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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE ARPEN GROUP, INC., et al., Plaintiffs and Appellants, v. INDUSTRIAL PARK ASSOCIATES, INC., et al., Defendants and Respondents.	B206651 (Los Angeles County Super. Ct. No. PC040329)

APPEAL from a judgment of the Superior Court of Los Angeles County. Holly E. Kendig, Judge. Affirmed.

Stanley H. Kimmel for Plaintiffs and Appellants.

Thomas N. Cano for Defendants and Respondents.

The sole issue in this appeal is whether the trial court erred in imposing a discovery sanction in the amount of $8,500, jointly and severally, on appellants The Arpen Group, Inc., and Lawrence D. Lansing (hereinafter collectively referred to as Arpen) and on Arpen's legal counsel, Stanley H. Kimmel and the Law Offices of Stanley H. Kimmel. We find no abuse of the trial court's broad discretion and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Arpen, which provides professional civil engineering services, sued respondents Industrial Park Associates, Inc., and Douglas Wax (hereinafter collectively referred to as IPA) and others for interference with contract, interference with prospective business advantage, slander, and related causes of action. The lawsuit grew out of civil engineering tasks associated with the development of adjacent industrial properties, and a lot line adjustment and the changing legal description of the properties.

On September 27, 2007, IPA served a request for admissions of fact. IPA incorporated or referenced legal descriptions of the lot line adjustment and sought various admissions regarding Arpen's engineering work and the physical conditions on the lots. In response to an October 26, 2007, letter by Arpen's counsel, IPA's counsel granted Arpen's request for an extension until November 16 (a Friday) to respond to the request for admissions. However, the envelope containing Arpen's response was postmarked November 19 (a Monday), and received the next day on November 20.

In early January of 2008, opposing counsel communicated with each other regarding the timing for Arpen's filing an amended complaint and deficiencies in Arpen's responses to IPA's request for admissions. In a 12-page letter dated January 11, 2008, counsel for IPA complained to opposing counsel about the untimeliness of the service of the responses and itemized numerous specific problems with Arpen's response to the requests for admission. For example, counsel pointed out that the parties had previously spent much time discussing the usage of terms identifying and defining the two adjacent lots and adjacent projects in question, that those items had been defined in the requests for admission to correlate to their meaning as used in the first amended complaint and in incorporated written agreements. Thus, counsel for IPA itemized in his letter the many

answers he deemed unresponsive and evasive or vague, and complained that Arpen could not legitimately claim a lack of information or belief as to its own actions, communications, and documents.

Thereafter, on February 7, 2008, IPA moved to compel further answers by Arpen. IPA also filed a request for admission of facts to which further responses were requested, which detailed IPA's numerous specific requests, Arpen's answers to the requests, and IPA's argument in support of a further response to each request. On February 20, 2008, Arpen filed its opposition to the motion to compel further responses to IPA's requests for admission of facts. Arpen asserted that there was no justification for compelling further responses, that Arpen's denials were in response to requests for admission that contained erroneous legal descriptions, and that its denials that included facts requiring determination at trial were appropriate. Arpen also urged that IPA had not met and conferred before filing its motion, and that Arpen's responses were timely served and if untimely, that it should be forgiven for its mistake, inadvertence or excusable neglect because it made "reasonable efforts" to timely deliver its responses.

On February 25, 2008, IPA filed its reply to the opposition. IPA asserted that Arpen's responses to the discovery requests (like its opposition to IPA's motion) were served late, that IPA had made every reasonable effort to resolve the issues between the parties, and that Arpen had responded with evasive statements and inappropriate objections.

At the March 3, 2008, hearing on IPA's motion to compel further responses to its requests for admission, the court stated in pertinent part that it had reviewed the parties' representation of Arpen's filed responses,[1] and that Arpen's responses were untimely resulting in its waiver of any objections to the subject of the requests for admission. The court also noted that counsel "admitted in a declaration [that] these were untimely" and did not move for relief from the resulting waiver of any objection to the requests for admission. (See Code Civ. Proc., § 2033.280, subd. (a).)[2]

Arpen argued that many of the questions posed by IPA incorporated essentially the legal description of the property on the day the contract was created, but that the legal description had changed before the contract was performed. Hence, Arpen urged that many of the questions that dealt with what had occurred focused on property that was no longer properly described as it was described in the questions. Arpen's counsel thus deemed the questions "not understandable . . . . so we deny them." According to Arpen's counsel, the questions made "no sense" because it was based on a past legal description, so he answered with denials.

However, the court remarked that some of Arpen's objections based on vagueness and irrelevance were "a little bit disingenuous" because IPA's descriptions were based on Arpen's "own descriptions of the property, the contract terms, and so forth." The court acknowledged that it could not order a responding party to admit a request for admissions, because "if you have a clear denial, then you got a denial." However, the

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[1] The trial court noted that "I was a little disappointed that neither party had provided a copy of the actual responses." Similarly, this Court finds the record on appeal lacking in the same respect. However, in view of the undisputed description and apparent copying of salient portions of the actual responses in the pleadings before the trial court and in the record on appeal, we generously opt not to deem the appellate record inadequate. We thus do not reject Arpen's contentions on that basis. (Compare *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003 & fn. 2.)

[2] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

court emphasized that here the responding party "chose to say they couldn't admit or deny, so they were going to deny. I've never really seen that kind of a response to a request for admission before, because if you don't have enough information to admit or deny, there's a different type of response. But they went through, nonetheless, and denied."

The court initially considered imposing sanctions in the amount of $12,500, which was less than the $17,752.50 amount IPA requested and documented as attorney fees and costs. The court then considered sanctions in the lesser amount of $7,500, but ultimately imposed sanctions in the amount of $8,500, as reasonable costs and attorney fees incurred. This amount was ordered payable jointly and severally by Arpen and its counsel to counsel for IPA. The court also found untimely Arpen's objections to the request for admissions, and it thus deemed Arpen's objections waived and struck them.

DISCUSSION

I. The standard of review.

The propriety of a discovery sanction award is ordinarily reviewed using the abuse of discretion standard. (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 388-389; *Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 114.) Discovery sanctions are "'subject to reversal only for arbitrary, capricious, or whimsical action.'" (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 9-10; see *Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1601.)

However, a trial court's discretion in granting discovery sanctions will be upheld only if it is supported by substantial evidence. (*Rangel v. Graybar Electric Co.* (1977) 70 Cal.App.3d 943, 947-948 [trial court abused its discretion based upon lack of substantial evidence in imposing evidence sanction]; see also *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430 [whether informal resolution efforts were reasonable and in good faith].) "A reviewing court must therefore first determine whether substantial evidence supports the factual basis on which the trial court acted, and then determine whether the orders made by the trial court were an abuse of discretion in light of those facts." (*Ibid.*)

II. <u>The trial court did not abuse its broad discretion in imposing the monetary sanction.</u>

A. Arpen's objection to the discovery was untimely, and it thus waived any objection to IPA's request for admissions.

Section 2033.280 provides, in pertinent part, as follows: "If a party to whom requests for admission are directed fails to serve a timely response, the following rules apply: (a) The party to whom the requests for admission are directed waives any objection to the requests . . . ." In Arpen's opposition to the motion to compel, it acknowledged that IPA "bases its motion on [Arpen's] untimely response" and claimed that it had made "reasonable efforts" to timely serve a response or, alternatively, that it should be granted "relief from any waiver of the right to object" because of mistake, inadvertence, or excusable neglect, as permitted in section 2033.280, subdivision (a).

It is uncontested that Arpen's response to the request for admissions was due November 16, 2007 (a Friday), and that the envelope containing the response was postmarked November 19 (a Monday), and received the next day on November 20. Arpen's opposition to the motion to compel indicated in a supporting declaration that the response to IPA's request for admissions had been delivered in packages to the post office on November 16. However, as asserted by Arpen: "On 11/19/07, the US Postal Service determined that the service packages were overweight, and required that the service packages be delivered to a desk clerk personally. This was done, and a supervisor cancelled the postage by 'round stamp' dated 11/16/07, and added a postage meter label for $0.00, metered 11/19/07, so the package would reflect desk processing, and would not again be returned as overweight."

Section 2033.280, subdivision (a), provides that although a party to whom the requests for admission are directed "waives any objection to the requests" when it "fails to serve a timely response," the trial court "*may* relieve that party from this waiver" (italics added) if (1) there is substantial compliance with other requirements for proper responses (see §§ 2033.210, 2033.220, 2033.230), and (2) the party's failure to timely respond was the result of mistake, inadvertence, or excusable neglect. The key is that the

trial court is not *required* to relieve the party of the waiver of its objection to the requests—it "may" do so, but is not required to do so, even if the two prerequisites for relief from waiver are satisfied.

In the present case, on November 16, Arpen's package was not properly delivered to the post office for mailing; not until November 19—when proper postage was added—was the package ready for mailing by the post office. Although service is generally complete when deposited in a post office, to constitute completed service the package must be deposited "with postage paid." (§ 1013, subd. (a).) Here, all the postage was not paid. Thus, it was untimely.

We find that Arpen has failed to carry it burden of establishing why the court abused its discretion (see *Weinkauf v. Superior Court* (1966) 64 Cal.2d 662, 665) in declining to relieve Arpen of its waiver resulting from its untimely service. Arpen does not explain, for example, why the court acted in any arbitrary, capricious, or irrational manner. Nor does Arpen allege that the court had some preconceived policy that precluded its individual exercise of discretion, or that the court was ignorant of some essential fact or law. (See, e.g., *Estate of Gilkison* (1988) 65 Cal.App.4th 1443, 1448-1449; *Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 338-339.) The trial court's decision was not "so irrational or arbitrary that no reasonable person could agree with it" (*People v. Carmony* (2004) 33 Cal.4th 367, 377), nor did it "exceed[] the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)

Accordingly, the trial court did not err in finding Arpen's objections to the request for admissions untimely, and in consequently deeming Arpen's objections waived and then striking them. With its objections waived, Arpen was obviously unsuccessful in opposing the motion to compel. Pursuant to section 2033.290, subdivision (d), "the court *shall impose a monetary sanction* . . . against any party, person, or attorney who *unsuccessfully makes or opposes a motion to compel further response*, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Italics added.) As discussed

below, no substantial justification existed, thus requiring a monetary sanction against Arpen.

B. Arpen did not act with substantial justification because, as the trial court found, the bulk of its objections were "disingenuous."

As to the bulk of its answers, Arpen failed to adhere to the basic statutory requirements of responses to a request for admissions.[3] As aptly characterized by IPA, Arpen made the following objections: "irrelevant" to approximately 118 requests for admission; "burdensome" to 84 requests for admission; "seeks information available" to IPA to five requests for admission; "legal conclusion" to five requests for admission; "lacks sufficient information and belief" to approximately 110 requests for admission with no statement that Arpen made any inquiry to obtain information, even as to matters relating to its own actions, communications and documents (including many documents it had earlier served on IPA in requests to admit genuineness); "vague" as to the names of the two adjacent projects involved in the dispute, though the properties are identified with street addresses exactly as alleged in the first and second amended complaints; "vague" as to the legal descriptions of the two lots relating to the two projects, though the definition section of the request for admissions defines the lots identically to the descriptions used in Arpen's agreements with other involved entities; and "vague and ambiguous" as to the term "civil engineering plans" (though the term had been used by appellant Lansing).

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[3] Section 2033.220 provides as follows: "(a) Each answer in a response to requests for admission shall be as complete and straightforward as the information reasonably available to the responding party permits. [¶] (b) Each answer shall: [¶] (1) Admit so much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party. [¶] (2) Deny so much of the matter involved in the request as is untrue. [¶] (3) Specify so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge. [¶] (c) If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter."

It is thus apparent that many of Arpen's objections were directed to words and terms in the request for admissions that IPA had expressly defined to mean the same as Arpen meant when it used those terms in its complaints and in its contracts. Arpen even objected in part as "irrelevant" and "lacks sufficient information and belief" to 16 requests for admission concerning documents that were in its own requests for admission of genuineness previously served on IPA. Many of Arpen's objections were inapplicable to requests for admission. For example, many of its responses—like "burdensome," "seeks information available," "equally available," and "public knowledge"—did not constitute "information" that was "complete and straightforward." (§ 2033.220, subd. (a).) In an apparent understatement, the trial court properly determined "that some of these objections are a little bit disingenuous as they relate to the responding party's own descriptions of the property, the contract terms, and so forth, as being vague and irrelevant."

Arpen claims that its responses to the request for admissions were proper because a court cannot force a litigant to admit any particular fact it has denied where the responding party has "clearly denied the requests." (*Holguin v. Superior Court* (1972) 22 Cal.App.3d 812, 820.) However, many of Arpen's denials were not "clear." The trial court aptly acknowledged that it could not order a responding party to admit a request for admission where there is a clear denial, but it emphasized that Arpen in many instances chose to respond by indicating "they couldn't admit or deny, so they were going to deny." That simply does not constitute a clear and straightforward denial. *Holguin* and other similar cases are thus inapplicable.

C. Arpen's failure to meet and confer required the imposition of sanctions.

Section 2023.020 requires that the trial court "*shall impose* a monetary sanction" (italics added) on any party or attorney who fails to confer as required. IPA's motion to compel further answers and its counsel's declaration and supporting documents detail the telephone calls and letters between counsel from December 17, 2007, through January 11, 2008, trying to resolve the issues created by Arpen's many objections. Counsel for Arpen did not communicate in any way to meet and confer after he received

the 12-page letter of January 11, 2008, or after IPA filed its motion to compel further answers on February 7, 2008.

Accordingly, Arpen's failure to confer after the time frame noted above is a separate and independent factor requiring imposition of sanctions. (§§ 2023.010, subd. (i), 2023.020.)

(D.) Other issues.

Arpen argues for the first time on appeal that because the trial court did not also compel further responses to the request for admissions, it could not impose sanctions, even though the court struck Arpen's objections as untimely and thus deemed them waived. However, Arpen failed to raise below the belated assertion that striking the objections was not within the scope or purview of IPA's motion to compel. Apart from whether Arpen's complaint is waived for failure to object in the trial court (see *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422), the court's ruling reflected a proper exercise of its inherent and broad powers to control the litigation before it. (See *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1321.) Also, although the court stated "no further responses necessary," Arpen could have sought to file further responses if it truly wanted to do so.

Moreover, contrary to Arpen's assertion, the purpose of the discovery sanction imposed related to a statutory basis for imposing the sanction. According to Arpen, the court's only purpose in imposing the sanctions was to enable IPA to follow up with an appropriate interrogatory form (Form Interrogatory 17.1) after the court struck the objections. Although the court stated that the moving party could follow up with an appropriate interrogatory form to obtain facts that support its denials, the court did not state that was its purpose. The bottom line is that Arpen engaged in conduct for which sanctions are mandated by statute (see §§ 2023.010, 2023.02, 2033.290, subd. (d)), and we reasonably infer from the record that the court intended to impose mandatory sanctions to deter or compensate for Arpen's misconduct. Nor is there any basis for characterizing as punishment such legislatively mandated sanctions.

Equally without merit is Arpen's assertion that the trial court arbitrarily increased the amount of sanctions. The amount of sanctions requested by opposing counsel was $17,752.50, and that figure was supported by its itemization of fees. Initially, when the court indicated to counsel its tentative thinking, it remarked, "And I am inclined to give sanctions in the amount of $7,500." Later, the trial court stated, ". . . I want to tell you that I came in here this morning thinking I was going to give him $12,500. So you might talk me up. Be careful." After that comment, the court stated, "I'm going to strike the objections. And sanctions in the amount of $7,500. I'd be tempted with very much more conversation to go–based on all of this, I'm going to give sanctions of $8,500. I'm not going up to where I was before, although I think that number could also be justified." Accordingly, when viewed in its proper context, the record reveals that the $7,500 figure was merely the trial court's initial thinking near the outset of the proceeding, and that the court did not arbitrarily increase the amount of sanctions.

Nor is there any merit to Arpen's related claim that sanctions cannot be imposed against counsel absent a finding that counsel was "advising" (§ 2023.030, subd. (a)) abusive discovery conduct. (See *Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 261.) Advising misconduct (such as advising a client not to appear for a deposition) is only one of several independent grounds that can support imposition of sanctions on counsel. "One engaging in misuse of the discovery process" (§ 2023.030, subd. (a)), including counsel directly engaging in such misuse, as in the present case, can also warrant imposition of sanctions. Misuses of the discovery process applicable here include making without substantial justification an unmeritorious objection to discovery, making an evasive response to discovery, opposing unsuccessfully and without justification a motion to compel, and failing to confer with opposing counsel in a reasonable and good faith attempt to resolve informally the dispute. (§§ 2023.010,

2023.020)[4] Thus, no finding was required that counsel *advised* abusive discovery conduct because that was not the basis for imposition of the sanction.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.

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[4] Finally, in a two-sentence request at the end of IPA's opening brief, it requests that we impose on Arpen "damages as may be just" (§ 907) in addition to the costs on appeal because Arpen's appeal was "frivolous or taken solely for delay." (§ 907) However, IPA has not filed the necessary motion and supporting declaration (Cal. Rules of Court, rule 8.276), and we thus deny its informal request.