

No. B280101

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

EDUARDO E. RIVAS

Plaintiff and Appellant,

vs.

VERIZON COMMUNICATIONS ET AL.

Defendants and Respondents.

Appeal From The Los Angeles County Superior Court
Honorable Robert L. Hess
Los Angeles County Superior Court Case No. BC594595

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This case is a sad example of how a lawyer's behavior, combined with a trial court's failure to follow clearly established law, can deprive plaintiff of his day in court.

Plaintiff's counsel failed to appear at a case management conference. The court then ordered him to appear and show cause why this failure should not result in the action's dismissal or the imposition of monetary sanctions upon counsel. Plaintiff's counsel failed to appear at the show cause hearing, and the court, citing Government Code section 68608, subdivision (b) ("section 68608(b)"), dismissed the action due to counsel's conduct.

Dismissal was improper, and the judgment must be reversed, for three independent reasons. First, section 68608(b) does not override Code of Civil Procedure section 575.2, subdivision (b), which precludes dismissal sanctions for local rules violations if counsel is solely at fault. Second, section 68608(b) requires that even if a court has power to impose dismissal sanctions, it must first consider lesser sanctions, which the court did not do. Third, even if the court had the power to dismiss the action and had complied with section 68608(b)'s requirements, dismissal would have been too harsh a sanction.

STATEMENT OF THE CASE

A. Procedural Fact Summary.

1. Trial court proceedings.

Plaintiff's initial complaint for wrongful termination and other employment-related causes of action was filed on September 14, 2015. (Clerk's Transcript ["CT"] 3.) On October 8, 2015, the Superior Court set a Case Management Conference for February 8, 2016. (CT 32.)

On January 20, 2016, plaintiff filed a First Amended Complaint ["FAC"]. (CT 33.) On February 8, 2016, the matter was "called for hearing," but defendants' counsel failed to appear. (Motion to Augment the Record ["Motion to Augment"], Exh. 1, p. 9.) The Case Management Conference was continued to March 28, 2016. (*Ibid.*) Defendant answered the FAC. (CT 47.)

On March 29, 2016, the matter was again "called for hearing," but plaintiff's attorney did not appear "because a family member ha[d] been hospitalized." (Motion to Augment, Exh. 2, p. 11.) The Case Management Conference was continued to May 12, 2016. (*Ibid.*)

On May 12, 2016, the cause was "called for hearing," but the Case Management Conference was continued to June 28, 2016 because "[d]efense counsel recently substituted in." (Motion

to Augment, Exh. 3, p. 13.) Plaintiff's counsel was present (by telephone) and notice was waived. (*Ibid.*)

On June 28, 2016, plaintiff's counsel failed to appear for the case management conference. (Motion to Augment, Exh. 4, pp. 15-16.) The court ordered plaintiff's counsel to appear on July 27, 2016 and show cause why the action should not be dismissed or monetary sanctions imposed upon counsel for failure to appear at the June 28, 2016 Case Management Conference. (*Ibid.*) Notice of this hearing was served only on plaintiff's counsel. (*Id.* at Exh. 4, p. 17.)

On July 27, 2016, plaintiff's counsel did not appear at the show cause hearing, nor had he filed a written response to the order to show cause. (Motion to Augment, Exh. 5, pp. 19-20.) Because plaintiff's counsel failed to appear at the June 28, 2016 Case Management Conference and at the July 27, 2016 hearing, the court stated it would dismiss plaintiff's action "pursuant to Government Code §68608(b)." (*Id.* at p. 20.) Defendants filed a Notice of Order of Dismissal served only on plaintiff's counsel. (*Id.* at pp. 19, 21.) No dismissal order was entered at that time, however. (See CT 1-2, 65-66.)

2. Appellate court proceedings.

Plaintiff attempted to appeal, but on February 2, 2017, this Court sent plaintiff a notice stating that:

The Civil Case Information Statement for the above-entitled appeal filed on February 2, 2017 is deficient as you did not attach a copy of the final judgment or dismissal order. No appeal lies from a proceeding entitled, 'Notice of Court Ordered Dismissal.' The appealable order is from the dismissal order or judgment. [¶] You must provide the court with a conformed copy of the final judgment or dismissal order within 15 days from the date of this notice.

(CT 66.)

Pursuant to plaintiff's request, the time to secure the dismissal order was subsequently extended to May 12, 2017. (CT 69.) Plaintiff submitted a proposed order of dismissal to the trial court on or about May 1, 2017. (CT 63.) The court declined to sign the order because a Notice of Entry of Dismissal had previously been served by defendants and because plaintiff was still "formally represented by counsel (no substitution of attorney) in this court." (CT 65.)

On or before May 12, 2017, plaintiff notified this Court that the trial court would not sign the proposed order. (CT 69.) This Court granted plaintiff several extensions of time to obtain a dismissal order from the trial court. (CT 69; Request for Judicial Notice, Exh. 1, p. 11.) On July 24, 2017, plaintiff sent the trial court a request to enter an order of dismissal, and concurrently submitted a Notice of Substitution of Attorney. (CT 63.)

On August 22, 2017, the trial court signed an order stating in relevant part that “[f]or Plaintiff’s counsel’s unexcused failure to appear at the case management conference and at the hearing on the order to show cause, IT IS HEREBY ORDERED that plaintiff’s action is dismissed. per [sic] Govt. Code §68608(b).” (CT 72.) On September 15, 2017, this Court filed an Order stating that it had received the trial court’s dismissal order and was therefore relieving plaintiff from default. (Request for Judicial Notice, Exh. 1, pp. 11-12.)

B. Appealability.

This Court recognized that no appealable order had been entered at the time plaintiff first attempted to appeal. (CT 66.) Once the trial court entered an appealable order, this Court permitted the appeal to go forward. (Request for Judicial Notice,

Exh. 1, pp. 11-12.) The Court acted properly. (*Estate of Dito* (2011) 198 Cal.App.4th 791,800 [“No purpose would be served by dismissing the appeal and requiring appellants to file a new appeal after securing a judgment of dismissal in the trial court.”].)

C. Substantive Facts.

Jamaul D. Cannon, State Bar No. 229047, represented plaintiff in the trial court from the action’s inception through at least May 3, 2017, long after the trial court announced its intention to dismiss the action. (CT 1-3, 65.) The initial complaint in this action was filed on September 14, 2015. (CT 3.) On February 7, 2016, a Notice of Disciplinary Charges against Cannon was filed by the State Bar. (Request for Judicial Notice, Exh. 2, pp. 14, 16.) A trial, at which Cannon represented himself, was held on those charges on June 24 and 28-29, and July 1, 2016. (Request for Judicial Notice, Exh. 2, p. 15.) On December 20, 2016, the California Supreme Court ordered Cannon disbarred effective January 19, 2017. (*Ibid.*)

D. Standard Of Review.

An order imposing sanctions is reviewed for abuse of

discretion. (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167.)
“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.’”
(*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.)

“The scope of discretion always resides in the particular law being applied, i.e., in the legal principles governing the subject of the action.... Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion.” (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 737.) (“*Jacobs.*”) (Internal brackets and quotation marks omitted.)

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING PLAINTIFF’S ACTION PURSUANT TO SECTION 68608(b).

A. The Court Lacked Power to Dismiss For A Violation of Local Rules That Was Solely Counsel’s Fault.

The trial court dismissed plaintiff’s action pursuant to section 68608(b). (CT 72.) That statute grants judges “all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case.” (Gov. Code, § 68608(b).)

Because section 68608(b) “gives trial courts only those sanctioning powers ‘authorized by law,’” the legislature did not intend “to establish an independent sanctioning power.” (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.) (“*Garcia.*”) In consequence, section 68608(b) cannot legitimize a dismissal that would otherwise be prohibited. (*Id.* at pp. 481-482.)

Plaintiff’s action was dismissed “[f]or Plaintiff’s counsel’s unexcused failure to appear at the case management conference

and at the hearing on the order to show cause” (CT 72.)

At all times relevant to this case, the Los Angeles County Superior Court Rules have provided that “[t]he court may impose appropriate sanctions for the failure or refusal to comply with the rules in this chapter, including the time standards and/or deadlines, and any court order made pursuant to the rules.” (Superior Ct. L.A. County, Local Rules, rule 3.10.)

Such sanctions can include dismissal for failure to comply with local rules. (Code Civ. Proc., § 575.2, subd. (a).) However, an action cannot be dismissed for failure to comply with local rules “if a failure to comply with these rules is the responsibility of counsel and not of the party. . . .” (Code Civ. Proc., § 575.2, subd. (b).) *Garcia* held that section 68608(b) did not override Code of Civil Procedure section 575.2, subdivision (b), so the former statute did not give trial courts the power to dismiss an action for noncompliance with local court rules if only counsel was to blame. (*Garcia, supra*, 16 Cal.4th at pp. 481-482.)

Garcia is factually on point and controlling. In *Garcia*, counsel failed to comply with several local trial court rules, including one that required him to appear at a status hearing. (*Garcia, supra*, 16 Cal.4th at p. 472.) The court issued a notice of motion to dismiss the action, and the case was eventually

dismissed after plaintiff's counsel failed to appear at the hearing on the motion to dismiss. (*Id.* at pp. 472-473.) In denying a motion to reconsider the dismissal, the court cited plaintiff's counsel's "cavalier attitude of when you appear in court and when you do not appear in court.'" (*Id.* at p. 474.)

Like the *Garcia* attorney, plaintiff's counsel's "unexcused failure[s]" (CT 72) to appear violated court orders. But, also as in *Garcia*, the fault was strictly counsel's; only counsel was given notice of the two relevant hearings and the court's intention to dismiss the case. (Motion to Augment, Exh. 3, p. 13; Exh. 4, pp. 15, 17; Exh. 5, pp. 19, 21.) Moreover, it was counsel's responsibility to appear at these hearings, and the record is devoid of any indication that plaintiff was in any way responsible for counsel's failure to appear.

Therefore, *Garcia* renders the dismissal an abuse of discretion as an action that "transgresses the confines of the applicable principles of law." (*Jacobs, supra*, 156 Cal.App.4th at p. 737; see also *Drum v. Superior Court* (2006) 139 Cal.App.4th 845, 853 [citing *Garcia* in holding that dismissal under section 68608(b) would have been an impermissible sanction when an attorney repeatedly failed to appear in court].)

B. Even If The Court Had The Power To Dismiss Plaintiff's Action Pursuant to Section 68608(b), The Court Failed To Comply With That Statute.

Section 68608(b) permits dismissal “if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case.” This requirement is independent of the limitation on dismissal when only counsel is at fault. (*Tliche v. Van Quathem* (1998) 66 Cal.App.4th 1054, 1061-1062 [(1) dismissal is inappropriate if the noncompliance was the responsibility of counsel alone, rather than the party [citations]; and (2) dismissal is appropriate only if less severe sanctions would be ineffective (Gov. Code, § 68608, subd. (b)).”].)

The Notice of Order of Dismissal stated that plaintiff's action would be dismissed pursuant to section 68608(b) “[f]or Plaintiff's counsel's failure to appear at the Case Management Conference held on June 28, 2016, and his failure to appear on July 27, 2016” (Motion to Augment, Exh. 5, pp. 19-20.) The Dismissal Order stated that “[f]or Plaintiff's counsel's unexcused failure to appear at the case management conference and at the hearing on the order to show cause, IT IS HEREBY ORDERED that plaintiff's action is dismissed. per [sic] Govt. Code

§68608(b).” (CT 72.)

Neither the Notice of Order of Dismissal nor the dismissal order provides any indication that the trial court considered whether less severe sanctions would be effective. (Motion to Augment, Exh. 5, pp. 19-21; CT 72) Because these documents contained no mention that the court had considered lesser sanctions, the only reasonable inference is that it failed to consider such sanctions. (*People v. McLernon* (2009) 174 Cal.App.4th 569, 575 [when a minute order dismissed a motion on the ground that it had been previously submitted, it was “clear that the trial court did not consider the merits of [the] motion.”].) Therefore, the court failed to comply with section 68608(b), and would have abused its discretion even if it had the power to dismiss plaintiff’s action pursuant to that statute.

C. Even If The Court Had The Power To Dismiss The Case And Had Complied With Section 68608(b), Dismissal Would Have Been Improper.

If the court had considered whether to impose lesser sanctions, it would have been clear to any reasonable judge that imposing terminating sanctions would have been grossly unjustified.

Defendants' counsel failed to appear at two case management conferences, and no reason was given for one of these absences. (Motion to Augment, Exh. 1, p. 9; Exh. 3, p. 13.) Yet the court imposed no sanctions whatsoever on defendants. Plaintiff's counsel also missed two case management conferences, one because a family member had been hospitalized. (Motion to Augment, Exh. 2, p. 11; Exh. 4, pp. 15-16.) The only difference between the behavior of plaintiff's counsel and that of defendants is that plaintiffs' counsel missed one more court appearance: the hearing on the order to show cause.

Given the conduct of both parties, the lack of prior sanctions, and the preference for resolving cases on the merits, no reasonable judge who had considered the range of sanctions available would have imposed terminating sanctions. (See generally *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 503 ["To remove a case from the trial track without exhausting every reasonable means to achieve compliance with the court's standards would favor efficiency above the pursuit of justice."].)

The wisdom of exploring lesser sanctions and applying terminating sanctions sparingly is illustrated by the substantive facts in this case. Plaintiff's attorney Jamaul D. Cannon faced state bar court charges during the latter stages of this action. He

was defending himself in the state bar court on June 28, 2016, the day on which his failure to appear for the case management conference resulted in the order to show cause. (Motion to Augment, Exh. 4, pp. 15-16; Request for Judicial Notice, Exh. 2, p. 15.) Cannon was eventually disbarred. (*Ibid.*)

The trial court presumably did not know about Cannon's disciplinary proceedings, although the court might have obtained this information in the course of considering lesser sanctions. However, plaintiff is not contending that the court erred by failing to obtain this information; plaintiff is simply pointing out that use of the nuclear option of terminating sanctions can result in terrible unfairness. The legislature was undoubtedly aware of this fact when it precluded dismissal if the failure to comply with local rules was due solely to counsel, and when it required that courts consider the efficacy of lesser sanctions before dismissing cases pursuant to section 68608(b). Because the trial court ignored the California Legislature's express commands as well as the *Garcia* holding, and because dismissal would not have been justified even if the court had the power to dismiss the case and had followed the proper procedures, the judgment cannot stand.

CONCLUSION

For the above-stated reasons, the judgment should be reversed and the case remanded for trial.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the attached Appellant's Reply Brief contains 2,7__ words excluding the materials specified in Rule 8.204(c)(3).

DATED: June 1, 2018

LAW OFFICE OF BARRY M. WOLF

By: _____
Barry M. Wolf

Attorney for Eduardo E. Rivas

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my address is 11150 Olympic Boulevard, Suite 1050, Los Angeles, California 90064.

On June 1, 2018, I served the foregoing document described as **RESPONDENT'S BRIEF** on the Superior Court in this action by placing a true copy thereof in a sealed envelope addressed as stated below:

Hon. Robert L. Hess
Los Angeles County Superior Court
Department 24
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012

BY MAIL: On June 1, 2018, I deposited this envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **June 1, 2018** at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Barry M. Wolf