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

BEKAH DU BOIS STRATTON,

Plaintiff and Appellant,

v.

GARY BERTIS STRATTON,

Defendant and Respondent.

H036950

(Santa Clara County

Super. Ct. No. CV145620)

I. INTRODUCTION

Plaintiff Bekah Du Bois Stratton¹ brought a civil action against her husband, defendant Gary Bertis Stratton, claiming that she had contracted genital herpes from him. She alleged causes of action for battery, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress. The jury ultimately returned a special verdict finding that plaintiff did not “contract HSV II” during the timeframe that she alleged she had contracted genital herpes from defendant. The court thereafter entered judgment in defendant’s favor.

On appeal, we understand the principal arguments of plaintiff, a self-represented litigant,² to be that the trial court erred by 1) failing to limit defense counsel’s cross-

¹ At trial, plaintiff testified that her name was “Bekah Du Bois” and that she had also been known as “Bekah Du Bois Stratton.”

² Plaintiff was represented by counsel during a portion of the trial court proceedings.

examination of plaintiff as to certain matters, 2) refusing to allow rebuttal testimony by plaintiff's expert witness, 3) failing to include the burden of proof in one of the special verdict questions, 4) failing to follow an order excluding at trial evidence of plaintiff's past litigation, 5) denying plaintiff's motion in limine to exclude evidence of her having a sexually transmitted disease other than herpes, and 6) denying plaintiff's motion for a new trial. For reasons that we will explain, we will affirm the judgment.

Defendant has filed a motion in this court seeking sanctions against plaintiff and dismissal of the appeal. Plaintiff has filed a response and a motion for sanctions against defendant and his counsel. We will deny the motions by both parties.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and defendant married in 1987. In June 2009, after the couple had allegedly separated in May 2009, plaintiff filed a civil complaint against defendant alleging that she contracted genital herpes from him after they had unprotected sex in February 2009. Plaintiff claimed that defendant "actively concealed" from her the fact that he had genital herpes. She asserted that he "had a duty to inform her of his infection and current outbreak prior to engaging in sexual activity," and that she would not have consented to sexual activity with him had she known he was infected with genital herpes. Plaintiff alleged four causes of action against defendant for battery, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress.

In August 2009, defendant filed an answer denying the allegations in the complaint.

The parties filed several pretrial motions in limine. After a hearing on the motions, the trial court filed a written order. With respect to plaintiff's motions, the court denied a motion to exclude evidence of her having a sexually transmitted disease other than herpes, and denied a motion to exclude evidence regarding her prior sexual partners. The court granted plaintiff's motion to exclude evidence regarding any history of her

having had an abortion. Further, the court granted in part and denied in part plaintiff's motion to exclude evidence of past litigation or claims by her.

The jury trial was held in January 2011. The evidence included expert witness testimony on behalf of each party. Among other testimony, plaintiff's expert witness, Gary Richwald, M.D., M.P.H., testified that plaintiff "most likely acquired genital herpes due to the . . . herpes simplex virus 2 from [defendant]." Defendant's expert witness, Dr. Julie Higashi, a board certified physician in internal medicine and infectious diseases, testified that "[i]t cannot be determined who gave herpes to whom in this case." She also testified that "it is more than likely that [plaintiff] had herpes prior to 2008."

During trial, the court allowed plaintiff to amend the complaint to conform to proof to allege that she contracted herpes from defendant between December 2008 and January 2009. The jury ultimately returned a special verdict, finding that plaintiff did not "contract HSV II between December 2008 and January 2009." A judgment was entered in defendant's favor.

Plaintiff subsequently filed a motion for a new trial. The trial court denied the motion after a hearing.

Plaintiff thereafter filed a timely notice of appeal. Defendant has filed a motion in this court for sanctions against plaintiff and for dismissal of the appeal. Plaintiff has filed a response and a motion for sanctions against defendant and his counsel.

III. DISCUSSION

A. Plaintiff's Appeal

1. Failure to limit defense counsel's cross-examination of plaintiff

On appeal, plaintiff makes reference to certain questions posed to her during cross-examination by defense counsel. In referring to those questions, we understand plaintiff to contend that the trial court erred in allowing defense counsel's "offensive questioning as to matters unrelated to the herpes virus." We also understand plaintiff to contend that the court erred in allowing defense counsel, during the course of that cross-

examination, to refer to the contents of documents that were not authenticated or admitted into evidence. We understand plaintiff to argue that the questions posed by defense counsel violated Evidence Code section 352 and plaintiff's rights to due process and privacy.

Defendant responds that plaintiff forfeited her contentions on appeal because her pretrial motions in limine did not cover the questions at issue, and she failed to object to the questions at trial. Defendant also argues that even if plaintiff preserved the issue for appeal, she cannot show prejudice.

“It is hornbook law that a timely and specific objection is required to prevent the consideration of certain evidence; the failure to object at all waives any claim of error.” (*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1611; see Evid. Code, §353, subd. (a).) Here, with respect to the questions and documents at issue, plaintiff has not shown that she made a timely objection at trial on the same legal grounds that she raises in this court. Although an appropriate motion in limine may preserve the issue for appeal (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950), plaintiff makes no contention on appeal that any of her pretrial motions in limine pertain to the matters raised in the questions at issue by defense counsel. We therefore determine that plaintiff has failed to preserve for appeal her evidentiary claims regarding defense counsel's “offensive questioning as to matters unrelated to the herpes virus.”

We also understand plaintiff to be arguing for the first time in her reply brief that the trial court erred by failing to comply with Evidence Code section 783,³ which sets forth the procedures to be followed in a civil action alleging sexual battery “if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff.” (Evid. Code, § 783.) “Points raised in the reply brief for the first time will not be considered,

³ Plaintiff repeatedly refers to Evidence Code section “768” in her reply brief, but the text of the section from which she quotes is Evidence Code section 783.

unless good reason is shown for failure to present them before.” (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3 (*Campos*)). “The California Supreme Court long ago expressed its hostility to the practice of raising new issues in an appellate reply brief.” (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) “ ‘Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant.’ [Citation.]” (*Ibid.*) Here, in the absence of good cause for plaintiff’s delay in raising the issue of the trial court’s failure to comply with Evidence Code section 783 until the reply brief, we will not consider it. (*Campos, supra*, at p. 794, fn. 3.)

2. Failure to allow rebuttal testimony by plaintiff’s expert witness

As noted, plaintiff’s expert, Dr. Richwald, testified that plaintiff “most likely acquired genital herpes due to the . . . herpes simplex virus 2 from [defendant].” He also testified as to when the transmission most likely occurred, and that certain conduct by defendant had placed plaintiff “at increased risk of becoming infected with HSV-2.” After direct and cross-examination of Dr. Richwald was completed, plaintiff agreed to excusing him as a witness.

Later, defendant’s expert witness, Dr. Higashi, testified that “[i]t cannot be determined who gave herpes to whom in this case.” She also testified that “it is more than likely that [plaintiff] had herpes prior to 2008.” Dr. Higashi based this latter opinion on plaintiff’s deposition and medical record, which contained “evidence of symptoms that are consistent with atypical herpes outbreaks.”

Plaintiff cross-examined Dr. Higashi on two separate days. Before the start of the second day of cross-examination, plaintiff indicated that she wanted to offer rebuttal testimony by her own expert, Dr. Richwald, to the testimony of Dr. Higashi. Plaintiff identified the matters about which Dr. Richwald would testify in rebuttal, including whether a particular symptom exhibited by a person is associated with atypical genital herpes. The court denied plaintiff’s request to offer rebuttal testimony. The court determined that some of Dr. Higashi’s testimony which plaintiff sought to rebut was

actually similar to earlier testimony by plaintiff's expert Dr. Richwald, and that some of Dr. Richwald's proposed rebuttal testimony had already been testified to by him. The court also determined that the proposed rebuttal testimony by Dr. Richwald was "arguing with [Dr. Higashi's] opinion" rather than raising a factual issue.

Before completing her cross-examination of Dr. Higashi and outside the presence of the jury, plaintiff again raised the issue of rebuttal testimony by Dr. Richwald. Plaintiff gave the court a letter, apparently written by Dr. Richwald, describing his proposed rebuttal testimony. The proposed testimony included whether a particular symptom exhibited by a person is associated with atypical genital herpes. The court stated: "I think it still falls in the category of medical opinion dispute. So I'll stand by my ruling that Dr. Richwald will not be called as a rebuttal witness."

On appeal, plaintiff contends in a conclusory fashion that the trial court abused its discretion in refusing to allow rebuttal testimony by Dr. Richwald.

We determine that plaintiff's failure to present argument supported by relevant legal authority is fatal to her claim on appeal. "We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived. [Citations.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830; accord *People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*) [court may treat issue as waived where party fails to provide a legal argument with citation of authorities]; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 (*Landry*) [an issue that is "unsupported by pertinent or cognizable legal argument . . . may be deemed abandoned"]; *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284 (*20th Century Ins. Co.*) [issue on appeal was abandoned where discussion was "conclusory" and lacked citation to supporting authority]; Cal. Rules of Court, rule 8.204(a)(1)(B) [each point in a brief must be supported by "argument and, if possible, by citation of authority"].) In this case, plaintiff fails to articulate how the

court's ruling was erroneous and provide supporting legal authority. We therefore treat the issue as waived.

3. Failure to include the burden of proof in special verdict question

The jury was given a special verdict form containing 22 questions. Special verdict question No. 1 stated: "Did Bekah DuBois contract HSV II between December 2008 and January 2009?" The special verdict form informed the jury that if it answered "no" to this question, it should not answer any further questions. The jury answered "No" to this question. In her motion for a new trial, plaintiff argued that question No. 1 should have asked whether it was "more likely than not" that defendant infected her. The trial court ultimately denied plaintiff's motion for a new trial.

On appeal, we understand plaintiff to contend that special verdict question No. 1 should have included the "more likely than not standard" of proof. We understand plaintiff to argue that, without this language, the special verdict question was "unfair, misleading, and materially prejudicial" to her.

Defendant contends that plaintiff has waived the issue because she failed to object to the special verdict question during trial. Defendant also argues that there was no error by the trial court because the jury was properly instructed that plaintiff had the burden of proof under the " 'more likely than not' standard."

Assuming plaintiff has not waived the issue (see *All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1220 [appellants "timely preserved" their challenge to the verdict forms "by raising it at their motion for new trial"]), we determine that plaintiff fails to demonstrate error with respect to the special verdict form.

"The special verdict must present the conclusions of fact as established by the evidence" (Code Civ. Proc., § 624.) In other words, "a special verdict presents to the jury *each ultimate fact in the case*. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that 'nothing shall remain to the court but to draw from them conclusions of law.' [*Id.*]" (*Falls v. Superior Court* (1987) 194 Cal.App.3d

851, 854-855, italics added.) In this case, plaintiff fails to provide legal authority supporting her contention that the trial court erred by failing to include the burden of proof in special verdict question No. 1.

Further, the trial court instructed the jury regarding the burden of proof pursuant to CACI No. 200 as follows: “A party must persuade you by the evidence presented in court that what . . . she is required to prove is *more likely to be true than not true*. This is referred to as *the burden of proof*. [¶] After weighing all of the evidence, if you cannot decide that something is *more likely to be true than not true*, you must conclude that the party did not prove it. [¶] . . . [¶] In criminal trials the prosecution must prove that the defendant is guilty beyond a reasonable doubt; but in civil trials, such as this one, the party who’s required to prove something need prove only that it is *more likely to be true than not*.” (Italics added.) The court also instructed the jury as to the elements that plaintiff needed to prove in order to recover on her causes of action and that the jury “must consider all of the instructions together.” “Absent some contrary indication in the record, we presume the jury follow[ed] its instructions [citations] ‘and that its verdict reflects the legal limitations those instructions imposed’ [citation].” (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803-804.) In view of the court’s instructions to the jury, we are not persuaded by plaintiff’s contention that the wording of special verdict question No. 1 was somehow “unfair, misleading, and materially prejudicial” to plaintiff.

4. Failure to follow an order excluding evidence of plaintiff’s past litigation

Plaintiff brought a pretrial motion in limine seeking to exclude under Evidence Code sections 350 and 352 any reference to her “past personal injury litigation or claims.” In the motion, plaintiff argued that “evidence of prior claims would be offered solely for the purpose to paint [her] as ‘litigious’, to confuse the jury, and to prejudice the jury against [her] for reasons other than relevant evidence in this case.” At the hearing on the motion, defense counsel argued that plaintiff’s prior litigation was relevant to her current claim for emotional distress damages and would be used for impeachment.

Defense counsel contended that plaintiff had “a number of cases” involving “severe emotional distress” that allegedly included “the same sorts of symptoms that she’s describing here,” and that the evidence would show “relevant preexisting conditions, relevant identical symptoms that lasted a long time.” The trial court granted the motion in part. Pursuant to the court’s written order, the defense was not to make “reference to any specific lawsuits brought by the Plaintiff,” but defense counsel was allowed to “inquire about the Plaintiff’s prior symptoms and/or injuries.”

At trial, defense counsel cross-examined plaintiff concerning mental health issues that she had experienced prior to January 2009, when she claimed to have contracted herpes from defendant, and the possible causes of the mental health issues. At one point, defense counsel asked plaintiff a series of questions concerning whether she had told her physician that she was experiencing “increased stress at home” in 2002, due to a “dispute” or “lawsuit” involving a family trust and money going to plaintiff’s daughter and not to plaintiff. In answering the questions, plaintiff denied that there had been a dispute or lawsuit regarding the family trust matter. Plaintiff then objected to the questioning on the ground that it was “in violation of” the court’s “order regarding motions in limine,” and moved to strike. The court clarified that the pretrial order limiting evidence pertained only to “[p]ersonal injury” suits and implicitly overruled her objection. Defense counsel thereafter continued to cross-examine plaintiff about the family trust matter and what she had reported to her physician about it.

On appeal, we understand plaintiff to contend that the trial court erred because it failed to follow its pretrial order excluding evidence of her past litigation and allowed defense counsel to cross-examine her concerning the family trust matter.

Defendant responds that plaintiff has “mischaracterize[d]” the record, that defense counsel’s questions were for the proper purpose of impeaching plaintiff’s credibility, and that plaintiff fails to demonstrate prejudice.

We determine that plaintiff fails to show that the court did not follow its pretrial order limiting evidence of prior litigation. The court clarified that the pretrial order pertained only to personal injury litigation. Defense counsel’s questioning pertained to a family trust matter. On appeal, plaintiff fails to provide any record citation or legal argument establishing that the family trust matter involved personal injury litigation. We therefore determine that plaintiff fails to show error.

Moreover, even assuming the trial court erred in allowing questions about the family trust matter, plaintiff fails to demonstrate prejudice. A trial court’s erroneous ruling on the admissibility of evidence “ ‘is grounds for reversing a judgment only if the party appealing demonstrates a “miscarriage of justice”—that is, that a different result would have been probable if the error had not occurred.’ [Citations.]” (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317 (*Pannu*); *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 (*Shaw*).) No such showing has been made by plaintiff in this case.

5. Denial of plaintiff’s motion in limine to exclude evidence of a sexually transmitted disease other than herpes

Prior to trial, plaintiff filed a motion in limine seeking to exclude under Evidence Code sections 350 and 352 any evidence of her having had a “sexually transmitted disease other than Herpes II.” Plaintiff argued that the only purpose of such evidence would be to suggest that she “was somehow unchaste” and that the evidence would be “raised by the defense to prejudice the jury against [her] on reasons unrelated to the claim.”

At the hearing on the motion, the trial court asked several questions to ascertain the relevance of the evidence. Defense counsel explained that there would be expert testimony at trial that people who “have prior [sexually transmitted diseases] . . . are more likely to have herpes.” Defense counsel further stated that there would be testimony “that prior [sexually transmitted diseases] are an important element to consider in determining”

who more likely gave herpes to whom. Plaintiff replied that she was twice infected with gonorrhea, a sexually transmitted disease. The first time occurred when she was raped at the age of 16, and the second time occurred in 1985 after she met a man through a dating service. She asserted that there was no evidence that she had contracted anything other than gonorrhea. Defense counsel responded that plaintiff had not been tested for herpes at the time she was tested for gonorrhea. Plaintiff later contended that there was “no correlation” between herpes and gonorrhea.

The trial court stated that evidence that plaintiff “may have had prior [sexually transmitted diseases] of an unnamed type” would be allowed at trial, but that “any reference to the word ‘gonorrhea’ ” would be prohibited. The court explained that referring to “gonorrhea” was “more inflammatory than probative.” Plaintiff indicated that if such evidence was going to be allowed in, she preferred that the specific term “gonorrhea” be used so she could “talk about how it’s not related” to herpes. The court stated: “All right. Then I’m going to deny your motion”

On appeal, we understand plaintiff to contend that the trial court abused its discretion in denying her motion in limine and allowing evidence that she may have had another sexually transmitted disease besides herpes. We also understand her to argue that the court erred because it “would not allow [a] full explanation of the origin of gonorrhea by [her], leaving before the jury a false implication that [she] was continually contracting gonorrhea”

Evidence Code section 350 provides that “[n]o evidence is admissible except relevant evidence.” Further, Evidence Code section 352 provides that “[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

“Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion. [Citations.]” (*Pannu, supra*, 191

Cal.App.4th at p. 1317; *Shaw, supra*, 170 Cal.App.4th at p. 281.) “This standard is not met by merely arguing that a different ruling would have been better. Discretion is abused only when in its exercise, the trial court ‘exceeds the bounds of reason, all of the circumstances before it being considered.’ [Citation.] . . . In appeals challenging discretionary trial court rulings, it is the appellant’s burden to establish an abuse of discretion. [Citations.]” (*Shaw, supra*, at p. 281.) Further, as we noted, if a trial court’s ruling on admissibility is erroneous, the error “ ‘is grounds for reversing a judgment only if the party appealing demonstrates a “miscarriage of justice”—that is, that a different result would have been probable if the error had not occurred.’ [Citations.]” (*Pannu, supra*, at p. 1317; accord *Shaw, supra*, at p. 281.)

We determine that plaintiff fails to meet her burden in this case. The record indicates that the trial court determined, based on the anticipated testimony from the experts,⁴ that a history of contracting another sexually transmitted disease from someone other than defendant was relevant to the issue of whether plaintiff contracted herpes from defendant. The record also reflects that the court undertook an Evidence Code section 352 analysis, as the court proposed restricting the parties from specifically mentioning “gonorrhea” as “more inflammatory than probative.” In view of the record, we are not persuaded by plaintiff’s conclusory argument that the trial court abused its discretion in allowing testimony concerning gonorrhea.

Further, plaintiff fails to demonstrate prejudicial error based on the court’s purported failure to allow a “full explanation” concerning the “origin of gonorrhea by” her. First, she fails to provide a citation to the record supporting her contention that she was precluded from presenting such evidence at trial. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [an appellate court is not required to search the record on its own

⁴ Plaintiff’s and defendant’s experts subsequently testified at trial about the relationship between herpes and other sexually transmitted diseases.

seeking error, and a party's failure to provide supporting citations to the record will result in the argument being deemed waived]; Cal. Rules of Court, rule 8.204(a)(1)(C) [each appellate brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"].) We observe that the trial court *denied* defendant's pretrial motion in limine seeking exclusion of evidence that plaintiff was raped when she was 16 years old. The court indicated that, because there was evidence that plaintiff had gonorrhea as a result of the rape, and because the defense intended to raise at trial the issue of plaintiff having gonorrhea, plaintiff should not be precluded from referring to the rape. Second, even assuming the court denied plaintiff the opportunity to provide a "full explanation" concerning how she contracted gonorrhea, we are not persuaded by her argument that the jury was left with a false impression about her contraction of it. For example, plaintiff's expert referred to plaintiff's contraction of gonorrhea as arising from "a single intercourse, a rape." In sum, plaintiff fails to demonstrate prejudicial error by the court regarding an evidentiary ruling concerning gonorrhea.

6. Denial of plaintiff's motion for a new trial

The trial court denied plaintiff's motion for a new trial. In her opening brief on appeal, plaintiff contends that she is appealing from the denial of the motion. She fails to discuss the substance of her motion, or the trial court's ruling, let alone make any argument as to why the trial court's ruling was erroneous. We therefore treat the issue as waived. (*In re Marriage of Falcone & Fyke, supra*, 164 Cal.App.4th at p. 830; *Stanley, supra*, 10 Cal.4th at p. 793; *Landry, supra*, 39 Cal.App.4th at pp. 699-700; *20th Century Ins. Co., supra*, 86 Cal.App.4th at p. 284; Cal. Rules of Court, rule 8.204(a)(1)(B).)

B. Motions for Sanctions and Dismissal

Defendant has filed a motion seeking imposition of sanctions against plaintiff, as well as dismissal of the appeal, on the grounds that the appeal was frivolous and brought for an improper purpose. In a declaration, defendant's counsel seeks \$31,000 in

sanctions based on the amount of time he has spent and anticipates spending in connection with defending this appeal.

Plaintiff opposes the motion and seeks sanctions against defendant and his counsel in the amount of \$7,500.

Under Code of Civil Procedure section 907 and California Rules of Court, rule 8.276(a), an appellate court may impose sanctions against a party or an attorney for taking a frivolous appeal. In *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, the California Supreme Court set forth the standard for determining whether an appeal is frivolous and deserving of sanctions. The court stated that sanctions “should be used most sparingly to deter only the most egregious conduct.” (*Id.* at p. 651.) The court further explained that “[a]n appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions.” (*Id.* at p. 650.) Instead, “an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]” (*Ibid.*)

In this case, although it is a close issue whether plaintiff’s appeal is “totally and completely without merit” (*In re Marriage of Flaherty, supra*, 31 Cal.3d at p. 650), we determine that plaintiff’s arguments do not justify sanctions. Further, on the record before us, we do not find that the appeal was taken for an improper purpose, or that this is a case of sufficiently “egregious conduct.” (*Id.* at p. 651.) We therefore deny the motion for sanctions by defendant, as well as his request for dismissal of the appeal. We also deny plaintiff’s motion for sanctions as her arguments in support, including that defendant’s motion was frivolous, are not well taken.

IV. DISPOSITION

Defendant’s motion for sanctions and dismissal is denied. Plaintiff’s motion for sanctions is denied. The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

RUSHING, P.J.

PREMO, J.