

Think Before You Object – The Appellate Court Affirms a Sanctions Award

By

Svetlana (Lana) U. Sheshina, Esq.
Schwartz Semerdjian Haile Ballard & Cauley, LLP

In a recent case of *Michael H. Clement et.al. v. Frank C. Alegre (Clement)* (2009) 177 Cal.App.4th 1277. 99 Cal.Rptr.3d 791, the First Appellate District affirmed trial court's decision to grant defendant's motions to compel and an award of \$6,632.50 in sanctions.

In *Clement*, a case arising out of a dispute over a sale of real property, defendant served two identical sets of 23 special interrogatories on both plaintiffs (individual and corporation). Plaintiffs answered three interrogatories and objected to rest.

The discovery referee described the objections as of two types: "vague and ambiguous" to interrogatory requesting description of "all economic damages you claim to have sustained..." and "violates section 2030.060 subdivision (d) because it is not full and complete in itself, requiring, ... reference to the answer to an earlier question as reference to 'other materials' in order to answer question, citing *Catanese v. Superior Court (Catanese)* (1996) 46 Cal.App.4th 1159, 1164" to the interrogatory requesting to "state the amount of such damages as identified in interrogatory No. 1." *Clement, Supra*, 99 Cal.Rptr.3d at 795-796.

Plaintiffs claimed that they are entitled to additional 30 days to respond to interrogatory No. 2 since it referred to the answer to the interrogatory No. 1.

The parties engaged in series of meet and confer letters. Defendant's counsel argued that term economic damages described by Civil Code section 1431.2, quoted by Plaintiff is precisely the information Defendant was seeking. Stating also that *Catanese, Supra*, 46 Cal.App.4th 1159, did not apply, because the interrogatory No.2 was full and complete in and of itself and merely asked for the amount of damages Plaintiff was claiming. Defendant made similar arguments for each of the interrogatories challenged on this basis.

Plaintiff's counsel responded, suggesting the replacement discovery eliminating concerns stated to be served on plaintiffs.

Defendant's counsel responded reiterating that the interrogatories were full and complete in and of themselves and the term "economic damages" was clear. He further notified Plaintiffs' counsel of his intent to file a motion to compel and request sanctions. Plaintiff's counsel reiterated his demand for replacement discovery. *Clement, Supra*, 99 Cal.Rptr.3d at 795-796.

Defendant filed motion to compel seeking sanctions against Plaintiff corporation and Plaintiff's attorney. The matter was heard by the discovery referee, who found that Plaintiffs "deliberately misconstrued the question" insofar as they contended the phrase 'economic damages' was too vague" and also found that Plaintiffs' claim that "an interrogatory that referenced a prior interrogatory was not full and complete in and of itself" was inappropriate and frivolous. The referee further determined that the parties were at the impasse with their meet and

confer attempts, accordingly recommending that the court order Plaintiffs to provide further answers without any of the objections and impose the following sanctions: reimburse defendants \$4,950 for legal fees, \$40 for filing motions to compel and \$1,642.50 for defendant's one-half of the referee fee for time spent exclusively on the motion. The court adopted the referee's order. *Clement, Supra*, 99 Cal.Rptr.3d at 797.

The Appellate Court reviewed the following issues: (1) monetary sanctions and standard of review; (2) vagueness objection to "economic damages" term; (3) objection that question was not "full and complete in and of itself"; and (4) meet and confer process.

1. Monetary Sanctions and Standard of Review.

Citing CCP section 2023.030 (a) the Court stated that the trial court is authorized and shall impose monetary sanctions for misuse of the discovery process unless it finds there is a substantial justification or other circumstances make the imposition of the sanction unjust. *Clement, Supra*, 99 Cal.Rptr.3d at 797. Citing *In re Marriage of Michaely* (2007) 150 Cal.App.4th 802, 809, the Court stated that providing evasive discovery responses constitutes misuse of the discovery process. *Id.*

The Appellate Court reviews trial court's imposition of sanctions for abuse of discretion and will reverse only if the decision was arbitrary, capricious or whimsical. However, the Court construes de novo the applicable discovery statutes in reviewing a sanction order. *Clement, Supra*, 99 Cal.Rptr.3d at 797-798. (Internal citations omitted.) The burden is on the appellant to demonstrate an error. *Id.*

2. Vagueness Objection to "Economic Damages" Term.

The Court held that Plaintiffs' contention that "economic damages" was ambiguous was preposterous in the present circumstances. The Court noted that Plaintiffs *themselves* quoted the statute defining the term and after the defense counsel confirmed that discovery requests used the statutory definition of the term, Plaintiffs continued to object and deliberately provided an answer using a definition narrower than that provided by statute. *Id.* (Original Italics.) The Court stated that it was "clearly" a "game-playing" which supports the referee's findings and the sanctions award. *Clement, Supra*, 99 Cal.Rptr.3d at 798.

The Court further stated that the intent to willfully misuse the process of discovery is not required for imposition of sanctions. "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." *Id.* (Citing *Kohan v. Cohan* (1991) 229 Cal.App.3d 967, 971.)

3. Objection That Question Was Not "Full and Complete in and of Itself."

The court stated that the rule of CCP§2030.060 (d) and (f) is designed to prevent evasion of the statutory limit on the number of the specially prepared interrogatories that a party may

propound. The rule is also violated where the respondent must necessarily resort to other materials in order to answer the interrogatory. This, the Court followed, does not include referring a prior interrogatory. The drafters of Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) paragraph 8:979, state that questions regarding the same subject should be allowed although they include an “and” or “or”. *Clement, Supra*, 99 Cal.Rptr.3d at 802.

The “central precept to the Civil Discovery Act of 1986 ... that civil discovery be essentially self-executing.” *Id.* (Internal citations are omitted.) This means that the discovery process should operate without judicial involvement. *Id.* The Court followed that there are some genuine discovery disputes where the court must decide one way or the other, in which case the losing party is substantially justified in carrying the matter to the court. “*But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists.*” *Id.* (Original Italics.) The Court further stated that imposition of expenses is “virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery [the] *expenses should ordinary be imposed* unless a court finds that the losing party acted justifiably in carrying his point to court.” *Id.* at 802-803. (Referencing 2 Hogan & Webber, Cal. Civil Discovery, *Supra*, Appendix D, Reporter’s Notes at pp. AppD-19 to AppD-21.) (Internal citations omitted)

The Court stated that it had “no difficulty in affirming the trial court’s determination that in this case plaintiffs forced to court a dispute that was not ‘genuine’” and “the record here strongly indicates that the purpose of plaintiffs’ objections was to delay discovery, to require defendants to incur potentially significant costs in redrafting interrogatories that were clear and that did not exceed numerical limits, and to generally obstruct the self-executing process of discovery.” *Id.* at 803.

4. Meet and Confer Process.

Evaluating the meet and confer process in this matter the Court stated “[a]lthough some effort is required in all instances, (No exception based on speculation that prospects for informal resolution may be bleak), the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court’s discretion and judgment, with due regard for all relevant circumstances.” *Id.* at 804. (Citing *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 432-433, and *Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1438).

Based on the record of correspondence between parties the Court found there was adequate support for the finding that the parties were at the impasse. The Court noted that the fact that defense counsel never compromised his position that the interrogatories were proper does not constitute failure to meet and confer since he continued to state that the term economic damages was used as defined by statute.

While affirming the trial court’s decision and awarding defendant its costs on appeal, the Court continued to say that the “resort to courts could easily have been avoided here had *both* parties actually taken to heart Justice Stone’s admonitions in *Townsend* that ‘the statute requires

that there be a serious effort at negotiation and informal resolution” and that “a reasonable and good faith attempt at informal resolution entails something more than bickering with [opposing] counsel Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate.” *Id.* at 804-805. (Citing *Townsend, Supra*, 61 Cal.App.4th 1438-1439.) (Original Italics.)