

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed February 7, 2007

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of

FELIX TORRES, JR.,

A Member of the State Bar.

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03-O-04964

OPINION ON REVIEW

The State Bar has requested interlocutory review of a State Bar Court hearing judge’s discovery sanctions order, claiming that the sanctions were inadequate. Although hearing judges are afforded wide discretion in ruling on discovery matters, we conclude, for the reasons stated, that the hearing judge abused her discretion as her decision frustrated the purposes of discovery. The relevant facts and procedural history are set forth below.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 4, 2005, the State Bar filed a Notice of Disciplinary Charges (NDC) against respondent, and on December 16, 2005, filed a second NDC. On February 15, 2006, the two matters were consolidated. On March 10, 2006, respondent was properly served with a notice of deposition scheduled for April 3, 2006. The Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.) applies to State Bar disciplinary proceedings with limited exceptions not applicable here.¹ (Rule 180; *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 502.)

¹Unless noted otherwise, all references to rules are to the Rules of Procedure of the State Bar. Rule 186 provides that monetary sanctions and arrest of a party are inapplicable as discovery sanctions. The rule also provides that dismissal shall not be ordered as a discovery sanction unless the court first considers the impact of dismissal on the protection of the public.

(See Dissenting Opinion)

On March 27, 2006, respondent sought a protective order requesting that his deposition take place in Laguna Hills, California, instead of at the State Bar's Los Angeles office, as a "reasonable accommodation" under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.)(ADA).² In his papers, respondent also asserted that the time for discovery cut-off had passed.³ He did not attend the scheduled deposition.

On March 30, 2006, the State Bar filed, *inter alia*, a motion to compel respondent's oral testimony. On April 5, 2006, the hearing judge denied respondent's request for a protective order and granted the State Bar's motion to compel discovery. The court-ordered deposition was scheduled for April 25, 2006.

On April 21, 2006, the State Bar sent respondent an e-mail message reminding him of the rescheduled, court-ordered deposition. Respondent replied via e-mail that he would not attend the deposition, and again cited his disability as the reason. He failed to appear at the scheduled deposition.

On May 4, 2006, the State Bar filed a motion requesting terminating sanctions.⁴ On May 10, 2006, respondent filed his reply to the State Bar's motion, again asserting his ADA rights. He also alleged that the original deposition notice was defective, thereby rendering the order to compel discovery void on its face.⁵

²At no time has respondent provided any evidence to support his ADA claim.

³The discovery cut-off issue was resolved by the hearing judge in favor of the State Bar and is not involved in the limited scope of this review. Respondent also stated in his motion for a protective order that he would not attend the deposition scheduled for April 3, 2006, "in order to reserve his rights for the protective order." However, his request for a protective order did not comply with requirements of California Code of Civil Procedure section 2025.410.

⁴A terminating sanction can include an order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process; an order staying further proceedings by that party until an order for discovery is obeyed; an order dismissing the action, or any part of the action, of that party; or an order rendering a judgment by default against that party. (Code Civ. Proc., § 2023.030(d)(1)-(4).)

⁵The hearing judge correctly concluded that the provision at issue was directory and that no adverse consequence occurred by failing to comply.

On May 17, 2006, the hearing judge issued an “ORDER RE: SANCTIONS” in which she imposed sanctions for respondent’s failure to appear at his scheduled depositions on two occasions, one of which had been ordered by the court. The imposed sanctions barred respondent from entering any documentary or testimonial evidence at trial, except for his own testimony.⁶

On June 1, 2006, the State Bar filed a Request for Interlocutory Review with this court. The State Bar contends that the hearing judge abused her discretion by allowing respondent to testify at trial without first submitting to a deposition, thereby denying the State Bar the opportunity to impeach his trial testimony. The State Bar has specifically requested that respondent’s answer to the NDC be stricken and that a default judgment be entered against him. Though we granted respondent an opportunity to reply to the State Bar’s review petition, he did not do so.

II. DISCUSSION

As this is an interlocutory review, our scope is limited to deciding whether the hearing judge committed legal error or abused her discretion. (Rule 300(k); *In the Matter of Respondent AA* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 721, 726.) Under this standard, we do not review with the “ ‘intention of substituting the view of this court for that of the hearing judge, but rather with the intention of “employ[ing] the equivalent of the substantial evidence test by accepting the trial court’s resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences [citations omitted].” ’ [Citation.]” (*In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289, 293.) The discretion we review is

⁶The relevant part of the order states: “**GOOD CAUSE HAVING BEEN SHOWN THEREFOR**, given the failure of respondent to appear for his oral deposition and thereby submit to an authorized method of discovery, and his failure to comply with this court’s order, as set forth above, the court orders that pursuant to Code of Civil Procedure section 2023.010, subdivision (d) and section 2025.450, subdivision (d), respondent is barred from offering any documentary evidence or any testimonial evidence, other than his own testimony, at trial in this matter.” (Emphasis in original.)

a discretion that is guided and controlled by fixed legal principles and should be exercised in a manner as to not impede or defeat the ends of substantial justice. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 577.)

As the State Bar has asked this court to review the discovery sanction issued by the hearing judge, it is instructive to be guided by the abuse of discretion standard that civil courts apply when reviewing the appropriateness of a discovery sanction.

California courts favor the long-standing public policy of disclosure regarding discovery. As our Supreme Court stated in its seminal discovery law opinion: “disclosure is a matter of right unless statutory or public policy considerations clearly prohibit it.” (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 378.) In *Greyhound*, the court affirmed that “[o]ne of the principal purposes of discovery was to do away ‘with the sporting theory of litigation - namely, surprise at the trial.’ [Citations.]” (*Id.* at p. 376.)

While discovery statutes are intended to take the game out of the trial, their purpose is not to adversely affect the general adversarial nature of litigation. (*Greyhound Corp. v. Superior Court, supra*, 56 Cal.2d at p. 376.) The court set forth nine objectives which the discovery rules were enacted to accomplish:

- “(1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury;
- (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses;
- (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty;
- (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements;
- (5) to expedite litigation;
- (6) to safeguard against surprise;
- (7) to prevent delay;
- (8) to simplify and narrow the issues; and,

(9) to expedite and facilitate both preparation and trial.”

(*Ibid.*, fn. omitted, paragraphs added.)⁷

Our Supreme Court made clear the benefit of the discovery process in narrowing issues between parties and as a device in which parties can fully ascertain the facts before trial. (See *Greyhound Corp. v. Superior Court*, *supra*, 56 Cal.2d at p. 385; see also *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, *Cembrook v. Superior Court* (1961) 56 Cal.2d 423.)

This strong policy is also codified in the Civil Discovery Act of 1986 (Civil Discovery Act). (Code Civ. Proc. §§ 2016.010 - 2036.050.) As the State Bar Court has adopted virtually all of the Civil Discovery Act, we are guided by the manner in which the civil courts review discovery sanctions for abuse of discretion or error of law.

A judge has broad discretion to impose discovery sanctions in a civil proceeding, and is subject to reversal only for arbitrary, capricious, or whimsical action. (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228.). “The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to impose punishment. [Citations.]” (*Motown Record Corp. v. Superior Court* (1984) 155 Cal.App.3d 482, 489, quoting *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 303-304.) We should be loath to interfere with the hearing judge’s discovery decision.⁸

⁷The court identified these areas as intended goals of the Discovery Act of 1956 adopted by the California legislature and modeled after the federal rules regarding discovery. These principles are equally applicable to the purpose of the Civil Discovery Act of 1986. (See *Beverly Hosp. v. Superior Court* (1993) 19 Cal.App.4th 1289, 1294.)

⁸The dissent cites our earlier opinion in *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273, 276, for an abuse of discretion test that equates it with a “manifest miscarriage of justice.” That case involved review of a hearing judge’s order partially reducing an award of costs. (Bus. & Prof. Code, § 6086.10.) While we emphasize that the hearing judge in a discovery matter is accorded a wide discretion in selecting an appropriate resolution, there are a number of other definitions of abuse of discretion used by us and the civil courts, and we have cited illustrative ones, *ante*.

In our analysis, we first determine if discovery sanctions were appropriate. We observe that while the power to impose discovery sanctions is broad, there are two requirements that must be met before the imposition of a sanction: 1) there must be a failure to comply with court-ordered discovery; and 2) the failure must be willful. (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; *Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904.)

This record compels the conclusion that respondent failed to comply with court-ordered discovery and that his non-compliance was willful. Respondent failed to appear for a properly-noticed deposition, and subsequently failed to appear for a second, court-ordered deposition. When reminded of the second deposition by the State Bar, respondent indicated that he would not attend.

The hearing judge correctly determined that sanctions were appropriate. However, we conclude that the hearing judge abused her discretion by imposing an insufficient sanction that failed “ ‘to protect the interests of the party entitled to but denied discovery.’ ” [Citations.]” (*Vallbona v. Springer, supra*, 43 Cal.App.4th at p. 1545.)⁹

Long ago, the policy decision was made to apply the Civil Discovery Act broadly to State Bar disciplinary proceedings. (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-302.) Accordingly, it is fully appropriate to apply the sanctions called for by the Act, as allowed by rule 186, for willful disobedience of discovery provisions.

The hearing judge found that respondent failed to comply with the court-ordered discovery and barred respondent from offering at trial any evidence, except for his own testimony. This discovery sanction results in an empty penalty. It is ineffective to induce

⁹Other than collateral discussions regarding the applicability of the Civil Discovery Act to State Bar Court disciplinary proceedings, we have never found discovery sanctions imposed by a hearing judge inadequate. (See, e.g., *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495 [respondent’s claim that application of the Civil Discovery Act to attorney disciplinary proceeding denied him due process was rejected]; see also, e.g., *In the Matter of Lapin* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 279 [upholding authority or pro tempore judge to only permit testimony of a witness that is first deposed].) The present matter affords such opportunity in that we find the sanction imposed by the hearing judge to be effectively no sanction at all.

respondent to provide the discovery sought since it does not preclude respondent from introducing his own testimony at trial. Not only must we consider the right of the requesting party to obtain proper discovery, we must also consider the integrity of the discovery process and the interest of the court in compelling “ ‘obedience to its judgments, orders and process.’ [Citations.]” (*Sauer v. Superior Court, supra*, 195 Cal.App.3d at p. 230.) The sanction issued by the hearing judge nullifies the purpose of the order that compelled respondent to appear at the deposition.

The Civil Discovery Act provides that a court may enter monetary, issue, evidence, terminating, or contempt sanctions.¹⁰ (See Code Civ. Proc. § 2023.030.) The penalty 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.” [Citations.]’ ” (*Vallbona v. Springer, supra*, 43 Cal.App.4th 1525, 1545.)

In addressing the issue in the present case, we take into consideration that the purpose of a discovery sanction is to enable a party to obtain evidence under a party opponent’s control, as well as to further the efficient and economical disposition of cases on the merits. (*Caryl Richards, Inc. v. Superior Court, supra*, 188 Cal.App.2d at p. 303.) In accordance with this purpose, a court will generally impose lesser sanctions regarding a discovery request unless the lesser sanctions will not bring about the compliance of the offending party. (*R.S. Creative, Inc. v. Creative Cotton* (1999) 75 Cal.App.4th 486, 496.)

We find *Sauer v. Superior Court, supra*, 195 Cal.App.3d 213, to be instructive in this matter. In *Sauer*, the court upheld an issue-preclusion sanction after concluding that lesser sanctions were insufficient.¹¹ If the lower court had imposed a lesser sanction, the non-compliant

¹⁰As noted *ante*, monetary sanctions are inapplicable in State Bar disciplinary hearings.

¹¹An issue-preclusion sanction allows a court to designate facts that “shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process.” (Code Civ. Proc., § 2023.030(b).) Additionally, a court “may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.” (*Id.*)

party would have been allowed to benefit from a delay in production of the requested documents by forcing the requesting party to proceed to trial ill-prepared. (*Id.* at p. 230.) A court's exercise of discretion should not reward the disobedient party, let alone at the expense of the fundamental reasons supporting the discovery process.

In the present case, as noted, the hearing judge barred respondent from introducing any documentary or testimonial evidence, *except for his own testimony*. This is precisely the discovery the State Bar sought by requesting respondent's deposition. We find that the imposition of this lesser sanction hinders the State Bar's ability to proceed at trial. By this means, respondent would be allowed to testify without affording the State Bar the opportunity to impeach his testimony or credibility or even to adequately prepare for trial, opening the trial to surprise and delay.

In an instance where lesser sanctions are ineffective, a court is empowered to apply terminating sanctions. (*R.S. Creative, Inc. v. Creative Cotton, supra*, 75 Cal.App.4th at p. 496.) Terminating sanctions are warranted against a litigant who persists in the outright refusal to comply with his discovery obligations. (*Fred Howland Co. v. Superior Court*, (1966) 244 Cal.App.2d 605, 612.) This includes instances where a party refuses to appear for scheduled depositions. (See, e.g., *Flood v. Simpson* (1975) 45 Cal.App.3d 644 [default judgment entered as sanction against defendant failing to appear for three depositions]; *Scherrer v. Plaza Marina Coml. Corp.* (1971) 16 Cal.App.3d 520, superseded by statute on another ground [imposed terminating sanction for failure to appear for two depositions].) However, because of the drastic nature of a terminating sanction, it should only be granted when the party has had an opportunity to comply with a court order. (*Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, 1581.)

On this record, we conclude that the sanction imposed is wholly inappropriate to respondent's disobedience. Respondent elected not to attend a properly-noticed deposition, which resulted in a court order to compel his deposition. He was then given the opportunity to

comply with that order, but willfully failed to do so. Guiding civil case law holds that on this record a more severe sanction is necessary, and we so conclude.

We vacate the order of the hearing judge and remand this matter to the Hearing Department for further proceeding in accordance with this opinion. The order of this court filed on June 16, 2006, staying the proceeding below is hereby vacated.

STOVITZ, J.*

I concur:

WATAI, Acting P. J.

*Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.

Dissenting Opinion of EPSTEIN, J.

The State Bar, which is seeking interlocutory review, asserts that the sanctions ordered by a hearing judge are insufficient, and instead it asks for terminating sanctions in the form of an order striking respondent's answer and entering a default. The majority of this court agrees, finding "the sanction imposed is wholly inappropriate to respondent's disobedience," and it remands this matter to the hearing department for further proceedings. (Maj. opn. *ante*, at p. 8.) I respectfully dissent.

The question before this court is whether the hearing judge abused her discretion by imposing the sanctions she chose. (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36-37, superseded by statute on another ground.) The discretion accorded the hearing judge in determining appropriate discovery sanctions is extremely broad. Indeed, "[i]n choosing among its various options for imposing a discovery sanction, a trial court exercises discretion, subject to reversal only for manifest abuse exceeding the bounds of reason. [Citation.]" (*Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.) Upon applying the abuse of discretion standard, I would affirm the sanctions order because it is not arbitrary or capricious (*In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108) nor does it exceed the bounds of reason.

After respondent failed to appear at his duly-noticed deposition, the State Bar filed a motion for terminating sanctions on May 4, 2006. Respondent filed a reply on May 15, 2006. After considering the matter, the hearing judge issued her sanctions order, which she filed on May 17, 2006. In her order, the hearing judge applied the relevant rules of discovery and issued a written decision addressing respondent's failure to appear at his deposition and concluding that good cause justified the preclusion of all documentary and testimonial evidence, except for respondent's testimony at trial.

The sanctions imposed were grave indeed. More importantly, under the abuse of discretion standard, we must presume that the hearing judge, in issuing her order, was aware of and gave consideration to the various discovery and procedural options available to the State Bar,

both before and during trial, including, inter alia, a motion to re-open discovery to enable the State Bar to pursue other avenues such as interrogatories, requests for admission, subpoena duces tecum and the like. Also, during trial, the State Bar would not be precluded from requesting a continuance in order to obtain rebuttal evidence. “We 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. Where, as here, the petitioner presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords 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.” (*Sauer v. Superior Court, supra*, 195 Cal.App.3d at p. 230 [holding a sanctions order will only be reversed if it exceeds the bounds of reason].)

While we may have ruled differently had we heard the motion, “[we] may not substitute [our] own view as to the proper decision.’ [Citations.]” (*In the Matter of Respondent J, supra*, 2 Cal. State Bar Ct. Rptr. at p. 276.)

Additionally, we have made clear that “ ‘[t]o be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice.’ ” [Citations.]” (*In the Matter of Respondent J, supra*, 2 Cal. State Bar Ct. Rptr. at p. 276.) In this instance, neither a discretionary abuse has been demonstrated nor has a “manifest miscarriage of justice” been established.

Without question “management of discovery lies within the sound discretion of the trial court” (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1123), and it is our duty to ensure that it remains within the hearing department’s discretionary purview. In my view, the majority opinion trespasses upon the hearing department’s area of responsibility and impinges on its broad discretion necessary for management of the discovery process. The chief mischief of the majority’s opinion is that it may ultimately compromise the court’s ability to expedite trials. The Supreme Court gave voice to this very concern in *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 171, fn. 11: “ ‘One of the prime purposes of the Discovery Act is to

expedite the trial of the action. This purpose will be defeated if appellate courts entertain petitions . . . by which review of the orders of trial courts in discovery proceedings are sought and which do not clearly demonstrate an abuse of discretion where discovery is denied’ ”

Lest we unnecessarily compromise the integrity of the discovery process, we must take care not to substitute the judgment of this court for that of the hearing judge unless that judgment exceeds all bounds of reason. Having searched the record for an abuse of discretion, it simply cannot be found. Therefore, I would deny the State Bar’s petition.

EPSTEIN, J.

Case No. 03-O-04964

In the Matter of

FELIX TORRES, JR.

Hearing Judge

Hon. Pat McElroy

Counsel for the Parties

For State Bar of California:

Lawrence J. Dal Cerro
Manuel Jimenez
Office of the Chief Trial Counsel
The State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

For Respondent:

Felix Torres, Jr.
Law Office of Felix Torres, Jr.
P.O. Box 8065
Laguna Hills, CA 92654