C073185

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

In re the Marriage of Tanya Moman and Calvin Moman

TANYA MOMAN,
Respondent,
v.
CALVIN MOMAN,
Appellant.

Appeal from the Superior Court of Placer County
Case No. SDR-0037529

APPLICATION TO FILE AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT RE QUESTION #1 IN COURT'S LETTER OF 11/19/14

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Applicant and Proposed Amicus Curiae

APPLICATION TO FILE AMICUS CURIAE BRIEF

I, Christopher C. Melcher, respectfully request leave to file the attached amicus curiae brief in support of Appellant, Calvin Moman. The proposed brief is included with this application. This request is made pursuant to Rule 8.200, subdivision (c) of the California Rules of Court,

A. Statement of Interest

I am the sole author of this application and the proposed amicus brief. I was the Chair of The Family Law Section of The State Bar of California for the 2011-2012 term. I have authored several treatise chapters and articles on California family law. I am a Certified Family Law Specialist by the Board of Legal Specialization of The State Bar of California.

I learned of this appeal through my service on an amicus committee of a voluntary bar organization. I have no interest in the outcome of this case, and I have no relationship with the parties or their counsel. I have not been compensated by anyone for the preparation or submission of the proposed brief.

One of the issues in this case is a question of first impression which impacts the practice of family law, i.e., whether a trial court has the legal authority to strike a responsive pleading and enter a respondent's default for failure to serve a declaration of disclosure in a family law action. The proposed amicus brief supports Appellant's position on that question of law, but I do not take a position as to which party should prevail on any other issue in this appeal.

B. How the Proposed Brief will Assist the Court

This Court directed supplemental briefing by the parties on November 19, 2014, on several questions. I have read all of the briefs filed by the parties in this appeal. I believe that further briefing is necessary to answer the Court's question as to whether there is legal authority for the terminating sanctions issued in this case. The proposed brief discusses (1) the statutory authority of a trial court to strike a timely responsive pleading and enter that party's default in a family law action, and (2) whether the trial court possesses the inherent authority to impose such a sanction in the absence of express statutory authority.

C. This Application is Timely

An application to file an amicus brief is due within 14 days of the date the last appellant's brief is filed or was due. (Cal. Rules Ct., Rule 8.200, subd. (c)(1).) The last brief filed in this case was the supplemental brief by Respondent on February 20, 2015. Therefore, the deadline for this application is March 6, 2015.

Dated: March 2, 2015

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Christopher C. Melcher
Applicant

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I.

INTRODUCTION

This Court asked the parties for supplemental briefing on the following issue, among others, in its letter of November 19, 2014:

> 1. Does Family Code section 2107 authorize a court to strike a responsive pleading? Is there any other statutory authority for issuing terminating sanctions against a party who has been slow to produce financial disclosures in a marital dissolution case? Please include a discussion of the following cases: *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300; *Saxena v. Goffney* (2008) [159] Cal.App.4th 316; *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199; *Newland v. Superior Court* (1995) 40 Cal.App.4th 608; *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204; *Midwife v. Bernal* (1988) 203 Cal.App.3d 57; and *Thomas v. Luong* (1986) 187 Cal.App.3d 76.

Family Code section 2107 provides several avenues of relief when a party has not complied with his or her disclosure obligations, such as monetary sanctions, evidence preclusion sanctions, an order compelling the required disclosure, or an order allowing for the case to proceed without the disclosure.[1] Terminating sanctions are not mentioned in Section 2107, and are not authorized by any other provision law for a disclosure violation.

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[1] Undesignated statutory references are to the Family Code.

There is no express provision in Family Code section 2107 that allows a court to strike a responsive pleading and enter default as a sanction for failure to comply with the disclosure statutes. Section 2017 states that "the court shall, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party." (Fam. Code, § 2107, subd. (c).) Terminating sanctions are not a "remedy provided by law"in these circumstances.

Trial courts have inherent authority to control proceedings, but inherent authority has its limits. There is a strong preference for allowing parties to have a trial on the merits, rather than foreclosing the right to present evidence for pre-trial misconduct. There is no legal authority to strike a responsive pleading and enter default for failure to comply with the disclosure statutes. There are other remedies (like evidence preclusion sanctions and monetary sanctions) which are adequate to address a disclosure violation. Therefore, the trial court acted in excess of its authority in entering the default of Appellant, Calvin Moman ("Calvin").

II.

FAMILY CODE SECTION 2107 DOES NOT AUTHORIZE THE STRIKING OF A RESPONSIVE PLEADING

Family Code section 2107 provides for the following relief for failure to comply with the disclosure statutes:

> (a) If one party fails to serve on the other party a preliminary declaration of disclosure under Section 2104 or a final declaration of disclosure under Section 2105, or fails to provide the information required in the

respective declarations with sufficient particularity, and if the other party has served the respective declaration of disclosure on the noncomplying party, the complying party may, within a reasonable time, request preparation of the appropriate declaration of disclosure or further particularity.

(b) If the noncomplying party fails to comply with a request under subdivision (a), ***the complying party may do one or more of the following***:

(1) File a motion to compel a further response.

(2) File a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure.

(3) File a motion showing good cause for the court to grant the complying party's voluntary waiver of receipt of the noncomplying party's preliminary declaration of disclosure pursuant to Section 2104 or final declaration of disclosure pursuant to Section 2105. The voluntary waiver does not affect the rights enumerated in subdivision (d).

(c) If a party fails to comply with any provision of this chapter, ***the court shall, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party***. Sanctions shall be in an amount sufficient to deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(Fam. Code, § 2107, emphasis added.)

Subdivision (b) of Section 2107 describes the type of relief which may be requested for a disclosure violation. The list does not include

striking the responsive pleading to a petition for dissolution and entering the default of a party who fails to comply with his or her disclosure obligations. The plain meaning of subdivision (b) is that a party may "do one or more of" the actions listed therein, which include (1) filing a motion to compel a further disclosure, (2) filing a motion to preclude the noncomplying party from presenting evidence on issues that should have been covered in the disclosure, and (3) filing a motion to grant a waiver of the complying party's receipt of the disclosure. If the Legislature intended to allow a party to request terminating sanctions in this instance, then it presumably would have listed those sanctions in subdivision (b). Since there is no such language in the subdivision (b), the complying party is not entitled to ask for termination sanctions under Section 2107.

Subdivision (c) of Section 2107 is a directive to the trial court, requiring the imposition of monetary sanctions for a disclosure violation, in addition to "any other remedy provided by law." (Fam. Code, § 2107, subd (c).) For the court to impose a terminating sanction under Section 2107, that remedy must be "provided by law" somewhere else in the Family Code or the Code of Civil Procedure. That brings us to the second party of the question asked by this Court.

III.

THERE IS NO OTHER STATUTORY AUTHORITY FOR TERMINATING SANCTIONS FOR FAILURE TO PROVIDE A DISCLOSURE

Entry of default is permitted by statute under the following circumstances:

A. Entry of Default for Failure to Timely Appear

Default may be entered when a respondent, who has been properly served, fails to timely appear in the action. (Code Civ. Proc., § 585, subd. (b).) A respondent is deemed to have appeared in a family law proceeding by either filing a response to the petition for dissolution, a notice of motion to strike, a notice of motion to transfer the proceeding, or a written notice of appearance. (Cal. Rules Ct., Rule 5.62, subd. (a).) The clerk must enter default if the respondent fails to appear within the time permitted. (*Id.*, Rule 5.401, subd. (a).) By comparison, a default cannot be entered for a respondent's failure to appear at trial; the remedy is to proceed with the noticed trial on an uncontested basis. (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 862-863; see also, *In re Nemis M.* (1996) 50 Cal.App.4th 1344, 1352 - party who disobeys court order to appear for hearing is in contempt, not in default.)

In this case, it appears that Calvin timely filed a response to the petition for dissolution. (AA 9, 101:23-24.) Accordingly, there was no authority under Code of Civil Procedure section 585 to enter default.

B. Striking a Pleading and Entry of Default as a Discovery Sanction

The Civil Discovery Act allows an "order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process" and an "order rendering a judgment by default against that party." (Code Civ. Proc., § 2023.030, subd. (d)(3)&(4).) Terminating sanctions are not available in the first instance for failure to provide a timely or further response to written interrogatories. (*Id.*, § 2030.290, subd. (c) - dealing with failure to serve timely response to written interrogatories; § 2030.300, subd. (d) - identical language dealing with failure to provide further response to written interrogatories). Monetary sanctions shall first be imposed, unless there was substantial justification for the conduct or imposition of monetary sanctions would be unjust. (*Id.*) "If a party then fails to obey an order compelling answers, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010)." (*Id.*)

Here, the declaration by Respondent, Tanya Moman ("Tanya") in support of the Order to Show Cause requesting entry of default mentioned that Calvin had not complied with discovery:

> This pattern of non-performance by [Calvin] [relating to his failure to provide disclosure statements] is nothing new. Although his first attorney provided [Calvin]'s alleged responses to form interrogatories, [Calvin] failed to properly respond to the interrogatories and failed to sign the responses, rendering the information essentially useless and inadmissible. Efforts to remedy the defect have fallen on deaf ears.

(AA 82:28 to 83:3, ¶ 4.)

Although the Order to Show Cause alleges a discovery violation, the court did not issue an order compelling answers to interrogatories. Thus, the terminating sanctions issued by the court could not have entered pursuant to the Civil Discovery Act for any discovery violation by Calvin because the Civil Discovery Act does not permit terminating sanctions for a discovery violation, unless a party has disobeyed an order compelling answers to interrogatories. (Code Civ. Proc., §§ 2023.290, subd. (c) & 2023.030, subd. (c).)

The choice of discovery sanctions is normally reviewed under the abuse of discretion standard. (See, *Sauer v. Sup.Ct. (Oak Industries, Inc.* (1987) 195 Cal.App.3d 213, 228.) However, a court does not have discretion to impose a sanction in excess of its legal authority.

The law also requires notice before sanctions of this nature may be imposed. (*Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199; Code Civ. Proc., §§ 2023.030, subd. (a) & 2023.040.) It is a violation of due process, and an abuse of discretion, to impose discovery sanctions in the absence of proper notice. (*Sole Energy, supra,* at pp. 207-208.) Specifically:

> A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought.

(Code Civ. Proc., § 2023.040.)

Here, the Order to Show Cause mentions a discovery violation, but does not say that sanctions were being requested under any provision of the Civil Discovery Act. The Order to Show Cause also indicates that "[P]oints and authorities" were to be filed by Tanya (AA 78, item 3(a)(4)), but a memorandum of points and authorities was not found in the record. (See, AA 78-83.) Therefore, there was a lack of required notice to support the imposition of sanctions under the Civil Discovery Act.

Even if Calvin had disobeyed an order compelling answers to the interrogatories, and Tanya had given proper notice of her request, the imposition of terminating sanctions would still be improper under the circumstances, since the alleged violation consisted of failure to verify the answers and a failure to "properly respond" to the interrogatories. (See, AA 82:28 to 83:3, ¶ 4.) As the court stated in *Thomas v. Luong* (1986) 187 Cal.App.3d 76:

> The use of the ultimate sanction, as that imposed in the case before us, is a drastic penalty and case law recognizes that it should be sparingly used. [Citation.] [¶] While there is no question but that a trial court, under appropriate circumstances, has the power to sanction a party who refuses to provide discovery to which his adversary is entitled, the sanction chosen must not be the result of an arbitrary selection. It should not deprive a party of all right to defend an action if the discriminating imposition of a lesser sanction will serve to protect the legitimate interests of the party harmed by the failure to provide discovery.

(*Thomas, supra,* at p. 81.)

A misuse of discovery does not justify a windfall to the interrogating party. (*Caryl Richards, Inc. v. Sup.Ct. (Klug)* (1961) 188 Cal.App.2d 300, 303 - decided prior to Civil Discovery Act of 1986). In *Caryl Richards*, it was held that terminating sanctions for evasive answers to discovery was excessive, since an order establishing the facts in question against the party would accomplish the purposes of discovery. The court in *Caryl Richards* stated:

> One of the principal purposes of the Discovery Act [Citation] is to enable a party to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice *on the merits*. [Citations.] Its purpose is not 'to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits.' [Citations.]

(*Caryl Richards, supra,* at p. 303, emphasis in original.)

The court further explained in *Caryl Richards*:

> While under the statute the court undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law. 'The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon

> which the exercise of judicial power necessarily depends.'

(*Caryl Richards, supra,* at p. 305, quoting *Hovey v. Elliott* (1897) 167 U.S. 409, 414.)

Although *Caryl Richards* was decided before the Civil Discovery Act of 1986, it remains a viable statement of the law. "The rule that a sanction order cannot go further than is necessary to accomplish the purpose of discovery is some 35 years old in California, and is rooted in constitutional due process. [Citation.]" (*Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613, citing to *Caryl Richards*.) The court in Newland observed the following about terminating sanctions:

> Many of the cases we have cited *(Midwife v. Bernal* [(1988) 203 Cal.App.3d 57] is a particularly good example) involve violations of orders and the discovery process far more egregious than anything suggested in the case before us. All have held the terminating sanction to be improper, and it is not surprising that real parties have failed to cite a single case that upholds that remedy in this situation.

(*Newland, supra,* at p. 615, involving terminating sanctions for failure to pay monetary sanctions.)

Likewise, the court in *Midwife v. Bernal* (1988) 203 Cal.App.3d 57, concluded that "[c]onstitutional due process 'imposes limitations on the power of courts, even in aid of their own valid processes, to order discovery sanctions that deprive a party of his opportunity for a hearing on the merits of his claim.' " (*Midwife, supra,* at p. 64.) In the *Midwife* case, it was held to be an abuse of discretion to impose terminating sanctions on the ground that the plaintiff had failed to pay monetary sanctions ordered by the court. The court in *Midwife* stated that California courts have held that "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.]"" [Citation.] (*Midwife, supra,* at p. 64.)

In light of this history, the court in *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, stated: "The courts therefore frown upon the extreme sanction of dismissal of a case for failure to make discovery, and recommend instead lesser sanctions of fines." (*McGinty, supra,* at p. 210.) The court must consider the nature of the offending conduct, the prejudice to the complaining party, and whether the proposed sanction places that party in a better position than the party would have occupied had proper discovery answers been provided. (*Id.,* at pp. 211-215.) In the cases discussed in *McGinty*: " The common element was a continuous willful obstructive conduct by the party, or ... egregious interference with the opposing party's ability to make a case." (*McGinty, supra,* at p. 212.)

In *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, the issue was whether evidentiary sanctions could be imposed against a party who gave a wilfully false answer to an interrogatory, in the absence of a prior order compelling a further answer to the interrogatory. The court held:

> Thus, in the absence of a violation of an order compelling an answer or further answer, the evidence sanction may only be imposed where the answer given is *willfully false*. The simple failure to answer, or the giving of an evasive answer, requires the propounding party to pursue an order compelling an answer or further answer—otherwise the right to an answer or further answer is waived and an evidence

> sanction is not available. '[T]he burden is on the propounding party to enforce discovery. Otherwise, no penalty attaches either for the responding party's failure to respond or responding inadequately.'

(*Saxena, supra,*, at p. 334, emphasis in original.)

Here, there was no finding that Calvin's unverified answers to interrogatories were wilfully false. There was no finding that Calvin had disobeyed a prior court order compelling further answers to the interrogatories. There was no proper notice that sanctions were being requested under the Civil Discovery Act. And, there was no reason to impose the ultimate, terminating sanction under these circumstances. Therefore, the sanctions cannot be upheld as a proper exercise of authority under the Civil Discovery Act.

C. Striking a Pleading and Entry of Default for Violation of a Local Rule

The third avenue for issuance of terminating sanctions is for a violation of a local rule of court. When a local rule of court has been violated has been found, "the court on motion of a party or on its own motion may strike out all or any part of any pleading of that party, or, dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party…." (Code Civ. Proc., § 575.2, subd. (a).) No local rule was alleged to have been violated here.

D. Terminating Sanctions under Court's Inherent Authority?

There is no statutory authority for striking out a responsive pleading and entry of default in any circumstances other than those discussed above. Still, it could be argued that the terminating sanctions were a valid exercise of the court's inherent authority to dismiss an action. (See, Code Civ. Proc., §§ 581, subd. (m) & 583.150.) However, as explained by the California Supreme Court in *Lyons v. Wickhorst* (1986) 42 Cal.3d 911:

> In the absence of express statutory authority, a trial court may, under certain circumstances, invoke its limited, inherent discretionary power to dismiss claims with prejudice. [Citation.] However, this power has in the past been confined to two types of situations: (1) the plaintiff has failed to prosecute diligently [Citation]; or (2) the complaint has been shown to be "fictitious or a sham" such that the plaintiff has no valid cause of action [Citation]. [n4: Several additional grounds for dismissal have been recognized over the years. These include: (1) lack of jurisdiction; (2) inconvenient forum (see § 410.30 [generally without prejudice]; (3) nonjusticiable controversy, and (4) plaintiff's failure to give security for costs [Citation.]

(*Lyons, supra,* at p. 915.)

Although the court has limited, inherent authority to dismiss actions, the *Lyons* court stated that such authority is to be narrowly construed in favor of the right to a trial on the merits. (*Lyons, supra,* at p. 916.)

There is one case, *Del Junco v. Hufnagel*, that upheld a trial court order striking the defendant's answer and entering default, which has been cited by some sources[2] as authority for terminating sanctions in the face of

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[2] See, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 9(III)-A, 9:1003.20.

extreme, obstructionist conduct by a defendant. (See, *Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 796.) However, it is not clear whether the *Del Junco* court relied on the inherent authority of a trial court to uphold the sanctions, since there was a discovery violation involved in the case, which provided a statutory basis for such sanctions.

In *Del Junco*, a motion for terminating sanctions was filed pursuant to Code of Civil Procedure sections 128 and 128.6, and former section 2023, on grounds that the defendant had "failed to respond to discovery, failed to abide by court orders and procedures, failed to pay sanctions, and violated the preliminary injunction." (*Del Junco, supra,* at p. 796.) The court in *Del Junco* recognized that the Civil Discovery Act provides express statutory authority for "trial courts to impose terminating sanctions and strike pleadings as a discovery sanction. [Citation.] Additionally, the statutes recognize that the courts have the inherent authority to dismiss an action. [Citations.]" (*Id.,* at p. 799, fn. omitted.]

The *Del Junco* decision does not indicate whether the judgment was affirmed based on the statutory authority of the Civil Discovery Act or the inherent authority of the court. Nevertheless, the *Del Junco* court made it clear that terminating sanctions should not be issued absent "extreme situations" when no lesser sanction would be effective:

> Trial courts should only exercise this authority in extreme situations, such as when the conduct was clear and deliberate, where no lesser alternatives would remedy the situation [Citation], the fault lies with the client and not the attorney [Citation], and when the court issues a directive that the party fails to obey. (E.g., former Code Civ. Proc., § 2023.)

(*Del Junco, supra,* at p. 800.)

If the court in this case had inherent authority to strike Calvin's response and enter his default for failure to serve disclosures, then the court could only exercise that power per *Del Junco* if (1) the failure to comply with clear and deliberate, (2) no lesser remedy would have been effective, (3) the fault lied with Calvin and not his attorney, and (4) the court had issued a directive to comply. None of those findings were made in this case, and there was no prior directive by the court to comply. Therefore, there is no authority under *Del Junco* for the terminating sanctions in this case.

E. Entry of Default is Not Permitted Without Form FL-165

When the law permits terminating sanctions, the Rules of Court provide: "No default may be entered in any proceeding unless a request has been completed on a Request to Enter Default (form FL-165) and filed by the petitioner." (Cal. Rules Ct., Rule 5.402, subd. (a), emphasis added.) It does not appear from the record that a Request to Enter Default (form FL-165) was filed in this case. Without the required form, entry of default was improper even if otherwise authorized by law.

IV.

CONCLUSION

Section 2107 does not authorize the striking of a response to a petition for dissolution and the entry of default for failure to comply with the disclosure requirements of the Family Code. There is no statutory authority or inherent authority for such terminating sanctions either. Section 2107 provides for less extreme and more appropriate remedies, like evidentiary sanctions and monetary sanctions.

The trial court acted in excess of its authority in imposing the terminating sanctions in this case.

Dated: March 3, 2015

Respectfully submitted,

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Christopher C. Melcher

CERTIFICATE AS TO LENGTH OF BRIEF

I certify, pursuant to rule 8.204, subdivision (c)(l), of the California Rules of Court, that the attached brief contains 4,480 words, as measured by the computer program used to prepare this brief.

Dated: March 3, 2015

Christopher C. Melcher