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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOANN BLESSING-MOORE,

Plaintiff and Respondent,

v.

CHRISTINE D. REYES et al.,

Defendants and Appellants.

H035962

(Santa Clara County
Super. Ct. No. CV099563)

I. INTRODUCTION

Maria Virginia Reyes¹ was employed by respondent Joann Blessing-Moore, M.D. as the office manager for Dr. Blessing-Moore's medical practice. Dr. Blessing-Moore also employed Virginia's daughter, appellant Christine D. Reyes, as a medical assistant. In 2007, Dr. Blessing-Moore filed a complaint alleging that Virginia and Christine had embezzled funds from Dr. Blessing-Moore's medical practice in an amount not less than \$522,695.75. Dr. Blessing-Moore also alleged that Virginia's husband, appellant Alfredo G. Reyes, and Christine's boyfriend, appellant Danny Nasir, were involved in the embezzlement scheme.

¹ Since Maria Virginia Reyes, Christine D. Reyes, and Alfredo G. Reyes share the same surname, we will refer to them by their first names to avoid confusion. We will refer to Maria Virginia Reyes as Virginia to be consistent with her name as it is used throughout the record and the appellate briefs.

In October 2009, Dr. Blessing-Moore moved for terminating sanctions on the ground that appellants had failed to comply with their discovery obligations, including prior discovery orders. On December 10, 2009, the trial court granted the motion, struck appellants' answers, and entered their defaults. Dr. Blessing-Moore filed an application for default judgment in March 2010. In May 2010, Christine brought a motion under Code of Civil Procedure section 473, subdivision (b),² for relief from a default entered as a terminating sanction. The trial court denied the motion and, after holding a prove-up hearing, entered judgment for Dr. Blessing-Moore on June 23, 2010, in the amount of \$1,828,252.15.

Appellants Christine, Alfredo, and Nasir filed a notice of appeal from the June 23, 2010 default judgment. On appeal, they generally contend that (1) the order imposing terminating sanctions, as well as the underlying discovery orders, were excessive and punitive; and (2) the trial court abused its discretion in denying Christine's section 473 motion for relief from default. Alternatively, they argue that the judgment is void because the damages awarded exceed the amount stated in the complaint.

For the reasons stated below, we determined that (1) the trial court did not abuse its discretion in granting the motion for terminating sanctions; (2) the trial court did not abuse its discretion in denying Christine's section 473 motion for relief from default; and (3) under section 580, the judgment is void to the extent it awards damages in excess of \$522,695.75, which is the amount of damages stated in the complaint. We will reverse the judgment to the extent the damage award exceeds \$522,695.75 and remand the matter with instructions to the trial court to reduce the damages awarded to \$522,695.75 and to enter the modified judgment, unless, within 30 days after issuance of the remittitur, Dr. Blessing-Moore serves and files in the superior court a notice electing the option to

² All statutory references hereafter are to the Code of Civil Procedure unless otherwise indicated.

amend her complaint to pray for a different amount of damages and/or other appropriate relief. If Dr. Blessing-Moore files an amended complaint, appellants will be permitted to file a responsive pleading. (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826-830 (*Greenup*)).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

Our factual summary is drawn from the complaint filed by Dr. Blessing-Moore on November 26, 2007, since “ [t]he judgment by default is said to “confess” the material facts alleged by the plaintiff, i.e., the defendant’s failure to answer has the same effect as an express admission of the matters well pleaded in the complaint.’ ” (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823, italics omitted (*Steven M. Garber & Associates*)).

At all relevant times, Dr. Blessing-Moore was a physician with a solo medical practice in Palo Alto and San Mateo. In 2000, she contacted Medical Doctor Services, a staffing placement agency, to fill a vacant front desk manager position in her medical office. Medical Doctor Services placed Virginia in that position without informing Dr. Blessing-Moore that Virginia was released from federal prison in 1999 after serving a sentence for embezzling approximately \$2 million from a former employer.

Virginia was later promoted to office manager. Her job responsibilities included managing the financial affairs of Dr. Blessing-Moore’s medical office, including issuing checks and authorizing credit card payments; collecting, recording, and depositing all cash receipts; managing payroll and the office’s Merrill Lynch business account; and general bookkeeping. In 2001, Virginia authorized her daughter Christine’s employment as a part-time medical assistant for Dr. Blessing-Moore.

Between 2003 and 2007, Virginia and Christine engaged in an embezzlement scheme in which, among other things, they wrote checks to themselves on Dr. Blessing-Moore’s account, gave themselves raises, paid themselves for unworked overtime, and

failed to deposit the full amount of cash receipts from patients. Virginia and Christine misappropriated not less than \$522,695.75. Alfredo, Virginia's husband, and Nasir, Christine's boyfriend, conspired with them to defraud Dr. Blessing-Moore and to use the misappropriated funds for their own purposes. Specifically, defendants used the embezzled funds to purchase real property, including a residence in Los Altos Hills. Title to the Los Altos Hills property is held by Christine, Alfredo, and Nasir.

Virginia and Christine abandoned their positions with Dr. Blessing-Moore in the summer of 2007.

B. The Pleadings

Dr. Blessing-Moore filed a verified complaint on November 26, 2007, against defendants Virginia, Christine, Alfredo, Nasir, and Medical Doctor Services.³ The causes of action stated against Virginia, Christine, Alfredo, and Nasir include conversion, conspiracy to defraud, unjust enrichment, accounting, imposition of a constructive trust, quiet title, and injunctive relief. Additional causes of action alleged against Virginia and Christine include constructive fraud, breach of oral and implied employment contract, and breach of duty of loyalty. Regarding damages, the complaint states that Dr. Blessing-Moore "has been damaged in an amount to be proven at trial, but presently known to be not less than \$522,695.75."

Defendants Virginia, Christine, Alfredo, and Nasir filed an answer to the verified complaint on January 10, 2008.

C. Discovery Orders

1. February 4, 2009 Discovery Order

On December 19, 2008, Dr. Blessing-Moore filed a discovery motion in which she sought (1) an order compelling Virginia and Christine to provide responses to her first set of requests for production of documents and her first set of special interrogatories; (2) an

³ Virginia and Medical Doctor Services are not parties to this appeal.

order compelling Virginia, Christine, Alfredo, and Nasir to provide responses to her second set of form interrogatories; (3) an order that the truth of the matters specified in her first set of requests for admissions be deemed admitted by Virginia, Christine, Alfredo and Nasir; and (4) an award of monetary sanctions. Dr. Blessing-Moore filed a notice of non-receipt of opposition to the motion.

Counsel of record for all parties appeared at the January 30, 2009 hearing on the discovery motion. The attorney who was representing Christine and Alfred at that time advised the trial court that they were now in compliance with their discovery obligations, except that Christine had not served her responses to Dr. Blessing-Moore's requests for production of documents. The record reflects that Dr. Blessing-Moore's attorney received Alfredo's responses to the discovery requests on the day before the hearing.

On February 4, 2009, the trial court granted the motion as follows: “(1) Plaintiff's motion to compel a response to the First Set of Requests for Production of Documents is GRANTED. A Code-compliant response shall be served by Defendant [Virginia] and Defendant [Christine] within thirty days. Objections are deemed waived; ¶ (2) Plaintiff's motion for an order imposing monetary sanctions is GRANTED. Plaintiff is awarded monetary sanctions in the amount of \$1,000 against Defendant [Virginia], Defendant [Christine], Defendant [Alfredo], and Defendant [Nasir] to be paid within thirty days.”

2. May 22, 2009 Discovery Order

On April 20, 2009, Dr. Blessing-Moore filed a motion to compel compliance with the February 4, 2009 discovery order.⁴ She also filed a motion to compel the deposition of Virginia, a motion to compel the deposition of Nasir, and a motion to appoint a discovery referee. Defendants filed opposition to all four motions.

⁴ Although the parties and the trial court refer to the “February 3, 2009” discovery order, we will refer to the order by its filing date, February 4, 2009.

In its order of May 22, 2009, the trial court granted the motions to compel the depositions of Virginia and Nasir and ordered them to appear for deposition within 20 days and pay sanctions of \$690 each. The court also granted the motion to compel compliance with the prior discovery order and ordered Virginia and Christine to “comply with the February 3, 2009 order . . . and serve code-compliant responses to Plaintiff’s Requests for Production of Documents without objections within 20 calendar days [of] this order.” Sanctions were awarded against Virginia, Christine, Nasir, and Alfredo in the amount of \$1,000, to be paid within 20 days. The court denied the motion to appoint a discovery referee.

3. December 10, 2009 Order Imposing Terminating Sanctions

On October 2, 2009, Dr. Blessing-Moore filed a discovery motion in which she sought (1) an order compelling Virginia and Christine to provide responses to her second set of requests for production of documents; (2) an order compelling Nasir to provide responses to her first set of requests for production of documents; (3) an order that the truth of the matters specified in her second set of requests for admission be deemed admitted by Nasir; and (4) an award of monetary sanctions.

On the same day, October 2, 2009, Dr. Blessing-Moore also filed a motion for terminating sanctions. She argued that terminating sanctions were warranted because defendants had repeatedly failed to comply with their discovery obligations. Specifically, Virginia and Christine had failed to serve responses to Dr. Blessing-Moore’s request for production of documents despite being compelled to do so by two prior discovery orders; Virginia and Nasir had failed to appear for their depositions despite being compelled to appear by the May 22, 2009 discovery order; Virginia, Christine, Alfredo, and Nasir had each failed to respond to further sets of request for production of documents to which responses were due in July 2009 and had also failed to meet and confer; and Virginia, Christine, Alfredo, and Nasir had failed to pay the previously ordered monetary sanctions totaling \$3,680.

Dr. Blessing-Moore filed a notice of non-receipt of opposition to her motion for terminating sanctions on November 4, 2009. Defendants, who were now self-represented, did not appear at the November 13, 2009 hearing on the motion.

The trial court granted the motion for terminating sanctions in its December 10, 2009 order and ruled that the other pending discovery motion was moot. Defendants were ordered to pay sanctions in the amount of \$1,720.00 in connection with the other discovery motion. The court further ordered the answers of Nasir, Alfredo, Virginia, and Christine stricken and default entered.

D. Default Proceedings

Dr. Blessing-Moore filed an application for default judgment on March 15, 2010. She requested that judgment be entered in the total amount of \$1,828,252.15, which included damages of \$1,803,641.35 and costs of \$24,610.80.

On May 25, 2010, nearly six months after the trial court's December 10, 2009 order imposing terminating sanctions and entering appellants' defaults, Christine filed a motion under section 473, subdivision (b) for relief from default. She argued that her default had been taken due to excusable neglect, consisting of her attorney's failure to respond to requests for production of documents and her financial inability to pay the monetary sanctions. Christine also asserted that she had relied on her mother, co-defendant Virginia, to handle the litigation after their attorney withdrew in June 2009. The trial court denied Christine's motion for relief from default judgment in its order of June 18, 2010, stating that she had "not met her burden for relief under [section] 473."

A default prove-up hearing was held on June 21, 2010. Thereafter, on June 23, 2010, the trial court entered judgment after default. The judgment states: "On December 10, 2009, this Court granted terminating sanctions and entry of default against [Virginia, Christine, Alfredo, and Nasir] for their willful failure to comply with discovery rules and orders of this Court. [¶] On June 21, 2010 the Court conducted a prove up hearing resulting in the admission of several declarations regarding damages. The court, having

reviewed all declarations, moving papers and documents and having considered argument of Counsel, and good cause appearing therefor, Plaintiff Dr. Blessing-Moore's application for court judgment after default against Defendants is hereby GRANTED." The total amount of the judgment entered against Virginia, Christine, Alfredo, and Nasir is \$1,828,252.15, which includes \$1,803,641.35 in damages and \$24,610.80 in costs.

A timely notice of appeal from the June 23, 2010 default judgment was subsequently filed by Christine, Alfredo, and Nasir.

III. DISCUSSION

On appeal, Christine and Alfredo argue that (1) the order imposing terminating sanctions, as well as the underlying discovery orders, were excessive and punitive; (2) the trial court abused its discretion in denying Christine's section 473 motion for relief from default. Alternatively, they argue that the judgment is void because the damages awarded exceed the amount stated in the complaint.

Nasir filed a joinder in Alfredo's brief that does not include any arguments with respect to Nasir's different circumstances. Joinder is permitted under California Rules of Court, rule 8.200(a)(5), which states: "Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal." However, to the extent Nasir is not similarly situated with Alfredo, his reliance on the arguments made by Alfredo in his opening brief is insufficient to demonstrate error and thereby satisfy his burden on appeal. (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11.) We will therefore consider only the issues raised by Alfredo and Christine on appeal. In other words, to the extent Alfredo does not prevail on any of the issues he raises on appeal, Nasir also fails to prevail.

Our evaluation of appellants' contentions on appeal will begin with their challenge to the order imposing terminating sanctions, since that issue is potentially dispositive.

A. Order Imposing Terminating Sanctions

Christine and Alfredo argue that the trial court erred in granting Dr. Blessing-Moore's motion for terminating sanctions because the underlying discovery orders were erroneously granted, and also because Dr. Blessing-Moore's second set of requests for production of documents was served after their former attorney withdrew and they were self-represented. Additionally, we understand them to argue that their former attorney was at fault for their failure to comply with all of their discovery obligations.

Dr. Blessing-Moore points out that appellants did not oppose the motion for terminating sanctions, and contends that they have therefore waived their challenge to the December 10, 2009 order imposing terminating sanctions. Dr. Blessing-Moore also argues that the trial court acted well within its discretion when it granted the motion for terminating sanctions, because appellants had misused the discovery process by repeatedly failing to either timely respond or respond at all to her discovery requests, and they had both failed to comply with prior discovery orders. Additionally, Dr. Blessing-Moore contends that the withdrawal of appellants' attorney and their subsequent status as self-represented litigants did not excuse them from compliance with their discovery obligations.

1. Forfeiture

Our analysis of appellants' contentions begins with the threshold issue of forfeiture, since it is undisputed that appellants failed to oppose the motion for terminating sanctions in the proceedings below. They did not file written opposition to the motion for terminating sanctions or appear at the November 13, 2009 hearing on the motion.

The general rule is that "a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation]." (*In re S.B.* (2004) 32 Cal.4th 1287,

1293, fn. omitted; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184.)

Accordingly, an appellant who has failed to oppose a motion in the trial court usually has forfeited any appellate challenge to the resulting order. (*Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602.)

Although application of the forfeiture rule is not automatic, “the appellate court’s discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]” (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) Here, appellants have not argued that their case presents an important legal issue that would excuse forfeiture.

Appellants argue, however, that they did not forfeit their appellate challenge to the order imposing terminating sanctions because, even absent opposition to a motion for terminating sanctions, the trial court is obligated to “ ‘examine the entire record in determining whether the ultimate sanction should be imposed.’ ” Appellants rely on the decision in *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771 (*Deyo*) for that proposition.

The court in *Deyo* stated, “While sanctions are discretionary, the term judicial discretion implies absence of arbitrary determination, capricious disposition, or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. To exercise the power of judicial discretion, all the material facts must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision. [Citation.] Therefore, the court must examine the entire record in determining whether the ultimate [terminating] sanction should be imposed. [Citations.]” (*Deyo*, *supra*, 84 Cal.App.3d at p. 796, fn. omitted.) However, no issue was raised in *Deyo* as to whether a defendant’s failure to oppose a motion for terminating sanctions results in the forfeiture of an appellate challenge to the resulting order imposing terminating sanctions.

Christine also argues that she did not appear at the November 13, 2009 hearing on the motion for terminating sanctions because she was “unaware of the motion or

hearing.” The citation to the record that Christine provides for this statement is to her May 25, 2010 declaration filed in support of her section 473, subdivision (b) motion for relief from default. However, Christine merely states in that declaration, “I was never told anything about a hearing in *December 2009* in this case and did not know it was scheduled.” (Italics added.) The record citation therefore does not support her argument on appeal that she was unaware of the motion for terminating sanctions or the hearing held on the motion in *November 2009*. Moreover, Christine’s argument in her opening brief is insufficient to establish her lack of knowledge, since the argument of counsel in briefs is not evidence. (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11; *Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1173.)

We also find that Christine’s claim that she was unaware of either the motion for terminating sanctions or the November 2009 hearing on the motion is belied by the record. The proof of service for the motion for terminating sanctions, with the notice of motion indicating the hearing date, was served on Christine at her address of record on October 2, 2009.

For these reasons, we determine that appellants’ failure to oppose the motion for terminating sanctions has caused them to forfeit their appellate challenge to the order granting the motion, imposing terminating sanctions, and entering their defaults. Even absent forfeiture, we would find no merit in their contentions under the rules governing the imposition of terminating sanctions for misuse of discovery and the applicable standard of review, as discussed below.

2. Terminating Sanctions

Terminating sanctions may be imposed for misuse of the discovery process. (§ 2023.030⁵; *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 207.) “Failing to

⁵ Section 2023.030 provides in part: “To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing,

respond to an authorized method of discovery is a misuse of the discovery process. (§ 2023.010, subd. (d).) So is disobeying a court order to provide discovery. (*Id.*, subd. (g).)⁶ If a party fails to obey an order compelling answers to special interrogatories and/or an order compelling a response to a demand for production of documents, the court may impose a terminating sanction by striking out the pleading of that party and/or rendering a judgment by default against that party. (§§ 2023.030, subd. (d)(1) & (3), 2030.290, subd. (c), 2031.300, subd. (c).)” (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516 (*Van Sickle*)). Terminating sanctions are also authorized where a party has failed to obey an order compelling attendance at a deposition. (§ 2025.450, subd. (d); *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991.)

Thus, “[r]epeated failure to respond to discovery and to comply with court orders compelling discovery provides ample grounds for imposition of the ultimate sanction. [Citations.]” (*Jerry’s Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1069 (*Jerry’s Shell*); see also *Electronic Funds Solutions, LCC v. Murphy* (2005) 134 Cal.App.4th 1161, 1184 (*Electronic Funds Solutions*) [defendants’ misuse of the discovery process was pervasive and consistent, justifying terminating sanctions]; *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 280 (*Mileikowsky v. Tenet Healthsystem*), disapproved on another ground in *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1273 [court was not required to allow pattern of discovery abuse to continue ad infinitum].)

may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process: [¶] . . . [¶] (d) The court may impose a terminating sanction by one of the following orders: [¶] (1) An order striking out the pleadings . . . of any party engaging in the misuse of the discovery process.”

⁶ Section 2023.010 provides in part: “Misuses of the discovery process include, but are not limited to, the following: [¶] . . . [¶] (d) Failing to respond or to submit to an authorized method of discovery. [¶] . . . [¶] (g) Disobeying a court order to provide discovery.”

A court is not required to impose sanctions in a graduated fashion, but may apply “the ultimate sanction” against a party who has persisted in refusing to comply with discovery obligations. (*Deyo, supra*, 84 Cal.App.3d at p. 793.) “[T]he unsuccessful imposition of a lesser sanction is not an absolute prerequisite to the utilization of the ultimate sanction” (*Scherrer v. Plaza Marina Coml. Corp.* (1971) 16 Cal.App.3d 520, 524.)

3. Standard of Review

A trial court’s choice of sanctions with respect to discovery matters is reviewed on appeal for abuse of discretion. (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228 (*Sauer*).) Discretion is abused only when it can be shown that the trial court has “exceed[ed] the bounds of reason, all of the circumstances before it being considered.” (*Loomis v. Loomis* (1960) 181 Cal.App.2d 345, 348-349; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 (*Denham*).) “ ‘The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.’ [Citations.]” (*Denham, supra*, 2 Cal.3d at p. 566.)

In applying the abuse of discretion standard, “[w]e presume the trial court was aware of its various options in imposing an appropriate sanction and we will not select a sanction different from that within the trial court’s discretion.” (*Sauer, supra*, 195 Cal.App.3d at p. 230.) If an appellant presents facts that merely afford an opportunity for a difference of opinion, “the appellate court is neither authorized nor warranted in substituting its judgment for that of the trial court.” (*Ibid.*) Thus, even where “[w]e could . . . disagree with the trial court’s conclusion, but . . . the trial court’s conclusion was a reasonable exercise of its discretion, we are not free to substitute our discretion.” (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881-882.)

With regard to terminating sanctions, the court's discretion is constrained by the general rule that a willful failure to comply with a court order is a prerequisite for the imposition of a non-monetary sanction. (*Biles v. Exxon Mobile Corp.* (2004) 124 Cal.App.4th 1315, 1327 (*Biles*); *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496.) In this context, willfulness does not require a wrongful intention. A simple lack of diligence may be deemed willful where the party knew there was an obligation, had the ability to comply, and failed to do so. (*Deyo, supra*, 84 Cal.App.3d at p. 787.) A “ ‘conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance, is sufficient to invoke a penalty. [Citation].’ ” (*Sauer, supra*, 195 Cal.App.3d at pp. 227-228.) The party with the obligation to respond to discovery bears the burden of showing that the failure to respond or comply was not willful. (*Cornwall v. Santa Monica Dairy Co.* (1977) 66 Cal.App.3d 250, 252-253 (*Cornwall*).

4. Analysis

We will discuss the order imposing terminating sanctions with respect to each appellant separately, beginning with Christine.

Christine

In her motion for terminating sanctions, Dr. Blessing-Moore argued, among other things, that terminating sanctions were warranted because Christine had failed to comply with the prior discovery orders of February 4, 2009, and May 22, 2009. Christine contends that the trial court erred in granting the motion and imposing terminating sanctions because the two prior discovery orders were erroneous; she was unrepresented by counsel at the time of the motion for terminating sanctions; and her attorney was responsible for her failure to comply with her discovery obligations. We find no merit in Christine's contentions.

The first discovery order, filed on February 4, 2009, compelled Christine to provide responses to Dr. Blessing-Moore's first set of requests for production of

documents and to pay monetary sanctions. It is undisputed that Christine never served responses to the first set of requests for production of documents and never paid any monetary sanctions.

We understand Christine to argue that the trial court erred in granting Dr. Blessing-Moore's motion to compel responses to the first set of requests for production of documents and ordering her to pay monetary sanctions, because the notice of motion was defective. According to Christine, the notice of motion failed to identify her as the subject of the sanctions request, in violation of the notice requirement of section 2023.040. Having reviewed the notice of motion for Dr. Blessing-Moore's December 19, 2008 motion to compel responses to the first set of requests for production of documents, we disagree that the notice of motion did not meet statutory notice requirements.

Section 2023.040 provides in part: "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought." Here, the notice of motion for the motion to compel expressly identified Christine as a defendant who had failed to respond to the first set of requests for production of documents and who also had failed to meet and confer. Additionally, the notice of motion expressly requested that monetary sanctions be awarded against all defendants. We determine that no more was required to satisfy the section 2023.040 notice requirement. (Cf. *Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1435-1436 [citing former section 2023].)

Christine also failed to comply with the second discovery order, which was filed on May 22, 2009. In that order, the trial court granted Dr. Blessing-Moore's motion to compel compliance with the February 4, 2009 discovery order and ordered Christine to "comply with the February [4], 2009 order . . . and serve code-compliant responses to Plaintiff's Requests for Production of Documents without objections within 20 calendar days [of] this order." The court also ordered Christine and the other defendants to pay the monetary sanctions of \$1,690 (\$1,000 previously ordered on February 4, 2009, and

\$690 in connection with the motion to compel compliance) within 20 days. It is undisputed that Christine did not comply with the May 22, 2009 order because she never served responses to Dr. Blessing Moore's request for production of documents and never paid any monetary sanctions.

Christine argues that she is not to blame for her failure to comply with the February 4, 2009 discovery order because it was her attorney who failed to draft or serve responses to Dr. Blessing-Moore's first set of requests for production of documents. This argument is unavailing, since in the context of discovery sanctions, " "the negligence of the attorney . . . is imputed to his client and may not be offered by the latter as a basis for relief." ' ' " (*Sauer, supra*, 195 Cal.App.3d at p. 231.) Only the attorney's "positive misconduct which effectively obliterates the existence of the attorney-client relationship" will relieve the client from the consequences of his or her attorney's mistakes. (*Ibid.*) Thus, even an attorney's willful failure to comply with the court's discovery order does not fall within the "positive misconduct" exception. (*Ibid.*) We therefore find that Christine has not met her burden to show that her failure was not willful and for that reason the trial court abused its discretion in imposing terminating sanctions. (*Cornwall, supra*, 66 Cal.App.3d at pp. 252-253; *Biles, supra*, 124 Cal.App.4th at p. 1327.)

Christine also asserts, without further explanation, that that the monetary sanctions of \$1,690 were all out of "proportion to any misconduct attribute to [her]." She also states that she lacked the ability to pay the monetary sanctions. However, Christine provides no citation to the record to support her claim of financial inability at the time monetary sanctions were awarded. She refers only to a document showing the federal court's appointment of counsel for her in another matter on April 1, 2010, long after the monetary sanctions were awarded in February 2009 and May 2009 in this case. Christine's showing is obviously insufficient to meet her burden on appeal to show that the trial court abused its discretion in awarding further monetary sanctions because she lacked the ability to pay any sanctions. (*Denham, supra*, 2 Cal.3d at p. 566.)

We therefore determine that Christine did not meet her burden to show that either the February 4, 2009 order or the May 22, 2009 order constitute an abuse of discretion. Moreover, since Christine disobeyed both discovery orders by failing to provide responses to Dr. Blessing-Moore's first set of requests for production of documents and by failing to pay monetary sanctions, she misused the discovery process within the meaning of section 2023.010, subs. (d), (g). Under section 2030.030, subdivision (d)(1), the trial court was therefore authorized to impose terminating sanctions. (See *Jerry's Shell, supra*, 134 Cal.App.4th at p. 1069; *Electronic Funds Solutions, supra*, 134 Cal.App.4th at p. 1184; *Mileikowsky v. Tenet Healthsystem, supra*, 128 Cal.App.4th at p. 280.) Accordingly, Christine has failed to meet her burden to show that the trial court abused its discretion in granting Dr. Blessing-Moore's motion for terminating sanctions and imposing terminating sanctions in its order of December 10, 2009.

We recognize that Christine was self-represented at the time of the motion for terminating sanctions, but that fact does not alter our conclusion. It is well established that “[u]nder the law, a party may choose to act as his or her own attorney. [Citations.] ‘[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]’ [Citation].” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.) Thus, a self-represented litigant is not entitled to lenient treatment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) We therefore determine that although Christine was self-represented, she was not excused from complying with her discovery obligations and obeying the trial court's orders, and the trial court was not precluded from imposing terminating sanctions when she failed to do so.

Alfredo

Alfredo contends that the trial court erred in its discovery orders of February 4, 2009, and May 22, 2009, and therefore the trial court should not have imposed

terminating sanctions on the ground that he disobeyed those orders. Having reviewed the record on appeal, we disagree.

In her first discovery motion, filed on December 19, 2008, Dr. Blessing-Moore sought, among other things, an order compelling Alfredo to provide responses to her second set of form interrogatories and an order that the truth of the matters specified in her first set of requests for admissions be deemed admitted by Alfredo, as well as an award of monetary sanctions.

Alfredo did not file written opposition to the motion, but his attorney appeared at the hearing on the January 30, 2009, motion to advise the trial court that Alfredo was in compliance with his discovery obligations. The record reflects that Dr. Blessing-Moore's attorney received Alfredo's responses to her discovery requests on the day before the hearing. In its order of February 4, 2009, the trial court imposed monetary sanctions of \$1,000 against all defendants, including Alfredo.⁷ The trial court did not abuse its discretion in awarding monetary sanctions, because the court is authorized to impose monetary sanctions where "the requested discovery was provided to the moving party after the motion [to compel discovery] was filed." (Cal. Rules of Court, rule 3.1348.) However, the record reflects that Alfredo did not pay the monetary sanctions.

Dr. Blessing-Moore subsequently filed a motion to compel, among other things, Alfredo's compliance with the February 4, 2009 order imposing monetary sanctions. Alfredo's opposition to the motion, both written and at the hearing on the motion, did not include any opposition to the award of monetary sanctions. The trial court granted the motion to compel compliance with the February 4, 2009 order and ordered Alfredo and

⁷ We note that California Rules of Court, rule 3.1348, states: "The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed . . . or the requested discovery was provided to the moving party after the motion was filed."

the other defendants to pay additional monetary sanctions of \$690 in connection with the motion.

By October 2, 2009, the date Dr. Blessing-Moore filed a motion for terminating sanctions, Alfredo had not paid the monetary sanctions imposed on him in the orders of February 4, 2009, and May 22, 2009. As one of the grounds for terminating sanctions, Dr. Blessing-Moore pointed to Alfredo's failure to comply with these orders. Dr. Blessing-Moore also argued that terminating sanctions were warranted because Alfredo had not provided the responses to the first set of requests for production of documents that were due three months earlier, in July 2009, and had also failed to respond to her August 2009 correspondence seeking to meet and confer about his failure to respond to the document requests.

Like Christine, Alfredo challenges the trial court's order imposing terminating sanctions on the ground that the underlying discovery orders of February 4, 2009, and May 22, 2009, were erroneous. He adopts Christine's argument that the trial court erred in imposing monetary sanctions in its order of February 4, 2009, because the notice of motion for Dr. Blessing-Moore's motion to compel his responses to the first set of requests for document production did not satisfy the notice requirements of section 2023.040. Additionally, Alfredo adopts Christine's argument that any failure to comply with their discovery obligations was the fault of their former attorney. As discussed above, we find no merit in either of these contentions.

Alfredo also contends that it was improper for the trial court to award monetary sanctions in the second discovery order of May 22, 2009, based on Alfredo's failure to pay the monetary sanctions awarded in the first discovery order of February 4, 2009. This argument lacks merit because the court may impose additional monetary sanctions

where a party has failed to pay an earlier sanctions award. (§ 177.5⁸; *20th Century Ins. Co. v. Choong* (2000) 79 Cal.App.4th 1274, 1277–1278.)

Moreover, although Alfredo contends on appeal that he was financially unable to pay the monetary sanctions, he did not raise the issue of financial inability in opposition to either Dr. Blessing-Moore’s further request for monetary sanctions or her motion for terminating sanctions, and therefore he has forfeited that issue on appeal. (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) We also observe that Alfredo’s only record citation in support his claim of financial inability is to a claim of exemption to wage garnishment dated February 16, 2010, more than two months after the trial court granted Dr. Blessing-Moore’s motion for terminating sanctions on December 10, 2009.

Thus, we determine that Alfredo’s contention that his failure to comply with the earlier discovery orders of February 4, 2009, and May 22, 2009, did not warrant terminating sanctions because those orders were erroneous, does not satisfy his burden to show that the trial court abused its discretion in its December 10, 2009 order granting Dr. Blessing-Moore’s motion for terminating sanctions, imposing terminating sanctions, and entering Alfredo’s default.

Alternatively, Alfredo argues that terminating sanctions cannot be imposed for failure to comply with a prior order to pay monetary sanctions. It has been held that “a terminating sanction issued solely because of a failure to pay a monetary discovery sanction is never justified.” (*Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 615.) However, in this case the record reflects that terminating sanctions were not imposed on Alfredo solely because he failed to pay the monetary sanctions imposed on him in the orders of February 4, 2009, and May 22, 2009.

⁸ Section 177.5 provides in part: “A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars (\$1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification.”

In addition to his repeated failure to pay monetary sanctions, Alfredo failed to respond to Dr. Blessing-Moore's second set of form interrogatories and first set of requests for admissions until the day before the January 30, 2009 hearing on her first motion to compel his responses to those discovery requests. Alfredo also failed to respond to Dr. Blessing-Moore's first set of requests for production of documents, to which responses were due in July 2009, and did not respond to her August 2009 correspondence seeking to meet and confer about his failure to respond. Under all of these circumstances, which include Alfredo's repeated failure to either timely respond or respond at all to Dr. Blessing-Moore's discovery requests, his failure to meet and confer, and his repeated failure to pay court-ordered monetary sanctions, we determine that Alfredo has not shown that the trial court "exceed[ed] the bounds of reason" in imposing terminating sanctions. (*Sauer, supra*, 195 Cal.App.3d at p. 231.)

B. Order Denying Relief from Default Under Section 473, subdivision (b)

The trial court denied Christine's motion⁹ for relief from default judgment under section 473, subdivision (b) on the ground that she had "not met her burden for relief under [section] 473." Christine argues that the trial court abused its discretion because (1) her former attorney abandoned her in early 2009; (2) she was blameless since she responded to discovery as directed by her former attorney; (3) she reasonably relied upon her mother, co-defendant Virginia, to defend her after her former attorney withdrew; (4) Dr. Blessing-Moore failed to show prejudice; and (5) Christine moved for relief under section 473, subdivision (b) within the statutory time period.

In response, Dr. Blessing-Moore contends that Christine has not shown that she is entitled to relief under section 473, subdivision (b) on the ground of attorney misconduct, since her former attorney did not commit positive misconduct and Christine contributed to her discovery violations. Dr. Blessing-Moore also contends that Christine's reliance

⁹ No other defendant filed a motion for relief from default.

on her mother to defend the action was unreasonable; Christine was not diligent in bringing her section 473, subdivision (b) motion because she delayed filing the motion for nearly six months; and prejudice was shown by Christine's thwarting of discovery and the time and money Dr. Blessing-Moore spent in pursuing her discovery responses.

We will begin our evaluation of Christine's contentions with an overview of section 473, subdivision (b) and the applicable standard of review.

1. Section 473, subdivision (b)

As relevant here, the discretionary relief provision of section 473, subdivision (b) provides: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." This provision "applies to *any* 'judgment, dismissal, order, or other proceeding.'" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254 (*Zamora*).

This court has stated, " 'In order to qualify for [discretionary] relief under section 473, the moving party must act diligently in seeking relief and must submit affidavits or testimony demonstrating a reasonable cause for the default.' [Citation.] In other words, the court's 'discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner, within any applicable time limits.' [Citation.]" (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419 (*Huh*).

2. Standard of Review

The California Supreme Court has instructed that " '[a] ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.' [Citation.] ' "[T]hose affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the

facts stated, a determination of the controverted facts by the trial court will not be disturbed.” ’ [Citations.]” (*Zamora, supra*, 28 Cal.4th at pp. 257-258.)

However, any doubts in applying section 473 must be resolved in favor of the party seeking relief, because the policy underlying section 473 favors disposition on the merits. (*Huh, supra*, 158 Cal.App.4th at pp. 1419-1420.) An order denying a motion for relief under section 473 is therefore “ ‘scrutinized more carefully than an order permitting trial on the merits.’ [Citation.]” (*Id* at p. 1420.)

3. Diligence

In her opposition to Christine’s section 473, subdivision (b) motion to set aside the default, Dr. Blessing-Moore argued that the motion should be denied because it was not filed within a reasonable time. We find that the record supports an implicit finding by the trial court that Christine failed to satisfy the requirement of diligence in seeking relief from default under section 473.

“The party seeking relief under section 473 must also be diligent. [Citation.] Thus, an application for relief must be made ‘within a reasonable time, in no case exceeding six months, after the judgment . . . was taken.’ (§ 473, subd. (b).)” (*Zamora, supra*, 28 Cal.4th at p. 258.) Where there has been an extended delay in seeking relief under section 473, such as three months, the moving party must present an explanation, by affidavit or testimony, for the delay. (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 529 (*Benjamin*). “[T]he court then determines whether such explanation may be deemed sufficient to justify the granting of the relief sought.” (*Id.* at p. 529.) “To hold otherwise—that in the absence of any explanation a delay of more than three months in undertaking to open a default can be excused—would empower the trial court to dispense with the ‘reasonable time’ requirement of the statute.” (*Id.* at p. 532.)

Here, Christine filed her section 473, subdivision (b) motion for relief from default on May 25, 2010, nearly six months after December 10, 2009, the date that the superior court clerk mail-served the December 10, 2009 order granting Dr. Blessing-Moore’s

motion for terminating sanctions, imposing terminating sanctions, and entering Christine's default. Christine argues that she filed the motion for relief from default as soon as reasonably possible after her new lawyers were able to "learn the case, review tens of thousands of pages of documents, research the law, and determine a strategy."

We have reviewed the record concerning Christina's diligence in seeking relief from default. Christina's new lawyer states in his supporting declaration: "My Firm began representing [Christine] *pro bono* on March 15, 2010, at the request of the federal district court, after [Christine] was indicted in federal court for allegedly failing to report as income amounts of money paid to her by the plaintiff in this case. [¶] . . . [¶] After an initial review of the record and [Christine's] case file, we filed a Notice of Limited Scope Representation on April 7, 2010. . . [¶] Since filing that Notice, my Firm has continued to work diligently to prepare for this motion."

Christina's supporting declaration states in its entirety: "1. I am a defendant in this case. I submit this declaration in support of my motion for relief from default. The statements set forth in this declaration are based upon my personal knowledge. [¶] 2. I never recall being asked by an attorney in this case, other than my current counsel, to locate or send documents. [¶] 3. Since I obtained my new counsel—Boies, Schiller & Flexner, LLP—I have for the first time reviewed the document requests in this case directed to me. [¶] 4. I have searched for responsive documents. I am providing what few responsive documents I have to my current counsel. [¶] 5. After my last attorney withdrew from the case, I relied on my mother to handle this case. She told me she had called the Court and someone in the Clerk's office explained that she could put the case off by filing papers. I relied on my mother to do that. [¶] 6. I was never told anything about a hearing in December 2009 in this case and did not know it was scheduled. That is why I did not attend. [¶] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed in Santa Clara County on May 24, 2010."

We observe that Christine’s declaration does not provide any explanation of her failure to file her motion to set aside the default for nearly six months after service of order entering her default on December 10, 2009. Although Christine’s new lawyer asserts in his declaration that his law firm was diligent in filing the motion as soon as reasonably possible after beginning its representation of Christine in April 2010, that assertion does not support a showing of diligence on Christine’s part. To the contrary, the record reflects that Christine failed to take any steps to seek relief from the default during the nearly four months that passed between the date the default order was served in December 2009 and the date she obtained new counsel in April 2010.

On this record, we believe that the trial court could reasonably determine that Christine had failed to provide a satisfactory explanation for her delay of more than three months in filing her motion for relief from default under section 473, subdivision (b). (*Benjamin, supra*, 31 Cal.2d at p. 529.) Therefore, the trial court did not abuse its discretion in denying the motion on the ground that Christine failed to meet her burden to show that she acted diligently in seeking relief. (*Huh, supra*, 158 Cal.App.4th at p. 1419.)

4. Excusable Neglect

We understand Christine to contend that the trial court also abused its discretion in denying her relief from default because the default was taken due to her excusable neglect. “ ‘Section 473 . . . permits relief for “excusable” neglect. The word “excusable” means just that: inexcusable neglect prevents relief.’ [Citation.] [¶] The burden of establishing excusable neglect is upon the party seeking relief who must prove it by a preponderance of the evidence. [Citations.]” (*Iott v. Franklin* (1988) 206 Cal.App.3d 521, 528, fn. omitted; see *Huh, supra*, 158 Cal.App.4th at p. 1423.)

Christine contends that her attorney “abandoned” her in early 2009 and, as a result of that abandonment, her neglect in failing to respond to Dr. Blessing-Moore’s second set of requests for production of documents and in failing to oppose the motion for

terminating sanctions was excusable. Christine also contends her neglect was excusable because she reasonably relied upon her mother, co-defendant Virginia, to defend her interests after her former attorney withdrew.

Dr. Blessing-Moore argues that Christine has not met her burden to show excusable neglect, since her former attorney's representation did not rise to the level of positive misconduct, the record reflects that Christine did not cooperate with her former attorney, and her reliance on her mother for legal representation was unreasonable.

Our review of the record shows that Christine's former attorney filed a motion to withdraw as her attorney of record on June 1, 2009, which was served on Christine the same day. In his supporting declaration, Christine's former attorney, Shawn R. Parr, states: "The client [Christine] has violated the terms of the attorney-client fee agreement. In addition, the client has not returned phone calls and is not cooperating with counsel." Parr's motion was granted on June 30, 2009.

We determine that the trial court could reasonably find that Christine failed to show excusable neglect due to attorney abandonment, based on the record of attorney Parr's motion to withdraw as her attorney of record and the June 2009 order granting the motion. We emphasize that " "[t]hose affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed." ' [Citations.]" (*Zamora, supra*, 28 Cal.4th at pp. 257-258.) Since there is a conflict in the evidence (Christine's declaration versus attorney Parr's declaration) regarding whether Parr abandoned Christine or whether he properly withdrew after she failed to cooperate in the litigation, we may not disturb the trial court's implicit finding that Christine failed to show excusable neglect due to attorney abandonment.

Further, we agree with Dr. Blessing-Moore that Christine's contention that she reasonably relied on her mother to "handle this case" was insufficient to satisfy her

burden to show that default was entered due to her excusable neglect. The California Supreme Court has instructed that “[w]here a default is entered because defendant has relied upon a codefendant or other interested party to defend, the question is whether the defendant was reasonably justified under the circumstances in his [or her] reliance or whether his [or her] neglect to attend to the matter was inexcusable. [Citations.]” (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855 (*Weitz*)). This rule has been applied in instances where an insured relied upon his or her insurer to defend. (*Id.* at pp. 855-856.)

Thus, “[r]eliance on a third party constitutes a satisfactory excuse only if it is reasonable. [Citations.] ‘With regard to whether the circumstances warranted reliance by the defendant on a third party, the efforts made by the defendant to obtain a defense by the third party are, of course, relevant.’ [Citation.] The defendant cannot reasonably rely on the third party’s continued assurances in light of contrary information showing the third party is providing no defense. [Citation.]” (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 507 (*Cruz*)).

We believe that the record supports an implicit finding by the trial court that Christine’s reliance on her mother, co-defendant Virginia, was not reasonable. (*Weitz, supra*, 63 Cal.2d at pp. 855-856.) Virginia was a layperson; she had been ordered to pay monetary sanctions for failure to respond to discovery requests and appear for her deposition; and she did not respond to the motion for terminating sanctions that was served on all parties in October 2009 or appear at the hearing on the motion in November 2009. Christine could not reasonably rely on any assurances by her mother that she was “handling this case” in light of Virginia’s obvious failure to defend, not only Christine’s interests, but her own interests. (*Cruz, supra*, 146 Cal.App.4th at p. 507.)

The decision in *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681 (*Fasuyi*), on which Christine relies for the proposition that she could reasonably rely on her co-defendant mother to represent her, is distinguishable. In *Fasuyi*, the defendant corporation forwarded the summons and complaint to its insurer, who then failed to

timely file a responsive pleading. (*Id.* at pp. 686-687.) After the corporation's default was taken and a default judgment entered, the corporation moved to set aside the default and default judgment under section 473. The appellate court reversed the trial court's order denying the motion, determining that insured had reasonably relied on insurer to respond to the complaint in timely manner. (*Id.* at p. 694.) Thus, the decision in *Fasuyi* does not stand for the proposition that an adult child like Christine may reasonably rely upon her co-defendant mother, who is neither an insurer nor an attorney, to provide a defense.

Therefore, because Christine failed to meet her burden to show that her default was taken due to her excusable neglect, we conclude that the trial court did not abuse its discretion in denying Christine's section 473, subdivision (b) motion for relief from default. (*Huh, supra*, 158 Cal.App.4th at p. 1423.) Having reached that conclusion, we need not address Christine's argument that Dr. Blessing-Moore did not establish prejudice. "Because we conclude that no abuse of discretion has been shown with respect to the issue of . . . excusable neglect, we need not address other issues raised by appellant[], including the issue[] of prejudice." (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1402.)

C. The Default Judgment

Since we have determined that the trial court did not abuse its discretion in imposing terminating sanctions and entering appellants' defaults, and also did not abuse its discretion in denying Christine's motion under section 473, subdivision (b) for relief from default, we turn to appellants' challenge to the default judgment. The total amount of the June 23, 2010 judgment after default entered against Virginia, Christine, Alfredo, and Nasir is \$1,828,252.15.

1. Sufficiency of Complaint as to Alfredo

On appeal, Alfredo contends that the default judgment is void as to him because the complaint fails to state a cause of action for conspiracy against him. In particular,

Alfredo asserts that the complaint failed to alleged “the required element of the conspiracy’s ‘formation and operation.’ ”

Dr. Blessing-Moore disagrees. She maintains that the complaint included sufficient factual allegations against Alfredo to support a cause of action for conspiracy: Alfredo was married to co-defendant Virginia, “the main actor in the embezzlement scheme”; Alfredo was the agent or representative of the other parties involved in the scheme; he carried out the embezzlement; the proceeds of the embezzlement were used to purchase real property for Alfredo; Alfredo conspired to defraud Dr. Blessing-Moore; Alfredo paid off personal debts with the stolen funds; Alfredo was unjustly enriched as a result of the conspiracy; and Alfredo is liable for an accounting of the monies taken, imposition of a constructive trust, and transfer of title to real property purchased with the embezzled funds.

It has been held that “a default judgment cannot properly be based on a complaint which fails to state a cause of action against the party defaulted because, as Witkin explains, ‘[a] defendant who fails to answer admits only facts that are well pleaded.’ ” (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829, fn. omitted.) However, the California Supreme Court earlier ruled that “[i]t is well established that a judgment is not void if the court has jurisdiction of the parties and of the subject matter, irrespective of whether or not the complaint states a cause of action so long as it apprises the defendant of the nature of the plaintiff’s demand. [Citations.]” (*Christerson v. French* (1919) 180 Cal. 523, 525-526 (*Christerson*); see also *Molen v. Friedman* (1998) 64 Cal.App.4th 1149, 1154.) In *Christerson*, our Supreme Court examined the complaint at issue in that case and determined that it “sufficiently states a cause of action to inform the defendant of the nature of the claim against him and to give the court jurisdiction of the cause.” (*Christerson, supra*, 180 Cal. at p. 526.)

Having reviewed the complaint, we determine that the complaint sufficiently states at least one cause of action against Alfredo: the second cause of action for

conversion. “Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff’s ownership or right to possession of the property at the time of the conversion; the defendant’s conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. [Citations.]” (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 543-544.)

We find that the factual allegations in Dr. Blessing-Moore’s complaint describe the scheme perpetrated by Virginia and Christine to embezzle funds from Dr. Blessing-Moore while employed in her office. The complaint further alleges that the misappropriated funds were used to purchase personal and real property for the defendants, including Alfredo. Additionally, in the cause of action for conversion, the complaint states, “By virtue of the conduct alleged above, [defendants] wrongfully, fraudulently, and maliciously retained and converted Plaintiff’s funds for their own use, with full knowledge that Dr. Blessing-Moore was the lawful and beneficial owner of said funds and was entitled thereto. [¶] As a proximate result of Defendants’ conversion as herein alleged, Plaintiff has been damaged in an amount to be proven at trial, but presently known to be not less than \$522,695.75.”

Accordingly, we determine that the allegations of the complaint are sufficient to state a cause of action for conversion against Alfredo and thereby inform him of the nature of the claim against him and “to give the court jurisdiction of the cause.” (*Christerson, supra*, 180 Cal. at p. 526.) The default judgment is therefore not void as to Alfredo due to insufficiency of the complaint. Having reached that conclusion, we need not address appellants’ contention that the complaint does not allege a cause of action for conspiracy against Alfredo.

2. Excessive Judgment

Finally, appellants contend that the default judgment is void because the amount of the judgment, \$1,828,252.15, exceeds the amount of damages pleaded in the complaint, \$522,695.75.¹⁰ Appellants ask the judgment be reduced to \$522,695.75 in the event they do not succeed on their other arguments on appeal.

We will begin by addressing the issue of whether the default judgment is void because the amount of the judgment exceeds the amount of damages alleged in the complaint. The issue is governed by section 580, subdivision (a), which states that in non-personal injury cases, “The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint”

The California Supreme Court has “long interpreted section 580 in accordance with its plain language. Section 580 . . . means what it says and says what it means: that a plaintiff cannot be granted more relief than is asked for in the complaint.” (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166.) Thus, “a default judgment greater than the amount specifically demanded is void as beyond the court’s jurisdiction. [Citations.]” (*Greenup, supra*, 42 Cal.3d at p. 826; see also *Van Sickle, supra*, 196 Cal.App.4th at p. 1521.)

The primary purpose of section 580 “is to guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them. As we observed, ‘The notice requirement of section 580 was designed to insure fundamental fairness.’ . . . [D]ue process requires formal notice of potential liability; actual notice may not substitute for service of an amended complaint.” (*Greenup, supra*, 42 Cal.3d at p. 826.)

In *Greenup*, the court determined that “a default judgment entered as a discovery sanction is governed by the general rule that such a judgment cannot exceed the relief

¹⁰ “Because of its jurisdictional nature, the claim that a judgment exceeds the relief demanded in the complaint can even be raised for the first time on appeal. [Citations.]” (*People ex rel. Lockyer v. Brar* (2005) 134 Cal.App.4th 659, 666 (*Brar*).)

demanded in the complaint.” (*Greenup, supra*, 42 Cal.3d at p. 830.) Accordingly, we agree with appellants that the judgment in this case is void to the extent the amount of the judgment exceeds \$522,695.75, since that is the amount specifically demanded in the complaint. (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494-495 (*Becker*).)

We are not convinced by Dr. Blessing-Moore’s argument that, despite the rule articulated in *Greenup* that a default judgment entered on a discovery sanction cannot exceed the relief demanded in the complaint, the default judgment in her favor should be affirmed in the total amount of \$1,828,252.15. Relying on the decision in *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157 (*Cassel*), Dr. Blessing-Moore contends that because she pleaded an equitable accounting cause of action, she was not required to plead a specific amount of damages. Additionally, she contends that, under *Cassel*, the complaint need not plead a specific amount of damages because appellants are in possession of information about the exact amount of funds that they embezzled.

The decision in *Cassel* does not aid Dr. Blessing-Moore because it is distinguishable. The plaintiff in *Cassel* withdrew from a law firm partnership and filed an action for an accounting and valuation of his interest in the partnership, and for judgment for the full value of that interest. (*Cassel, supra*, 76 Cal.App.4th at p. 1159.) The court narrowly ruled that “in an action seeking to account for and value a former partner’s partnership interest and for payment of that interest, the complaint need only specify the type of relief requested, and not the specific dollar amount sought. We foresee no danger that defaulting defendants will be taken by surprise by judgments entered against them, because . . . they will be in possession of the essential information necessary to calculate their potential exposure.” (*Id.* at pp. 1163-1164.)

The decision in *Cassel* has been criticized. (See, e.g., *Finney v. Gomez* (2003) 111 Cal.App.4th 527 (*Finney*); *Van Sickle, supra*, 196 Cal.App.4th at p. 1526-1527.) In *Finney*, the appellate court determined that “the rationale of *Cassel* runs counter to the primary purpose of section 580 of ensuring notice and fundamental fairness.” (*Finney*,

supra, 111 Cal.App.4th at pp. 541-542, fn. omitted.) In *Van Sickle*, the court determined that “[t]he fact that the defendant may have access to materials from which it can calculate the extent of its liability is not a substitute for *notice from the plaintiff* of the amount of money the plaintiff is seeking.” (*Van Sickle, supra*, 196 Cal.App.4th at p. 1527.)

We view *Cassel* as limited to its facts, which involved a default judgment in an action by a former law firm partner for an accounting of the value of his interest in the partnership. (*Cassel, supra*, 76 Cal.App.4th at p. 1159.) Since the present case does not involve valuation of a law firm partnership, the ruling in *Cassel* does not apply to the default judgment obtained by Dr. Blessing-Moore.

Alternatively, Dr. Blessing-Moore argues that she provided sufficient notice of the amount of damages she claimed because, during the course of the litigation, she served appellants with “detailed writs of attachment setting forth over \$943,622 in claimed damages.” She also argues that her service on appellants of an “entire judgment packet including a detailed recitation of the \$1.8 million in damages claimed” provided sufficient notice. These arguments also do not convince us that the default judgment may exceed the amount of damages claimed in the complaint.

First, Dr. Blessing-Moore provides no authority for the proposition that writs of attachment may serve as sufficient notice under section 580 to a defendant of the potential exposure if the defendant defaults. She relies on the decision in *Brar, supra*, 134 Cal.App.4th 659, but that case did not involve writs of attachment and is otherwise distinguishable.

In *Brar*, a default judgment of \$1,785,000 was entered against a defendant attorney in action brought by the Attorney General to stop “shakedown lawsuits against small businesses under the unfair competition law (Bus. & Prob. Code, § 17200 et seq.).” (*Brar, supra*, 134 Cal.App.4th at p. 661.) Because the complaint expressly sought civil penalties of \$2,500 for each violation of the unfair competition law, pursuant to Business

and Professions Code section 17206, and the complaint also alleged approximately 1,500 violations, the *Brar* court determined that the complaint “gave fair warning of an exposure of at least \$2,500 times 1,500, which is \$3.75 million, which is more than the \$1,785,000 in the default judgment.” (*Id.* at p. 668.) In contrast, in the present case Dr. Blessing-Moore’s complaint expressly alleges damages of at least \$522,695.75, but does not provide any information from which appellants’ potential exposure to a default judgment of \$1,828,252.15 could have been calculated.

Moreover, the fact that Dr. Blessing-Moore served appellants with an “entire judgment packet including a detailed recitation of the \$1.8 million in damages claimed” more than two months prior to the June 21, 2010 prove-up hearing is irrelevant. Once their default was entered on December 10, 2009, appellants had no procedural rights. (*Steven M. Garber & Associates, supra*, 150 Cal.App.4th at p. 823.) “ ‘A defendant against whom a default has been entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff’s right of action. . . . [Citation.] ’ ” (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386.) In other words, any notice to appellants of their potential exposure after their defaults were entered, by way of Dr. Blessing-Moore’s judgment packets, was ineffective.

For these reasons, we conclude that under section 580, Dr. Blessing-Moore was not entitled to obtain a default judgment that awarded damages in an amount greater than the amount of damages specifically pleaded in her complaint, \$522,695.75. (*Greenup, supra*, 42 Cal.3d at p. 830.) Our final consideration is the appropriate disposition where, as here, the default judgment is excessive.

3. The Appropriate Disposition

Ordinarily, an excessive default judgment may be modified “to excise a portion violative of section 580. [Citations.]” (*Becker, supra*, 27 Cal.3d at p. 495.) A disposition may therefore appropriately remand the case to the trial court with directions to modify the judgment by striking the award of damages in excess of the amount

specifically pleaded in the complaint. (*Ibid*; *Jannsen v. Luu* (1997) 57 Cal.App.4th 272, 279-280; *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1743.)

However, an alternative disposition was devised in *Greenup*. In that case, the plaintiff did not state an amount of damages in her complaint and the *Greenup* court determined that the default judgment in the amount of \$676,000 was excessive. (*Greenup, supra*, 42 Cal.3d at p. 829.) Since at that time the jurisdictional limit of the superior court was \$15,000 (former § 86), the court concluded that “[t]he compensatory award should therefore be reduced to the extent that it exceeds \$15,000.” (*Id.*, at p. 830.)

Despite reaching that conclusion, the *Greenup* court did not require the trial court to modify the judgment on remand. The court stated, “Because this case appears to be the first reported decision to hold that a default judgment entered as a discovery sanction is governed by the general rule that such a judgment cannot exceed the relief demanded in the complaint, both plaintiff and the trial court may have been unaware that the deficiency in her prayer could have been corrected in the same way as in cases of default for failure to answer, i.e., by giving plaintiff the option of serving and filing an amended complaint.” (*Greenup, supra*, 42 Cal.3d at p. 830.)

The court further determined that “[i]n the interest of fairness plaintiff should now be given that option. Specifically, she should be allowed to choose to forego the reduced award prescribed herein and instead to file an amended complaint praying for a different amount of damages and/or other appropriate relief. If she so elects, she must serve her amended complaint on defendants, who will be entitled to file a new answer; all issues will then be at large, including liability. Of course, if defendants thereafter continue to disobey discovery orders and incur a second default judgment as a sanction, plaintiff will have the right, at a second ex parte hearing, to prove her actual damages up to the limits of her amended prayer.” (*Greenup, supra*, 42 Cal.3d at p. 830.)

Following *Greenup*, appellate court decisions have “recognized that even where it is possible to modify a judgment to a lesser amount warranted by the complaint, the court

has discretion to instead vacate the underlying judgment and allow the plaintiff to amend the complaint and serve the amended complaint on the defendant. [Citation.]” (*Van Sickle, supra*, 196 Cal.App.4th at p. 1529; *Julius Schifaugh IV Consulting Service, Inc. v. Avaris Capital, Inc.* (2008) 164 Cal.App.4th 1393, 1397-1399; *Electronic Funds Solutions, supra*, 134 Cal.App.4th at pp. 1177-1178, 1185.)

We find the alternate disposition devised in *Greenup* to be appropriate in the present case. There is little guidance available for a plaintiff who seeks an order imposing terminating sanctions for misuse of discovery, and who intends to proceed to a default judgment once the defendant’s default is entered, as to the proper procedure to follow with respect to amending the complaint in that circumstance. For that reason, although we conclude that the default judgment is void to the extent the amount of compensatory damages awarded, \$1,803,641.35, exceeds \$522,695.75, the amount of damages specifically demanded in Dr. Blessing-Moore’s complaint, we believe that our disposition should allow Dr. Blessing-Moore the option of foregoing the reduced default judgment and permit her to file an amended complaint specifying the full amount of damages and/or other appropriate relief. (*Greenup, supra*, 42 Cal.3d at p. 830; *Electronic Funds Solutions, supra*, 134 Cal.App.4th at p. 1177.) If Dr. Blessing-Moore selects that option, appellants will be entitled to file a responsive pleading and all issues will be subject to resolution, including liability. (*Greenup, supra*, 42 Cal.3d at p. 830.)

We note appellants’ claim that Dr. Blessing-Moore received “a windfall double recovery” in the default judgment because she refused to include an offset for the amount of her settlement with co-defendant Medical Doctor Services. We understand appellants to seek a ruling from this court entitling them to an offset from the default judgment in the amount of the settlement. Given our reversal of the default judgment, we need not reach the offset claim in this appeal. However, our decision today is without prejudice to further proceedings in the trial court with respect to appellants’ offset claim. (See, e.g., *Wade v. Schrader* (2008) 168 Cal.App.4th 1039 [postjudgment motion for settlement

credit]; *Reed v. Wilson* (1999) 73 Cal.App.4th 439 [motion to correct judgment to reflect offset under § 877].) We express no opinion as to the merits of any such further proceedings.

Finally, we also note that appellants have not challenged the amount of the \$24,610.80 costs award included in the default judgment. Our directions to the trial court to modify the judgment concern the award of compensatory damages only and do not include modification of the \$24,610.80 costs award.

IV. DISPOSITION

The default judgment is reversed and the case is remanded to the trial court with directions to modify the judgment by awarding respondent Joann Blessing-Moore, M.D. the amount of damages specified in the complaint, \$522,695.75, and to enter the modified judgment, unless, within 30 days after issuance of the remittitur respondent serves and files in the superior court a notice electing the option to amend her complaint to pray for a different amount of damages and/or other appropriate relief. If respondent elects that option, she must serve her amended complaint on appellants, who

will be entitled to file a responsive pleading. The parties are to bear their own costs on appeal.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P. J.

WALSH, J.*

*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.