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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RIMA MANASSERIAN-VIRABYAN,

Plaintiff and Appellant,

v.

GAGIK MURADYAN et al.,

Defendants and Respondents.

B265877

(Los Angeles County
Super. Ct. No. BC529366)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Reversed with directions.

Law Office of Corey Evan Parker and Corey Evan Parker
for Plaintiff and Appellant.

Diederich & Associates, Christina F. Michael and Amy Volk
for Defendants and Respondents.

Plaintiff Rima Manasserian-Virabyan filed a complaint against defendants Gagik Muradyan and Irina Muradyan seeking damages for personal injury. The trial court granted defendants' motion to compel discovery and ordered plaintiff to provide responses without objection. After plaintiff failed to comply with the discovery order, the court granted defendants' unopposed motion for a terminating sanction and dismissed the complaint without prejudice. Plaintiff moved for relief from the dismissal order under Code of Civil Procedure section 473, subdivision (b).¹ The court denied the motion. Plaintiff appealed from the judgment, but did not appeal from the order denying her motion for relief from dismissal.

Plaintiff contends the trial court abused its discretion by imposing a terminating sanction. She argues her former attorneys committed such an exceptional degree of misconduct that she should not be held responsible for their actions. In these circumstances, we conclude the court abused its discretion by imposing a terminating sanction in lieu of a lesser sanction. We therefore reverse the judgment with directions.

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

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

On November 27, 2013, plaintiff, through her attorney B. Kwaku Duren, filed a complaint alleging that on November 29, 2011, she fell on the sidewalk adjacent to property owned by defendants and suffered injury. Plaintiff alleged the sidewalk was uneven and defendants failed to maintain the sidewalk in a reasonably safe condition. The complaint stated causes of action for general negligence and premises liability.

B. *The Discovery Motion and Order*

On July 29, 2014, defendants filed motions to compel responses to their first set of demands for production of documents, special interrogatories, and form interrogatories. Defendants' counsel declared that plaintiff's attorney had failed to serve any responses to the discovery, which was served in April 2014, and failed to communicate with defendants' counsel regarding the discovery. Plaintiff did not oppose the discovery motions.

On August 26, 2014, the trial court granted the discovery motions and ordered plaintiff to provide verified responses without objection within 20 days. The court did not award a monetary sanction. Plaintiff failed to serve any responses.

C. *The Motion for a Terminating Sanction and Dismissal Order*

On November 24, 2014, defendants filed a motion for a terminating sanction under section 2023.030, subdivision (d). Defendants' counsel declared that plaintiff's counsel had failed to serve any discovery responses as required by the discovery order, despite an additional extension of time provided by defendants' counsel. Defendants argued that plaintiff's failure to comply with the discovery order was a misuse of the discovery process justifying the dismissal of plaintiff's complaint with prejudice as a terminating sanction. The request for terminating sanctions was set for hearing on March 12, 2015.

On January 7, 2015, plaintiff filed a substitution of attorney substituting herself as her own legal representative in place of attorney Duren. The trial court heard the motion for a terminating sanction on March 12, 2015. Plaintiff filed no written opposition and did not appear at the hearing. On April 8, 2015, the court filed a signed order granting the motion and dismissing the complaint without prejudice.²

² A signed order of dismissal is an appealable judgment. (§ 581d.)

D. *The Motion for Relief From Dismissal*

On April 24, 2015, plaintiff, representing herself, filed a motion for relief from the dismissal of her complaint pursuant to section 473, subdivision (b). Plaintiff filed her own declaration and a declaration by her daughter in support of the motion. Plaintiff argued that her failure to comply with the discovery order was not willful but rather was caused by the misfeasance of various counsel and her own infirmities. She presented evidence that attorney Duren had been temporarily suspended from the practice of law in November 2014. Another attorney, with whom she had signed a retainer, ultimately had declined to represent her but then refused to return her case file. Plaintiff was 81 years old, in poor health, and had a language barrier. Given this combination of factors, she requested that the court set aside the dismissal pursuant to its equitable powers under section 473. Defendants opposed the motion.

On May 22, 2015, the trial court issued an order denying the motion for relief from dismissal. The court found that plaintiff had failed to show any mistake, inadvertence, surprise, or excusable neglect and had failed to show that she had exercised reasonable diligence and acted as a reasonably prudent person. The court also found that defendants had demonstrated they would suffer prejudice if relief were granted, as the incident had occurred in November 2011, the action was filed on

November 27, 2013, and defendants' discovery requests had still not been answered as of May 2015. Further, the court noted that plaintiff had not attached discovery responses to the motion for relief under section 473 nor shown any intention to provide discovery in the near future.

E. *The Notice of Appeal*

On July 21, 2015, plaintiff filed a notice of appeal from the judgment of dismissal. Using a Judicial Council form, she checked the box for "Judgment of dismissal under Code of Civil Procedure sections 581d, 583.250, 583.360, or 583.430." She did not check the box for "An order after judgment under Code of Civil Procedure section 904.1(a)(2)."

DISCUSSION

A. *Plaintiff Did Not Appeal From the Order Denying her Motion for Relief From Dismissal so We Cannot Review That Ruling*

Plaintiff contends the trial court abused its discretion by imposing a terminating sanction. She also argues in a single sentence in the introduction of her opening brief that she is entitled to relief from the dismissal of her complaint pursuant to section 473.

A postjudgment order denying a motion for relief under section 473 is appealable as an order after judgment (§ 904.1, subd. (a)(2)). (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 857, fn. 3; *Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 294, fn. 4.) An appellate court has no jurisdiction to review an appealable order after judgment unless the appellant filed a notice of appeal making it reasonably clear that the appellant was also appealing from that order. (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173 (*Filbin*); *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239 (*Sole Energy*)).) The rule requiring liberal construction of a notice of appeal (Cal. Rules of Court, rule 8.100(a)(2)) cannot justify construing a reference to an appealable judgment as also encompassing a separately appealable order that the notice of appeal does not even mention. (*Filbin*, at p. 173; *Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1172.)

Filbin, supra, 211 Cal.App.4th at page 173, stated, “[W]here several judgments and/or orders occurring close in time are separately appealable . . . , each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal.” Similarly, *Sole Energy, supra*, 128 Cal.App.4th at page 239, stated, “A notice of appeal from a judgment alone does not encompass other judgments and separately appealable orders.”

In *Sole Energy*, the notice of appeal specified the judgment but did not specify an order granting a new trial motion. *Sole Energy* stated, “The notice of appeal neither specifies the new trial order nor makes it “reasonably clear” [the p]laintiffs were trying to appeal from it.” (*Ibid.*)

Plaintiff’s notice of appeal stated that she was appealing from a judgment of dismissal.³ It did not state that she was appealing from a postjudgment order and did not refer to the order denying her motion for relief under section 473. We note that plaintiff’s civil case information statement filed in this court indicated that the order appealed from was the order denying her motion for relief and attached a copy of that order.⁴ But a case information statement is not a notice of appeal and cannot confer appellate jurisdiction. (*Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1224 (*Bosetti*).

³ The signed order granting the motion for a terminating sanction and dismissing the action was an appealable judgment of dismissal, as stated.

⁴ In the information statement, plaintiff checked the box for “Judgment of dismissal under Code Civ. Proc., § 581d, 583.250, 583.360, or 583.430,” as in her notice of appeal, but she stated that the judgment or order appealed from was filed on May 22, 2015, the date of the order denying her motion for relief from dismissal, and she attached a copy of the order denying her motion for relief.

In *Bosetti*, the appellant filed a notice of appeal stating that the appeal was from a judgment after an order granting summary judgment. The appellant later filed a case information statement in the Court of Appeal indicating that the appeal was from both that judgment and a separate judgment of dismissal in favor of another defendant. *Bosetti* concluded that the case information statement could not be construed as a notice of appeal, noting that a notice of appeal must be filed in the trial court. (*Bosetti, supra*, 175 Cal.App.4th at p. 1224, citing Cal. Rules of Court, rule 8.100(a)(1).) *Bosetti* also stated that the notice of appeal could not be liberally construed to encompass a different judgment from the one specified in the notice where the judgments were filed on different dates in favor of different defendants. (*Bosetti*, at pp. 1224-1225.) Similarly here, plaintiff's case information statement identified an appealable order that was different from the judgment identified in the notice of appeal. Plaintiff's notice of appeal cannot be liberally construed to encompass the order denying the motion for relief.

We conclude that plaintiff did not appeal from the denial of her motion for relief from dismissal, so we have no jurisdiction to review that ruling.⁵ (*Silverbrand v. County of Los Angeles* (2009)

⁵ Moreover, plaintiff has abandoned any claim of error regarding the denial of her motion for relief from dismissal by failing to support the brief mention of the issue in her opening

46 Cal.4th 106, 113 [“the filing of a timely notice of appeal is a jurisdictional prerequisite”].)

B. *The Trial Court Improperly Imposed a Terminating Sanction*

We review an order imposing a discovery sanction for abuse of discretion. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.) “An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court’s decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the governing rules of law. “The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]” [Citations.]’ [Citation.] A decision ‘that transgresses the confines of the applicable principles of law is outside the scope of discretion’ and is an abuse of discretion. [Citation.]” (*Ibid.*)

brief with reasoned argument and legal authority. (*Needelman v. DeWolf Realty Co., Inc.* (2015) 239 Cal.App.4th 750, 762.)

We generally review the correctness of the trial court's decision based on the record before the trial court at the time of its decision. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *California School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770, 803.) Plaintiff has shown no exceptional circumstances justifying a departure from this general rule, particularly in light of her failure to appeal from the denial of her motion for relief from dismissal.

The record before the trial court at the time of the hearing on the motion for a terminating sanction strongly suggested that plaintiff's former attorney had provided woefully deficient representation and that plaintiff was having difficulty in representing herself effectively. Plaintiff's former attorney failed to respond to discovery, failed to communicate with opposing counsel regarding the discovery, and failed to oppose defendants' discovery motions. After the court granted the discovery motions, plaintiff's counsel failed to provide responses as ordered by the court.

On January 7, 2015, after defendants had filed their motion for a terminating sanction but before the hearing on the motion, plaintiff filed a substitution of attorney substituting herself as her own legal representative in place of her former attorney. The hearing was scheduled for March 12, 2015, yet plaintiff failed to

file an opposition and did not appear at the hearing on the motion.

Section 2023.030 authorizes the imposition of monetary, evidence, terminating, and contempt sanctions “[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title” Sections 2030.290, subdivision (c), and 2031.300, subdivision (c), authorize monetary and nonmonetary sanctions, including terminating sanctions, if a party fails to comply with an order compelling answers to interrogatories or responses to document demands. (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516.) Such sanctions may involve (1) the striking of all or parts of a pleading; (2) a stay of further proceedings by a party until the party obeys a discovery order; (3) the dismissal of an action; or (4) a default judgment. (§ 2023.030, subd. (d).)

A terminating sanction dismissing an action ordinarily is appropriate only if the party’s failure to comply with an order compelling discovery is so extreme or persistent that the court is convinced that a lesser sanction would be ineffective. (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 (*Lopez*); *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992.)

“The discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending

with the ultimate sanction of termination. ‘Discovery sanctions “should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.” [Citation.]’ (*Doppes v. Bentley Motors, Inc., supra*, 174 Cal.App.4th at p. 992.) “Although in extreme cases a court has the authority to order a terminating sanction as a first measure [citations], a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective [citations].” (*Lopez, supra*, 246 Cal.App.4th at pp. 604-605.)

The record here does not support the conclusion that a lesser sanction would be ineffective or that the misconduct was so extreme as to justify the dismissal of the action as a first measure. Instead, the record shows that the trial court had other means available to remedy the discovery misconduct. For example, the court could have stayed further proceedings by plaintiff until she obeyed the discovery order, and set an order to show cause regarding dismissal of the complaint. The court could have imposed a monetary sanction to secure compliance with its original order, or fashioned evidentiary or issue sanctions to restrict the introduction of evidence withheld from discovery. (See *Lopez, supra*, 246 Cal.App.4th at pp. 605-606.) We conclude that imposing the ultimate sanction of dismissing the complaint

in lieu of such a lesser sanction was an abuse of discretion. On remand, the court has broad discretion to impose an appropriate lesser sanction after full consideration of the plaintiff's failure to comply and any explanation therefor. (See *id.* at p. 606.)

DISPOSITION

The judgment is reversed with directions to the trial court to vacate the order granting the motion for a terminating sanction and conduct further proceedings consistent with the views expressed in this opinion. Plaintiff is entitled to costs on appeal.

KEENY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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