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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ALLISON MORENO et al., Plaintiff and Appellants, v. THOMAS A. OSTLY et al., Defendants and Respondents.	A127780 (Alameda County Super. Ct. No. RG07339821)

I.
INTRODUCTION

Appellants Allison Moreno (Moreno) and the law firm of Siegel & Yee appeal from a monetary discovery sanction imposed against them in the amount of $13,500 under Code of Civil Procedure[1] section 2023.030, subdivision (a). This order is appealable under section 904.1, subdivision (a)(12). Appellants claim that the sanctions order was an abuse of discretion. We disagree and affirm.

II.
FACTS AND PROCEDURAL HISTORY

Moreno filed a verified complaint against respondents Thomas A. Ostly (Ostly) and Ostly's former law firm Ostly, Murphy & Vu, LLP (now known as Murphy, Vu, Thongsamouth, Chatterjee, LLP) on August 8, 2007, pleading five separate causes of

[1] All further undesignated statutory references are to the Code of Civil Procedure.

action alleging sexual harassment, retaliation, and failure to pay back wages. The complaint sought both compensatory and punitive damages.

The complaint alleged that Moreno worked as a paralegal for respondents' law firm starting in December 2005. During her employment in May 2006, she claimed that Ostly forced himself on her sexually, and that once this conduct began it continued almost daily. The complaint further alleged that Moreno made it clear to Ostly in July 2006 that she wished to "sever the sexually intimate aspect of their relationship," and that shortly after that she was terminated. Among other enumerated allegations of misconduct by Ostly, the complaint stated that after Moreno's termination, Ostly wrote her emails incessantly demanding that she return to work.

The order which is the subject of this appeal relates to efforts by respondents to obtain electronic discovery (e discovery) from appellants. At a case management conference (CMC) held on July 15, 2009,[2] the court noted in its case management order that respondents were seeking copies of emails and text messages between Moreno and Ostly for the period September 2005, and August 8, 2007. The court ordered that the parties submit supplemental briefs relating to these discovery requests, and further ordered counsel to meet and confer to "narrow subject matter of correspondence being sought. The e discovery sought is for CLS [Collective Legal Services (CLS)][3] computers, Ms. Moreno's personal computer and Ms. Moreno's cell phone." A further CMC was scheduled for August 24.

After the CMC, counsel exchanged several emails for the purpose of satisfying the court's order that they meet and confer about the discovery. In the initial email from appellant Siegel & Yee, Moreno's counsel Dean Royer (Royer), took the position that the discovery requests were too broad and sought to narrow their scope. Respondents' counsel Shane Anderies (Anderies) agreed with the narrowed scope of discovery

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[2] All subsequent unspecified dates refer to the year 2009.

[3] While CLS apparently is a party to the litigation, it is not involved in this appeal. CLS was a subsequent employer of Moreno after she left Ostly's law firm, but during the relevant time period.

suggested by Moreno's counsel, and stated, "[p]lease let us know when [Moreno] will make her computer(s) and cell phone(s) available for inspection." In response, Royer stated that there remained an issue as to whether there were any relevant documents "located on [Moreno's] computer and/or cell phone that have not already been produced in discovery." He then stated that this issue would be addressed in the supplemental brief Royer intended to file, and that Moreno would not make her computer and cell phone available unless the court ruled that further discovery was permissible.

At the August 24 CMC, the court ordered Moreno to produce her personal computer and cell phone for inspection before September 11. The parties were ordered to meet and confer again regarding scheduling, with the court noting its availability to review in camera any e discovery that Moreno's counsel contended was privileged, private, or not relevant. After a further exchange of emails, Royer agreed to deliver Moreno's computer and cell phone to Anderies for inspection by a computer forensics expert hired by respondents. At Anderies's request, Royer confirmed that the computer being produced was a Toshiba Satellite, and the phone was an LG Rumor.

On September 4, after the hardware was produced and inspected, Royer sent an email to respondents' counsel confirming that "[Moreno] turned over all computers and phones and in [*sic*] her possession to your expert." Anderies replied by return email that he was "troubled" by Royer's failure to disclose that Moreno no longer had the computer and cell phone "from the relevant time period." Anderies disagreed that Moreno had complied with the discovery order by producing the computer and cell phone that she *presently* had in her possession. He then urged Royer to "come clean" about what happened to the cell phones and computers that contained the relevant e discovery. Anderies explained that he knew Moreno had a cell phone with relevant e discovery on it because Ostly saw Moreno show the relevant text messages to the hearing officer during a Labor Commission hearing held to determine if she had been terminated.

Royer responded by return email. He noted he always understood that the e discovery demands by Ostly were for computers and cell phones which were *currently* in Moreno's possession. Royer went on to state that it was not until September 3 that

respondents made it clear to him that the defense wanted to inspect computers and cell phones that Moreno actually used during the relevant time period. As to Anderies's request to identify how many computers and cell phones Moreno had used during the relevant time period, when she used them, and what happened to them, Royer took the position that respondents would have to conduct further discovery to obtain this information.

On October 20, respondents filed a motion for terminating and monetary sanctions pursuant to sections 2023.010 to 2023.030, inclusive. As an alternative to a terminating sanction, respondents requested a court order stating that a modified version of jury instruction CACI No. 204 (willful suppression of evidence) be given to the jury at trial.

In addition to the facts outlined above, Anderies stated in his declaration supporting the motion for sanctions that in preparation for the inspection of the computer and cell phone, respondents' expert asked for the make and model numbers of the hardware. Once that information had been provided by Moreno's counsel, Anderies became aware that the cell phone could not have any relevant e discovery on it since it was not manufactured until the fourth quarter of 2007, after the end of the relevant time period. After first refusing to disclose what other devices Moreno had access to during the relevant time period, and what happened to them, Royer ultimately confirmed that Moreno used two different cell phones, both of which "she now claim[ed] to have discarded in April 2007 and December 2008."

Anderies stated further in his declaration that he deposed Moreno on April 7, at which time she admitted that she had relevant text messages from Ostly on her cell phone in mid-2006, and that she showed them to a coworker with whom she had consulted for legal advice. Also, Ostly confirmed that Moreno used a different cell phone during the relevant time period, noting that Moreno brought the phone to a labor department hearing in order to show the hearing officer text messages Moreno claimed proved that she had been fired by Ostly.

As to the amount of monetary sanction, Anderies claimed that respondents had incurred a total of $11,700 in attorney fees resulting from needless meet and confer

sessions, and in preparing the motion for sanctions. Included also in this total was the anticipated time counsel expected he would devote to reviewing Moreno's opposition to the motion, preparing a reply brief, and attending oral argument. In addition, respondents sought $1,000 paid to the forensic expert in unnecessary costs for "having an expert copy information from the nonresponsive cell phone and computer [Moreno] produced."

Opposition to the motion rested largely on the declarations of Moreno's attorneys, Royer and Dan Siegel (Siegel), and that of Moreno herself.[4] Royer confirmed in his declaration that he advised Anderies in July 2009 that all documents in Moreno's possession had been produced. He stated this was reconfirmed in the supplemental brief he filed in August 2009, adding that Moreno had searched her computer and cell phone and did not find any emails that had not already been provided to respondents. However, Royer stated he "did not say anything further that [he] learned from Moreno about her cell phone based on attorney-client privilege."

Royer also confirmed in his declaration that he was asked by Anderies whether Moreno had used other computers and cell phones during the relevant time period which she no longer possessed, and if so, what had happened to them. Royer explained that he took the position that formal discovery would be required to elicit this information because "[he] was concerned that [respondents] might seek to use [his] meet and confer response as evidence, and were trying to engage in discovery without the need for formal requests based on the Court's limited order regarding Moreno's electronic devices."

Royer also challenged the amount of monetary sanction requested, noting that he had spent significantly less time on his opposition to the motion than that claimed necessary to prepare the motion. He stated that Anderies's estimates about the cost of future work to prepare a reply and attend the hearing on the motion were speculative. Royer denied any intent to mislead the court "by any oral or written statement [he had] made."

[4] No brief in opposition to the motion for sanctions appears in appellants' appendix on appeal.

As relevant to the motion, Moreno's declaration confirmed that she had been requested to search her computer and cell phone for emails and texts to or from Ostly during the relevant time period, and she did not find any that had not already been produced for her attorneys. Moreno stated that she used a cell phone from around late 2005 until near the end of 2006 to communicate with Ostly, and this cell phone was the only one she used for that purpose. She also confirmed that she showed her friend, Anne Omura, and the Labor Commission hearing officer the texts Moreno had received from Ostly, but she discarded that phone in April 2007 because she had acquired a new cell phone and no longer needed her older phone.

Moreno stated also that she used another cell phone from late 2006 until April 2007, and then from December 2007 to December 2008. This phone was added to her sister's cell phone account. The only messages exchanged on this phone with Anne Omura concerned the progress of the litigation. Moreno established her own cell phone account in December 2008, and acquired a new cell phone at that time.[5]

Siegel's declaration described his relationship with Royer and how ethical, honest, and conscientious he had been in all of their work together. He stated that no one in his firm ever asked Moreno to withhold or suppress any nonprivileged evidence during discovery. Siegel believed that Royer and Moreno were at all times in the litigation acting forthrightly and without any intention to suppress or to spoil any evidence in the case.

Siegel also discussed in his declarations his contacts with Ostly in 2006. He had at least one long conversation with him about Moreno's claim. During that conversation, Ostly informed Siegel that Ostly himself had preserved all text message communications between Ostly and Moreno. In light of that statement Siegel felt there was no need to supply copies of text messages to him as Ostly claimed that he had them all.

[5] Nothing was said about what happened to this second cell phone, an omission we note, *post*, that the trial court found "simply not credible."

A hearing on the motion was held on November 11. Royer began by apologizing "if this Court and [Ostly] and his counsel believe that my actions resulted in a waste of time and resources." Royer told the court that he believed he was being truthful when he said there were no relevant messages on Moreno's cell phone. However, Royer admitted that he did not advise the court or counsel that the cell phone to which he was referring was not in use during the relevant time period. He claimed that he did not disclose this because he felt he had a "competing set of duties."

Royer went on to explain the conflict he perceived. He stated he considered the information he had received from Moreno about there being other discarded phones which she used during the relevant time period to be a confidential communication. Thus, he believed the attorney-client privilege applied. Royer told the court that he was also concerned this information about other phones being no longer available could be detrimental to his client's interests, and could give rise to a spoliation of evidence claim by respondents.

Royer also acknowledged having a duty of candor to the court and opposing counsel. He stated that he attempted to reconcile these competing duties as best as he could. Royer denied having any intention to deceive counsel or the court. "I felt like I was walking a tightrope and . . . trying to advocate for my client while at the same time be candid."

The court found that Royer's explanation was "not very credible." The judge referenced another party (CLS) as having had a similar problem with the fact that Moreno's work computer had been replaced over time with a new one. "[Counsel for CLS] had no problem being frank with the Court. 'Look, you know, I'm telling you, Judge, that it's futile because my client never—they had these computers they got better than many years ago. And so there's nothing—there's just nothing to disclose.' That just cuts off the argument. And we didn't have to spend a whole lot of time on all these issues."

The court went on to express "astonish[ment]" at Royer's explanation, and to being upset upon learning that the devices Royer was trying so vehemently to resist

producing did not exist. The court noted that even at this late stage it was still unclear what happened to the second cell phone. "All I do know is that your client no longer uses that phone." Based on this ambiguity, the court expressed the view that there was still some "evasion" with regard to the present whereabouts of the devices.

At that point, the court announced that it was going to follow its tentative ruling and award a monetary sanction. Counsel for respondents was asked to submit a further declaration updating the actual amount of attorney fees incurred in preparing a reply brief and in attending the hearing.[6]

A supplemental declaration was submitted by Anderies stating he had spent an additional 21.4 hours in reviewing appellants' opposition to the motion for sanctions, preparing a reply brief, and in appearing and arguing the motion. At counsel's regular hourly rate of $300, respondents had incurred additional attorney fees of $6,420 resulting from the discovery dispute. This sum was in addition to the $7,500 in attorney fees the tentative ruling found had been reasonably incurred in connection with the discovery dispute concerning the e discovery, and $1,000 expert fee incurred.

Royer submitted a supplemental declaration stating that, although he did not have sufficient information needed to provide a counter-declaration concerning the attorney fees request, he nevertheless contended that the request for additional fees was "unreasonable on [its] face."

A written order was issued by the court on December 8 covering all issues argued at the November 12 hearing. As to the monetary sanction, which is the sole subject of this appeal, the court agreed with respondents' contention that a monetary sanction for abuse of discovery was warranted under section 2023.030, subdivision (a). The court rejected Royer's argument that his representations to respondents' counsel and the court were true and not intended to mislead. The court found that Royer's explanation as to why, during the extensive proceeding about the propriety of e discovery, he never

[6] The hearing continued for some time as counsel and the court discussed the additional request by respondents for terminating sanctions or for a jury instruction on spoliation of evidence. Other case management issues were also discussed.

mentioned that Moreno's cell phones, and perhaps her computer, used during the relevant time period were no longer available, was "simply not credible." The court pointed to statements made in the pleadings filed by Royer in the course of the dispute that "were patently designed to leave the impression upon this Court that [Moreno] had diligently inspected computer and cell phones used during the relevant time frame, that she had produced all relevant and responsive email and text messages . . . ."

As a result, the trial court concluded that the actions of Moreno and her counsel regarding the e discovery dispute were a misuse of the discovery process. It found that appellants' "misuse of the discovery process," "particularly as to the cell phone," included the making of unmeritorious objections without substantial justification to discovery or motions to compel (§ 2023.010, subds. (e), (h)), the making of evasive responses to discovery (§ 2023.010, subd. (f)), and the failure to confer in a reasonable and good faith attempt to resolve informally any dispute (§ 2023.010, subd. (i)).

As to the amount of monetary sanction, the trial court found Anderies's hourly rate of $300 to be reasonable, as was the 20 hours spent in unnecessary meet and confer and preparing the motion for sanctions. Also reasonably incurred was an additional 15 hours of time expended in reviewing Moreno's opposition to the motion, preparing a reply brief, and in attending the hearing on the motion.[7] Therefore, attorney fees totaling $12,500 were awarded in addition to the $1,000 expert fee incurred, for a total aggregate monetary sanction of $13,500.

III.

LEGAL DISCUSSION

A. Standard of Review

We review the court's imposition of discovery sanctions for abuse of discretion. (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1217, 1231; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496-497.) The trial court's

[7] The court noted that the 15 hours of attorney time was less than the 21.4 hours claimed by Anderies, but was the same amount of time spent by Royer in preparing his opposition to the motion.

broad discretion is subject to reversal only if the sanction order is "arbitrary, capricious, whimsical, or demonstrates a ' "manifest abuse exceeding the bounds of reason . . . ." ' [Citations.]" (*In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108.) This standard applies to challenges to the imposition of monetary sanctions for misuse of the discovery process, the sanction levied here. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102; *Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1123 ["abuse of discretion standard of review ordinarily applies . . . to review of an order imposing discovery sanctions for discovery misuse"].)

Where the imposition of a monetary sanction under section 2023.030 is based on certain factual finding made by the trial court, "that ruling is subject to the substantial evidence standard of review. [Citations.]" (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430.)

B. Legal Analysis

Section 2023.030 is the statute under which monetary, issue preclusion, evidentiary, termination, and contempt sanctions can be imposed for discovery misuse. Subdivision (a) pertains to the imposition of a monetary sanction: "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, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:

"(a) The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. . . . If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

Section 2023.010 provides a nonexclusive listing of the types of misconduct that are considered by the Discovery Act to be "misuse": "Misuses of the discovery process include, but are not limited to, the following:

"(a) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.

"(b) Using a discovery method in a manner that does not comply with its specified procedures.

"(c) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.

"(d) Failing to respond or to submit to an authorized method of discovery.

"(e) Making, without substantial justification, an unmeritorious objection to discovery.

"(f) Making an evasive response to discovery.

"(g) Disobeying a court order to provide discovery.

"(h) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.

"(i) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made."

At a minimum, the record provides substantial factual support that the sanction imposed on appellants was warranted under at least the subdivisions of section 2023.010 cited by the trial court in its order. Like the trial court, we are mystified, at the very least, that counsel did not disclose to opposing counsel and the court that at least the cell phones used by Moreno during the relevant time period were not any longer in her possession. Royer's explanation proffered at the November 12 hearing is no more "credible" to us than it was to the trial court.

Instead of doing what would have been reasonable and in good faith under the circumstances, counsel and Moreno first resisted any attempt by respondents to obtain the production of her cell phones and computer knowing Moreno no longer had cell phones used during the relevant time period. Then, when finally ordered to produce them, it was not disclosed that Moreno only had her *current* cell phone, which could not have contained the e discovery sought for the period spanning 2005 to 2007. To make matters worse, they then engaged in the charade of producing her current phone and computer to respondents' expert, who Royer must have known was being paid by respondents to perform the inspections, and did not tell them the device being produced was not the device in use from 2005 to 2007.

Given these circumstances, we conclude the trial court's award of a monetary sanction against appellants was supported by substantial evidence, and was well within the discretion of the court. Consequently, we affirm the order.

In reaching this conclusion we reject appellants' argument that because there was no formal request to produce the devices, appellants had no duty to provide a statement of their inability to comply to produce the tangible items identified in the request for production because they were lost, or no longer in Moreno's possession. (§ 2031.230.)[8] In making this assertion, appellants give insufficient weight to the fact that the production of the cell phone was hammered out over several court-supervised CMC's, and was the subject of a court order to produce. In light of these facts, Royer's statement that he thought what Moreno told him about the devices was confidential, or that he had no duty to disclose their nonexistence, is disingenuous, as is the argument that appellants could

[8] That section provides: "A representation of inability to comply with the particular demand for inspection, copying, testing, or sampling shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement *shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party*. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item." (Italics added.)

not be sanctioned because they had no formal obligation under the statutory provisions contained in the Code of Civil Procedure to submit a written statement of inability to comply under section 2031.230.

IV.

DISPOSITION

The order imposing a monetary sanction on appellants for misuse of discovery is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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SEPULVEDA, J.