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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HERBOVED, INC.,

Plaintiff and Respondent,

v.

PATANJALI AYURVED LTD et al.,

Defendants and Appellants.

G052073

(Super. Ct. No. 30-2014-00717428)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Appeal dismissed.

Kalara Law Firm, Monisha A. Coelho and Sunil Dutt Kalara; Akin Gump Strauss Hauer & Feld and Hyongsoon Kim for Defendants and Appellants.

Ferruzzo and Ferruzzo and Dale K. Quinlan for Plaintiff and Respondent.

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This is a dispute between Herboved, Inc. (plaintiff) and Patanjali Ayurved, Ltd., and Shekar Agrawal (defendants) relating to various business dealings. Defendants contested jurisdiction, and discovery was conducted on jurisdictional issues. Various disputes led to a referee's appointment pursuant to Code of Civil Procedure section 638,¹ and the referee determined defendants had engaged in intentional violations of discovery procedures. The referee's first report awarded plaintiff approximately \$26,000 in discovery sanctions with payment by a date certain. Defendants then sought ex parte relief from the trial court, which denied the application without stating its reasons. Defendants filed the instant appeal under section 904.1, subdivision (a)(12), which permits interlocutory appeals of discovery sanctions over \$5,000. We conclude, however, that there is no appealable order here, and accordingly, we dismiss the appeal.

I

FACTS AND PROCEDURAL HISTORY

Based on the limited issues, we need not delve too deeply into the underlying facts of the dispute between the parties. Suffice it to say that in April 2014, plaintiff sued defendants, alleging nine causes of action, including breach of contract, fraud, and various business torts. Defendants responded with a motion to quash on jurisdictional grounds. The parties then stipulated to continue the hearing on the motion to quash in order to give defendants more time to respond to discovery on jurisdictional issues.

The parties' subsequent disagreement on the proper scope, among other things, of the discovery requests led to a reference pursuant to section 638. The scope of the referee's duties was to ascertain the facts necessary to enable the court to determine the issues, specifically, "To hear and make all relevant findings on 6 motions to compel

¹ Subsequent statutory references are to the Code of Civil Procedure.

further response to discovery filed by [plaintiff]” Both parties agree this was a “special reference,” rather than a general one.

The referee’s first report to the court, dated May 27, 2015, concluded that “defendants have engaged in intentional violations of the Discovery Act and have deliberately ignored and/or disobeyed a previous written order of your Referee.” The referee found: “The Defendants have serially used boiler plate objections, unilaterally limited the scope of discovery and thereby justify not properly answering otherwise valid interrog[atories] and requests for production of documents. They have failed to even remotely explain their denials of requests for admission. In other instances they ‘construe’ discovery requests and thereafter provide answers or documents that are otherwise non-responsive.” As a result, the report noted, “[Plaintiff] had to bring six motions to compel”

The report also noted defendants had previously been found in violation of discovery, and willfully violated the referee’s discovery order. After a hearing, the referee stated, defendants were ordered to pay sanctions. The referee noted that as of the date of the report’s drafting, defendants had failed to fully comply with previously ordered discovery. The referee stated that issue sanctions, which would potentially be dispositive on the issue of jurisdiction, should be handled by the court. The referee also signed a “second discovery order” reflecting these decisions, including an order for defendants to pay \$26,384.69 in sanctions by June 5, 2015, nine days after the report and order was filed. The referee rejected defendants’ objections.

On June 2, defendants filed objections to the referee’s report. On June 4, defendants filed an “ex parte application to stay enforcement of the referee’s order.” (Original capitalization omitted.) Defendants argued plaintiff had substantially increased their sanctions request without notice, and stated, “should the [c]ourt decide to adopt the recommendations of the [r]eferee, Defendants will appeal.”

A hearing was held and argument was heard. The court issued its ruling by way of minute order, which states, in its entirety: “The Court having fully considered the arguments of all parties, both written and oral, now rules as follows: [¶] The Ex Parte Application is Denied.”

On June 10, defendants filed the instant appeal. Their notice of appeal checked the “Other” box on the Judicial Council form, stating the appeal was from a “May 5, 2015 Order Imposing Discovery Sanctions of \$26,384.69; Code Civ. Proc. 904.1(a)(12).” Plaintiff filed a motion to dismiss the appeal on July 2, arguing there was no appealable order. Defendants filed an opposition on July 17.

On August 3, 2015, defendants filed a second notice of appeal. This notice checked the box stating the appeal was from “An order or judgment under Code of Civil Procedure section 904.1(a)(3)–(13).” We issued an order stating the motion to dismiss would be decided in conjunction with the appeal.

II

DISCUSSION

“A voluntary reference may be a *special reference*, simply to ascertain some fact [citation], or a *general reference* “[t]o try *any or all of the issues* in an action or proceeding, whether of *fact or of law*, and to report a *statement of decision thereon*” [citation].” (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 450 (*Yeboah*)). “When the reference is special, the referee’s decision does not become the decision of the court until it is adopted by the judge. [Citations.] In fact, in the case of a special reference, the referee’s report is only the first step. The court must determine ‘the facts and the law by rendering its decision containing its findings of fact and conclusions of law which serves as the basis for the judgment *which shall be entered*; and the judgment thus entered is in nowise dependent upon the report of the referee for support but is grounded on the decision of the court [citation].’ [Citation.]” (*Ibid.*) In their briefing, the parties concur this was a special reference.

Despite their first notice of appeal which purported to do exactly that, defendants assert they are not appealing from the referee's report or order. Instead, they claim they are appealing from the trial court's "*adoption* of the recommendation."

The referee's report and/or order is not appealable. (*Yeboah, supra*, 128 Cal.App.4th at pp. 450-451.) "The special reference has the effect of a special verdict. [Citation.] However, there is no appeal from a verdict. [Citations.] [I]f the court adopts the referee's report, the court must enter a judgment to bring the matter to a conclusion." (*Ibid.*)

Defendants cite a plethora of cases stating that discovery sanctions over \$5,000 are immediately appealable under section 904.1, subdivision (a)(12). But that only begs the question of whether there was ever an order *by the court* ordering the payment of such sanctions. Defendants argue the court "adopted" the referee's findings, but in doing so they do not point to an order that states this. Instead, they point only to the trial court's denial of their *ex parte* application, which sought a stay of the payment of discovery sanctions.

That order, however, did not "adopt" anything. It simply denied the *ex parte* application. An *ex parte* application can be denied for numerous reasons. Perhaps the court felt the application was untimely, as it was filed only one day before the sanctions were due to be paid. Perhaps the court believed a noticed motion, on shortened time, would have been the appropriate means to contest the merits of the referee's report in a full and fair manner. In any event, we decline defendants' invitation to read far more into the court's order than it actually states.

The cases defendants cite on this issue are inapposite. For example, they rely on *Spence v. Omnibus Industries* (1975) 44 Cal.App.3d 970, which involved the appealability of an order compelling arbitration and immediate payment of an arbitration fee. The court concluded the "collateral matter" exception to the one final judgment rule applied. ""A necessary exception to the one final judgment rule is recognized where

there is a final determination of some *collateral matter* distinct and severable from the general subject of the litigation. . . . [Citation.]””” (Id. at p. 976.) The court found the case came within that rule because the court’s order “requires the aggrieved party, i.e., the plaintiffs, immediately to pay money, i.e., the \$720 arbitration filing fee. While we know nothing of the financial condition of the plaintiffs, if this order remains unchallenged it might well deprive them of any forum for resolving their complaints. The order that the plaintiffs pay the arbitration filing fee is collateral and directs the payment of money. It is appealable.” (Ibid.)

That is not the case here. The *ex parte* order is not a collateral matter, nor is it separate and distinct from the rest of the case. It simply reflects a denial of the procedural method defendants chose to challenge the referee’s recommendations. They are not without redress. Had defendants obtained the proper order, they would have the ability to appeal. They did not, and we therefore lack jurisdiction to hear this matter.

In the alternative, plaintiff asks that we dismiss the appeal as one taken purely for the purpose of harassment and delay. While we are not unmindful of the referee’s strong opinions regarding defendants’ conduct in this matter, because we conclude the appeal is improper for lack of an appealable order, we need not consider this issue further.

At oral argument, defendants requested that should we conclude the order was not appealable, we order that no sanctions are due until the trial court reaches a decision. We decline to opine on this issue in the context of a motion to dismiss.

III
DISPOSITION

The appeal is dismissed. Plaintiff is entitled to its costs.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.