sanctions are independently collectable, it is an abuse of

discretion to predicate terminating sanctions on the failure to pay a previous fee sanction. (*Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 610.)

As for the problem of the documents, the Discovery Act puts upon the party seeking documents at a deposition the burden of obtaining a formal court order for those documents. (See Code Civ. Proc., § 2025.450 [giving party who seeks production of documents not produced at deposition option of pursuing their production and requiring that party to show good cause for such production]; accord, *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 342 [“Under California law, upon the refusal of the deponent to produce the documents sought, the burden is upon the party seeking discovery to seek an order from the superior court to compel production.”].) In this case, Darin’s counsel did not seek production of any documents arguably not already produced at the time of the July 14 deposition. Rather he attempted to go from Debra’s absence from the deposition to terminating sanctions in one step. That was a step too far given this record.

IV. DISPOSITION

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion. Darin, of course, may pursue appropriate sanctions should Debra again fail to comply with proper discovery requests. In the interests of justice each side will bear its own costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.