Case Number: BC508502 **Hearing Date:** October 16, 2020 **Dept:** M

Robson v. MJJ Productions et al., BC508502

Tentative Ruling Re Sanctions

On September 24, 2020, the Court issued its final ruling on Plaintiff's motion for a protective order regarding the conduct of defense counsel during the deposition of third party Leroy Whaley, and request for sanctions. As set forth in that ruling, the Court denied Plaintiff's motion. The Court further concluded that Plaintiff's counsel had not met and conferred in good faith prior to filing the motion, and that sanctions were appropriate against counsel pursuant to California Code of Civil Procedure sections 2023.020 and 2025.420(h). The Court set a hearing on the amount of sanctions for October 16, 2020, and the parties stipulated to a briefing schedule on the issue.

On October 9, 2020, Plaintiff filed a declaration in opposition to defendant's declaration regarding the amount of sanctions to be awarded. The Court first addresses the issues raised by Mr. Finaldi in his declaration.

1. Due Process

In his declaration, Mr. Finaldi argues that the Court's imposition of sanctions would violate due process because he was not provided notice or a reasonable opportunity to be heard before the Court ruled that sanctions would be issued. Plaintiff brought his motion for a protective order pursuant to Code of Civil Procedure section 2025.420. The statute itself provides notice to any party bringing such a motion that the Court shall impose sanctions pursuant to section 2025.420(h) against "any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, 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." (Code Civ. Proc., § 2025.420(h).) The notice contained within the discovery statute of mandatory sanctions is sufficient to satisfy due process concerns.

In addition, Plaintiff complains he was not given a reasonable opportunity to be heard prior to the imposition of sanctions. The Court has not actually imposed sanctions at this time, and gave the parties time to brief the issue of sanctions. While Mr. Finaldi's declaration argues that he was only permitted to address the reasonableness of the amount of sanctions, the contents of his declaration contradicts this assertion and no such restriction is contained in the Court's minute order. In fact, Mr. Finaldi's ten page declaration only addresses the legal merits of the Court's imposition of sanctions on its own motion and fails to address the reasonableness of the sanctions requested by defense counsel. Counsel also will have the opportunity to argue these issues at the October 16, 2020 hearing. Therefore, the Court concludes that Plaintiff's counsel had a reasonable opportunity to be heard on the issue of monetary sanctions prior to the Court actually imposing monetary sanctions.

Moreover, the case law relied upon by Plaintiff's counsel does not support his contention that the Court is powerless to impose sanctions when a statute makes the imposition of those sanctions mandatory. For instance, Alliance Bank v. Murray (1984) 161 Cal. App. 3d 1, dealt with the prescribed procedure of a prior discovery statute that granted the court discretion to impose sanctions upon motion and notice, in that case for willfully failing to appear at a deposition. (Id. at 7.) The court concluded that appellant waived the 15 day notice period by participating in the sanctions hearing. (Id. at 9.) As to O'Brien v. Cseh, (1983) 148 Cal. App. 3d 957, the monetary sanctions were not imposed mandatorily as with section 2025.420, but were pursuant to Code of Civil Procedure section 128.5. In that matter, the application for sanctions was brought in an ex parte filing, which was not permitted by section 128.5 (Id. at 961.)

Finally, in In re Marriage of Fuller, (1985) 163 Cal. App. 3d 1070, the appellate court found that appellant, an attorney, had no notice from the court that sanctions would be imposed against him individually for his client's failure to comply with a court order and then fail to appear at a hearing. While the appellate court was unsure what statute was relied upon by the trial court in imposing sanctions, the potential statutes all required notice. (Id. at 1076-77.) Based upon the facts of that case, the Fuller court concluded that counsel was never placed on notice of possible sanctions, and had no reason to suspect sanctions would be awarded against him individually. (Id. at 1077.)

The Court concludes that it is appropriate in this matter for sanctions to be awarded against Plaintiff's counsel based on the plain language of the statute and the failure to properly meet and confer prior to filing this motion. As set forth in the September 24, 2020 order, the Court finds that counsel did not act with substantial justification in terminating the deposition and bringing this motion, and there are no other circumstances making the imposition of the sanction unjust. As the California Supreme Court has noted:

> [B]efore parties may seek assistance from the court to resolve disputes or extend discovery, they must meet and confer. Moreover, the trial court "shall" impose monetary sanctions against a party that unsuccessfully makes or opposes a motion involving discovery "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." (Code Civ. Proc., § 2024, subd. (e) [repealed].) As Justice Epstein explains: "The result is supposed to be that sanctions will be awarded in far more cases than before. And that, in turn, is supposed to encourage parties and their counsel to cooperate with discovery and avoid unnecessary court proceedings." (Epstein, The Civil Discovery Act of 1986, supra, 10 L.A. Lawyer, at p. 21.)"

(Fairmont Ins. Co. v. Superior Court (2000) 22 Cal.4th 245, 254 fn. 3.)

"Whenever one party's improper actions—even if not 'willful'—in seeking or resisting discovery necessitate the court's intervention in a dispute, the losing party presumptively should pay a sanction to the prevailing party." (Ellis v. Toshiba America Information Systems, Inc. (2013) 218 Cal.App.4th 853, 878, as modified (Aug. 14,

2013), as modified on denial of reh'g (Sept. 10, 2013) [internal quotations omitted] [quoting another source].) In Zellerino v. Brown (1991) 235 Cal.App.3d 1097, the Court of Appeal recognized that "[t]he deterrence provided by the threat of sanctions for an unjustified motion for a protective order promotes broad discovery and minimizes court intervention." (Zellerino 235 Cal.App.3d at 1110.)[1] In analyzing similar language in another portion of the discovery statute related to physical examination demands, the Court of Appeal explained, "[u]nder this legislative scheme, a monetary sanction must be imposed against any party or attorney who unsuccessfully opposes a motion to compel *compliance with a demand for a physical examination* unless the court finds the party or attorney acted with "substantial justification" or a sanction would be unjust for some other reason." (Ghanooni v. Super Shuttle (1993) 20 Cal.App.4th 256, 260 [emphasis added].). Ghanooni addresses the "unless" clause in the sanctions provision – that courts are required to impose sanctions unless the party was justified or it would be unjust, and such language is also used in Code of Civil Procedure section 2025.420(h). (See Id.; see also Code Civ. Proc., § 2025.420(h).)

In addition, a "motion for a protective order puts the burden on the objector to establish why a particular request need not be complied with, and 'should not be made unless the party making, and the party opposing, the protection sought have made a reasonable and good faith attempt to resolve the issues involved in an informal manner. The motion must be accompanied by a declaration detailing the steps that have been taken by counsel in an effort to resolve these issues *before troubling the court to do so.*' (1 *Hogan,* § 10.16, p. 650, emphasis added.)" (Zellerino 235 Cal. App. 3d at 1111. .) The meet and confer requirements are included in the various discovery statutes to ensure that the parties do not unnecessarily waste the time of the Court or of the parties.

The key difference between the cases relied upon by Plaintiff and this matter is that here the statute itself gave notice that a party who brings a failed motion for a protective order shall have monetary sanctions imposed. Indeed, counsel sought monetary sanctions against Defendants and counsel under this same statute. Plaintiff's counsel was given notice on September 24, 2020 that the Court intended to impose sanctions against him, and he was afforded an opportunity to respond in writing, and subsequently argue the matter. Furthermore, the Court did not limit Mr. Finaldi to a declaration in response, but set a briefing schedule for the hearing. Mr. Finaldi has filed a ten page brief in opposition to the imposition of sanctions, and after argument, will have had a full opportunity to be heard regarding the merits of sanctions.

As a separate basis for sanctions, the Court found that Plaintiff's counsel failed to meet and confer adequately before filing his motion for a protective order. The meet and confer efforts were facially insufficient. Mr. Cunny's March 2, 2017, email identifies itself as a good faith effort to meet and confer, but simply consists of four non-negotiable demands, and one day to respond. (Exh. C to Finaldi Decl. ISO Leroy Whaley Protective Order.) The imposition of non-negotiable demands is by its definition not a good faith meet and confer effort. Subsequent and reasonable efforts to reach a compromise were summarily rejected on March 8, 2020 by Mr. Finaldi. (Exhibit E to Finaldi Decl. ISO Leroy Whaley Protective Order ["It

is an absolutely preposterous proposal . . .. We will be filing the motion, seeking sanctions against your client and co-counsel."]) Finally, at the deposition, Mr. Finaldi rejected Ms. MacIsaac's efforts to salvage the deposition by meeting and conferring.

2. Conflation of Issues between Sanctions and Attorney Misconduct

Mr. Finaldi further argues that sanctions should not be imposed for his "refusing to continue to endure such abusive and wildly inappropriate conduct." (Finaldi Decl., p. 8.) Counsel requests that he should have been allowed to provide additional briefing on the issue of incivility so the Court could "make a determination with the full, complete record before it." (Id. at p. 9.) Counsel conflates the issues of sanctions, which were imposed for failing to meet and confer in good faith and bringing an unsuccessful motion for protective order, with his incivility to opposing counsel at this and another deposition. The issues are separate and distinct. As to Mr. Finaldi's behavior, the record certainly supported the Court's statement in its September 24, 2020 minute order that:

Plaintiff's counsel's statements made at other depositions regarding Ms. MacIsaac, including statements regarding her alleged lack of legal experience or ability as an attorney, belittling of her appearance ("red in the face"), making allegations regarding her emotional state and excessive breathing, and general dismissiveness will not be tolerated by the Court and could appear to indicate gender incivility.

Along with the rules of professional conduct, the Court has expectations for the professional and civil conduct of the attorneys that appear before it, and when such as here, an attorney falls short of that expectation, it is incumbent on the Court to address that behavior. The Court makes no apology for doing so. Counsel should focus more on ensuring that incivility does not continue, and not whether an evidentiary hearing is necessary for the Court to reach this conclusion, which was amply supported by the record before the Court in multiple depositions. As the Court had limited exposure to counsel and their history, the Court did not make any findings of misconduct, but appropriately put the parties on notice that the type of behavior observed by the Court would not be tolerated going forward.

3. Award of Sanctions

As stated, Plaintiff does not contest the amount of sanctions requested by Defendants. Defendants sought a total of $14,281.25. (See Steinsapir Decl., ¶ 13.) The Court has reviewed the request, including the hours spent and hourly rate of the attorneys, and concludes that the request is reasonable and limited to time spent opposing Plaintiff's motion for a protective order. The Court, however, believes that it would be just and reasonable to limit sanctions to time spent directly opposing the motion, which is $9,200. (Steinsapir Decl., ¶ 12(c).)

The Court awards Defendants $9,200 in monetary sanctions against Plaintiff's counsel, payable
within 30 days.