Filed 11/14/03 Forte v. Crabb CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

EUGENE FORTE, Plaintiff and Appellant, v. STEPHANIE CRABB et al., Defendants and Respondents.	H024270 (Monterey County Super. Ct. No. M50814)

INTRODUCTION

The claim filed by plaintiff and appellant, Eugene Forte, against Stephanie Crabb and Alain Pinel Realtors (Pinel) ended in terminating sanctions because plaintiff failed to produce discovery. In fact, plaintiff engaged in an extended, purposeful scheme to conceal and lie about evidence he had illegally obtained in order to benefit his case and put the defendants at a disadvantage at trial. He appeals the trial court's imposition of terminating sanctions on the grounds that the discovery statutes require the party to have disobeyed an order to compel before terminating sanctions are properly applied and that terminating sanctions were out of scale with his abuses of discovery. He also claims that defense counsel and the trial court committed various forms of misconduct.

While terminating sanctions ordinarily may only be imposed after one has violated a motion to compel production of evidence, plaintiff's purposeful concealment of the existence of key evidence set his method of abuse of discovery outside the ordinary

procedures. A party aggrieved by another's lies that particular evidence does not exist need not obtain a motion to compel production of that evidence prior to obtaining terminating sanctions when it is revealed that the evidence was actually purposefully concealed. Terminating sanctions were appropriate in this case. Plaintiff has failed to establish that defense counsel or the trial court committed misconduct or that any such misconduct impacted the outcome of his case. We will thus affirm the judgment.

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff filed suit against respondents/defendants Ms. Crabb and Pinel, as well as William and Collien Powell (not parties to this appeal) on October 2, 2000, for breach of fiduciary duty during the defendants' representation of plaintiff in his attempt to purchase real property from Mr. and Mrs. Powell.[1] Plaintiff claimed the defendants violated this duty when they failed to follow his specific instructions regarding communications relating to this purchase and failed to convey to plaintiff information received by Ms. Crabb from Mr. and Mrs. Powell regarding the subject property. Specifically, plaintiff alleged Ms. Crabb responded to Mr. Powell's question whether plaintiff would follow through with the contract to purchase the home, and cancelled pest control work that was required by the sale contract. Plaintiff also claimed Ms. Crabb's failure to advise of him of the correct deadline by which he had to waive contingencies on the purchase caused him to fail to meet that deadline. Plaintiff claimed these alleged failures caused Mr. and Mrs. Powell to cancel the contract to sell their property to plaintiff.

[1] Plaintiff originally filed suit against Mr. and Mrs. Powell, Ms. Crabb and Pinel as codefendants in a single suit, but obtained bifurcation of his claims against Mr. and Mrs. Powell from those against the defendants here in order to speed the outcome of his claim requesting specific performance of the contract to purchase the Powell home. The suit against Mr. and Mrs. Powell for breach of contract and fraud resulted in a court trial and verdict in favor of the Powells, which was affirmed by this court in March, 2003, in case number H023959.

The defendants produced discovery requested by plaintiff within 20 days of its original due date, with the exception of some disputed materials. On November 9, 2000, as part of their collection of discoverable evidence, the defendants requested that plaintiff identify and produce any audiorecordings of telephone conversations between himself, Mr. and Mrs. Powell and Ms. Crabb.[2] In December of 2000, plaintiff refused to answer the interrogatories regarding any such audiorecordings, citing his privilege against self-incrimination pursuant to the Fifth Amendment to the United States Constitution.[3]

The defendants argued that while plaintiff could assert his Fifth Amendment privilege in a civil action, he waived the right to remain silent by filing a complaint referring to factual issues addressed by the recordings. Absent compliance with the discovery request, the defendants would move to compel production of the audiorecordings, then move to dismiss the action.[4] After several delays in responding to defendants' requests for supplementary discovery responses, plaintiff's counsel[5] asserted that he would determine whether any such audiorecordings existed and eventually responded that plaintiff recorded only one telephone conversation with Ms. Crabb, but did not produce that recording.

In early April of 2001, defense counsel again wrote letters to plaintiff asking whether he would produce the recording or intended to assert his Fifth Amendment privilege. Counsel objected to permitting Ms. Crabb to be deposed until plaintiff

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[2] Appellant testified during *Forte v. Powell* that such recordings did exist.

[3] Penal Code section 632, subdivision (a) makes it a crime to surreptitiously record telephone conversations.

[4] Such a result was required, they argued, pursuant to *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554, 560 and *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168.

[5] Plaintiff's counsel who offered to research the existence of the audiorecordings, Mr. Lichtenegger, subsequently withdrew from representing plaintiff.

responded to the continuing discovery requests regarding audiorecordings, as such recordings would contain accurate renditions of conversations about which Ms. Crabb would be questioned. Plaintiff, who was now representing himself, wrote that he intended to invoke his Fifth Amendment right to refrain from incriminating himself, and refused to answer whether he made or possessed more than the one recording of Ms. Crabb. On May 2, 2001, plaintiff provided defense counsel with a copy of the recording of a single telephone conversation with Ms. Crabb. This recording consisted of one message left by Ms. Crabb on plaintiff's answering machine, which took place after the answering machine had been altered to include an outgoing message that conversations might be recorded.

Because plaintiff's response and the audiorecording was restricted to requests for alleged recordings of Ms. Crabb, defense counsel again requested that plaintiff produce any recordings of any telephone conversations with any person affiliated with Pinel. Plaintiff reiterated in May of 2001 that the sole recording of Ms. Crabb satisfied defense counsel's request and plaintiff's discovery obligation.

During a June 28th deposition, plaintiff testified, consistent with his testimony during the *Forte v. Powell* trial, that he had recorded multiple telephone conversations between himself and Ms. Crabb without her knowledge.[6] For the first time, plaintiff testified that he had destroyed all copies of recorded conversations with Ms. Crabb because such surreptitious recordings were illegal. Plaintiff then equivocated as to whether he had recorded any telephone conversations with Ms. Crabb and stated he did not listen to any recordings and that the recordings consisted of mechanical beeping

[6] Ms. Crabb prevailed in a countersuit against plaintiff for invasion of privacy with respect to these surreptitious recordings.

noises. Plaintiff's counsel[7] moved to strike all testimony regarding the audiorecordings by asserting his Fifth Amendment privilege against self-incrimination.

Plaintiff's deposition of Ms. Crabb with respect to the *Forte v. Powell* case was stipulated by the parties to be admissible in the current case. This deposition produced 310 pages of transcript and 44 exhibits. Plaintiff again deposed Ms. Crabb on June 28, 2001.

On August 1, 2001, the defense moved to dismiss plaintiff's complaint on the ground that he could not both assert his Fifth Amendment right by withholding recordings of conversations between the parties and continue to prosecute a case turning upon the content of those same conversations, and also upon the ground that he had willfully destroyed evidence that was material to the case. In the alternative, the defendants moved to compel plaintiff's production of any existing audiorecordings of telephone conversations with Ms. Crabb.

In response to the motion to dismiss or compel, plaintiff for the first time on August 20, 2001, waived his Fifth Amendment rights with respect to the audiorecordings. He asserted, contrary to his prior testimony, that he had not destroyed the master recordings of the telephone conversations and messages, and offered to provide them to defense counsel. Plaintiff thus argued that because he had finally complied with the discovery request, dismissal was not warranted. The defendants moved to again depose plaintiff regarding these recordings at plaintiff's expense.

Plaintiff produced, and the defendants prepared transcripts of some 48 recorded conversations, lasting 45 minutes and covering 246 transcript pages. During one of these recorded telephone conversations, plaintiff asserted that he had recorded 152 telephone conversations.

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[7] Plaintiff's counsel during this deposition was Mr. Putman.

Conversations recorded by plaintiff included what the trial court found to be "pivotal" discussions leading up to the failed real estate transaction that was the impetus for this case as well as the following:

On August 14th of 1999, plaintiff discussed with his attorney, Mr. Gunter, the tactical use of the recordings in his case against the defendants and the Powell's. In this conversation, Mr. Gunter advised plaintiff that the audiorecordings would have to be produced if the case proceeded to litigation. In another recording, plaintiff explained to one of his attorneys, Mr. Widman, on March 1, 2000, that plaintiff's case would be weakened by exposure of a July 28, 1999 recording in which plaintiff told Ms. Crabb that he would not waive contingencies until he had discussed some further issues with Mr. and Mrs. Powell. On March 9, 2000, plaintiff explained to Mr. Widman his plan to "put up the biggest fight we possibly can about [producing] the tapes, . . . be a little coy with it. I want them to think we do not want him to have those tapes, alright? [¶] . . . [¶] . . . That's the arsenic in the cake deal. . . . [¶] . . . Then we let go of the rubber band. . . . [¶] . . . That's the game plan. . . . [¶] . . . Let's see how good we can pull that one off." On April 26, 2000, plaintiff stated to Tamara, an attorney in the employ of Mr. Lichtenegger, "Do we have an objection to the tape being produced? Well, yes, I never thought . . . I thought that was only, you know, between myself and my counsel. We didn't have to give any of these tapes. We could have simply pled the [F]ifth [A]mendment on everything and kept the tapes for ourselves and used them against them as we needed them, you know what I mean?" In the same conversation, he explained to Tamara that Mr. Widman had produced some of the recordings in discovery in the *Forte v. Powell* case, contrary to plaintiff's wishes, which plaintiff characterized as "sloppy

work."[8] In that same conversation, Tamara argued that if plaintiff wanted to use the recordings against another party he would have to produce them in discovery.

At the first hearing on the motion for terminating sanctions on August 31, 2001, defense counsel argued that plaintiff's conduct of concealing evidence, lying regarding whether such evidence existed, and only producing it on the eve of trial and after defendants had been subjected to multiple depositions by plaintiff regarding these same conversations, was abusive of the discovery systems and warranted terminating sanctions. Plaintiff's counsel[9] admitted that plaintiff had indeed done everything that defense counsel described, but claimed it was all done on the advice of prior counsel.[10] Plaintiff's counsel conceded that if plaintiff had continued to claim his Fifth Amendment privilege with respect to the recordings, terminating sanctions would be appropriate. Plaintiff believed, however, that his eventual waiver of his Fifth Amendment privilege and production of the recordings should allow the defendant use of this "germane" and "critical evidence."

Defense counsel argued that there was no remedy that could bring the parties back to equipoise because each had already honed their factual and legal positions during the

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[8] Plaintiff asserted during the conversation with Tamara that the recorded conversations should not have been produced in discovery because they were "work product." Plaintiff does not claim on appeal that the recordings were privileged work product.

[9] Plaintiff's counsel at this hearing was Mr. Hanson. Mr. Hanson was later succeeded as counsel by Mr. Rummonds.

[10] During the events leading up to this lawsuit, plaintiff had been represented by Mr. Gunther, Mr. Alpaugh, Mr. Gorman, Ms. Loop, Mr. Thomas and Mr. Whitman in addition to those otherwise mentioned in this opinion. Plaintiff also represented himself during large portions of these proceedings. Plaintiff's claim that he withheld and lied about the recordings on advice of counsel was supported solely by an audiorecording of a telephone conversation during which Mr. Lichtenegger suggested that plaintiff may choose to "lose" the recordings rather than being forced to produce them, but that this choice was entirely up to plaintiff.

depositions and other proceedings already completed, as trial was currently set for September 24, 2001, less than a month away. Further, the recording with Mr. Lichtenegger regarding whether to "lose" the recordings turned not upon whether plaintiff was required by law to produce the evidence but rather whether it was beneficial to his case. If the tapes were not beneficial then they could be lost. Mr. Lichtenegger did not assert during the conversation that the concealment of evidence was legally proper.

The trial court observed that Mr. Lichtenegger asked defense counsel for an open-ended extension of time to review the defense discovery request shortly after the February 27, 2001 discussion of the evidentiary value of the recordings and whether to lose them. Within the month after defense counsel granted this extension, Mr. Lichtenegger withdrew from representing plaintiff, and plaintiff responded to interrogatories representing himself. In those responses, plaintiff attested under oath, without claiming any Fifth Amendment privilege, that the recordings did not exist, and when they had existed they consisted only of electronic beeps. The recordings were never produced during the trial of plaintiff's case against Mr. and Mrs. Powell. It was only when the court was about to decide whether to dismiss the current case because plaintiff had destroyed the recordings that he admitted possession of the recordings and produced them.

The recordings consisted not of beeps, as previously testified by plaintiff, but were "detailed conversations that [were] pivotal and part of the substance of the case, however they may bear out." The court requested that plaintiff produce any further recordings between himself and Mr. Lichtenegger to support his contention that the abuse of the discovery process in fact resulted from advice of counsel.

DISCUSSION

Plaintiff claims on appeal that terminating sanctions were statutorily barred because there was no pre-existing order compelling production of the withheld audiorecordings, and that such sanctions were otherwise inappropriate in this case.

Plaintiff further claims that the defendants, defense counsel and the trial court exhibited bias and unethical behavior against him resulting in an uneven playing field between the parties. We will affirm the judgment.

California's discovery laws are to be construed liberally in favor of disclosure of evidence unless statute or public policy clearly contradict specific acts in furtherance of that goal. (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 118.) One who believes he has a well-founded reason to withhold discovery of requested evidence has a legal means available to avoid revealing the material. Upon receipt of a demand for inspection of documents or other evidence, a party may move for a protective order to prevent such inspection. (Code Civ. Proc., § 2031, subd. (f).) A response to a demand for inspection must ordinarily be filed within 30 days of service of the demand. (Code Civ. Proc., § 2031, subd. (i).)

One who does not follow the proscribed methods of disputing discoverability of evidence, however, may be sanctioned by the court. Misuses of the discovery process include, but are not limited to, "Failing to respond or to submit to an authorized method of discovery. [¶] (5) Making, without substantial justification, an unmeritorous objection to discovery. [¶] (6) Making an evasive response to discovery. [¶] . . . [¶] (8) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery." (Code Civ. Proc., § 2023, subd. (a).) A trial court may issue a variety of orders to remedy abuse of the discovery process, including sanctions terminating the malfeasor's case. (Code Civ. Proc., § 2023, subd., (b)(4).)

Sanctions are designed to protect the interests of the party denied the discovery (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487 [disapproved on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4] citing *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793, superceded by statute on other grounds as stated in *Guzman v. General Motors Corp.* (1984) 154 Cal.App.3d 438, 444), to safeguard the integrity of the discovery process and to further the judiciary's interest in

compelling obedience to its orders. (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 229.) "[T]erminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party." (*R.S. Creative, Inc. v. Creative Cotton, Ltd*. (1999) 75 Cal.App.4th 486, 496.) The trial court's power to impose discovery sanctions, however, is broad and subject to reversal only if the application is " ' " 'arbitrary, capricious or whimsical . . . .' " ' [Citations.]" (*Ibid.*; see also *Juarez v. Boys Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 388.)

Plaintiff first argues that the absence of an order to compel the production of the audiorecordings and violation of that order precluded the use of terminating sanctions. Generally, discovery sanctions may only be imposed if the aggrieved party has moved to compel the production of evidence, the court has granted the motion, and the withholding party failed to comply with the order to produce the evidence. (Code Civ. Proc., § 2031, subd. (m); see also *Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, 1583.) The statute's requirement that an order to compel precede sanctions does not, however, address a case in which, as here, a party from whom inspection of evidence is demanded asserts that he has destroyed the evidence. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1163; *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447, 1456.)

Code of Civil Procedure section 2031, subdivision (m),[11] states that a motion to compel is only required where a response to a discovery request is inadequate or evasive. (*Pate v. Channel Lumber Co.*, *supra*, 51 Cal.App.4th at p. 1456.) Concealing the

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[11] "If the party demanding an inspection, on receipt of a response to an inspection demand, deems that (1) a statement of compliance with the demand is incomplete, (2) a representation of inability to comply is inadequate, incomplete, or evasive, or (3) an objection in the response is without merit or too general, that party may move for an order compelling further response to the demand." (Code Civ. Proc., § 2031, subd. (m).)

existence of evidence does not constitute an answer that is incomplete, evasive or lacking in merit. (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36, superseded by statute on other grounds as stated in *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573.) "Defendant has cited no case which holds a party who has received repeated assurances that all relevant documents have been produced must nonetheless file a motion to compel further responses in order to establish a right to sanctions should it turn out the assurances were false. [Citation.]" (*Pate v. Channel Lumber Co.*, *supra*, 51 Cal.App.4th at p. 1456.) " ' " 'Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply [with the required discovery] and (2) the failure must be wilful . . . .' " ' [Citation.]" (*R.S. Creative, Inc. v. Creative Cotton, Ltd.*, *supra*, 75 Cal.App.4th at p. 496, citing *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; Pen. Code, § 135.) Violation of an order to compel was thus not a necessary precursor to terminating sanctions because plaintiff intentionally and improperly concealed the existence of the recordings from the defendant in order to benefit his own case.

Plaintiff next argues that his ultimate production of the recordings remedied any harm from their prior concealment and thus eliminated any reason to invoke sanctions. A party's ultimate compliance with the originally required discovery does not bar imposition of terminating sanctions if the abuse of the discovery process has put the adverse party at a disadvantage. (*R.S. Creative, Inc. v. Creative Cotton, Ltd.*, *supra*, 75 Cal.App.4th at p. 497.) Rather, terminating sanctions may be applied in direct response to a motion for sanctions where that party has had ample opportunity to comply with the requested production, has presented no legal reason for its failure to produce, and the abuse of the discovery process was egregious. (*Ibid*. [terminating sanctions proper where plaintiff knowingly filed forged contract with its complaint, violated stipulation not to use or alter documents on computer that produced and stored the forged contract, and refused to submit to additional deposition regarding this malfeasance]; see

also *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1613-1615, 1618 [the ultimate production of the requested material did not remedy the harm from the extended failure to provide discovery where obtaining discovery was, in the words of the trial court, "like pulling teeth"]; *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1399; *Vallbona v. Springer*, *supra*, 43 Cal.App.4th at pp. 1545- 1546; *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns*, *supra*, 7 Cal.App.4th at pp. 35-36.)

Plaintiff defends his failure to timely produce the recordings by claiming he was instructed to conceal and lie about them by counsel, Mr. Lichtenegger. The party on whom the request discovery was served has the burden of showing that his failure was not willful. (*Cornwall v. Santa Monica Dairy Co.* (1977) 66 Cal.App.3d 250, 252- 253.) A party representing himself is held to the same standard as were he represented by counsel. (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639, disapproved on other grounds by Dumas v. Stocker, 213 Cal.App.3d 1262, 1268-1269, fn. 13.)

Plaintiff was represented by many different attorneys during the pendancy of these proceedings, as well as representing himself during much of the dispute over production of the recordings. The trial court found that at the time plaintiff falsely testified that he had destroyed the recordings, Mr. Lichtenegger had withdrawn as counsel and plaintiff was representing himself. The recordings recount plaintiff telling several attorneys that he intended to withhold the material then surprise the defendants with the evidence at a point when he believed the revelation would be beneficial to his case. The recordings also recount that Mr. Widman did produce the recordings in his possession during the *Forte v. Powell*, presumably because he did not consider them to be privileged work product. Two other attorneys also told plaintiff that the recordings could not be both withheld and offered as evidence against the defendants. Mr. Rummonds, plaintiff's counsel during the argument regarding the motion for terminating sanctions conceded that Mr. Lichtenegger's suggestion that the recordings could be lost did not establish that

plaintiff acted pursuant to advice of counsel. Plaintiff was acting as his own counsel when he lied about having destroyed the recordings, and withheld the recordings despite warnings that he could not properly do so and also use them as evidence against the defendants. His claim that he concealed the recordings under advice of counsel is thus devoid of merit.

Plaintiff also claims the application of terminating sanctions to this case exceeded the scope of remedy called for in the situation. The traditional remedies for spoliation, the intentional destruction or suppression of evidence, include discovery sanctions. (*R.S. Creative, Inc. v. Creative Cotton, Ltd.*, *supra*, 75 Cal.App.4th at p. 497; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12; *Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892, 907, disapproved on other grounds by *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 17-18; *Puritan Ins. Co. v. Superior Court* (1985) 171 Cal.App.3d 877.) "[T]here is no question that a court is empowered to apply the ultimate sanction against a litigant who persists in the outright refusal to comply with his discovery obligations. [Citation.]" (*Deyo v. Kilbourne*, *supra*, 84 Cal.App.3d at p. 793, fn. omitted.) The availability of more lenient sanctions "does not establish that the imposition of a more severe sanction was an abuse of discretion." (*Waicis v. Superior Court* (1990) 226 Cal.App.3d 283, 287.) On appeal, " '[T]he question before this court is not whether the trial court should have imposed a lesser sanction; rather the question is, whether the trial court abused its discretion by imposing the sanction it chose. [Citation.]' " (*Collisson & Kaplan v. Hartunian, supra,* 21 Cal.App.4th at p. 1620; see also *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns*, *supra*, 7 Cal.App.4th at pp. 36-37.)

The propriety of terminating sanctions is determined by the totality of the circumstances, including the willfulness of the improper acts, the detriment to the propounding party, and the number of formal and informal attempts to obtain the discovery. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1244-1246.) Terminating

sanctions have repeatedly been found proper where the aggrieved party waited many months to receive the evidence. (*Ibid*.) Moreover, imposition of a lesser sanction is not warranted where it would permit the malfeasor to benefit from his stalling tactics. (*Collisson & Kaplan v. Hartunian, supra,* 21 Cal.App.4th at pp. 1619-1620.)

Statements obtained by illegally recording telephone conversations may not generally be admitted into evidence, but may potentially be used to impeach inconsistent testimony by the party seeking to exclude the testimony. (Pen. Code, § 632, subd. (d); *People v. Crow* (1994) 28 Cal.App.4th 440, 452.) Plaintiff told his attorney Mr. Gunter shortly after filing his case that he thought it would be very beneficial to Mr. Gunter's preparation for depositions to listen to the recorded conversations of the defendants and the Powells. The defendants complied with plaintiff's discovery requests and submitted to extended depositions without benefit of refreshing their recollection of the discussions of the real estate purchase. The defendants submitted to depositions only after being assured that no recordings existed. They expressed fear of being blindsided by hidden evidence that could be used to characterize them as liars if they did not accurately recall material conversations. Plaintiff was thus able to benefit from using the recordings prior to deposing the defendants both in preparation and in potential cross-examination.

The court here noted that there were a variety of sanctions available, the applicability of which depended upon the materiality of the concealed evidence to the case and the extent to which sanctions could remedy plaintiff's misconduct. Further, the court questioned the overall fairness of allowing one who repeatedly lied about the existence of reportedly relevant evidence to pursue a lawsuit founded upon that evidence, essentially escaping from consequences. The court also expressed a great deal of concern over the fact that plaintiff never produced recorded conversations with Mr. and Mrs. Powell relating to disputed issues during the *Forte v. Powell* trial. The court's request that the defendant produce any other recordings of conversations with Mr. Lichtenegger supporting his claim that his withholding of evidence was pursuant to

advice of counsel shows its doubt as to whether plaintiff ever produced all relevant recordings.

" 'The sanction of peremptory dismissal, without consideration of the merits, is fundamentally unjust unless the conduct of a plaintiff is such that the delinquency interferes with the court's mission of seeking truth and justice.' " (*Karz v. Karl* (1982) 137 Cal.App.3d 637, 648, quoting *Morgan v. Ransom* (1979) 95 Cal.App.3d 664, 670.) The record shows that plaintiff's conduct, in refusing to make any effort to respond to discovery, interfered with the court's truth-seeking mission such that further examination of the merits of his case was not warranted. Plaintiff's violation of the rules of discovery were not merely technical, but rather eviscerated the truth-seeking process contemplated by the legislature when it designed our discovery system. (See *Sauer v. Superior Court, supra,* 195 Cal.App.3d at pp. 230-231.) Lesser sanctions would have permitted plaintiff to benefit from his malfeasance and would encourage him and others to violate the discovery statutes in the future. (*Ibid*.) Plaintiff has thus failed to prove that the trial court abused its discretion in granting terminating sanctions.

Plaintiff also argues that unethical actions and bias of defense counsel and the trial court showed that Judge Silver should have recused himself from presiding over plaintiff's case. He recounts as examples of such unethical actions alleged perjury by Ms. Crabb, defense counsel's tardy production of a memorandum between the defendants' and counsel regarding the factual background of their case, and the trial court's assertion of its preference that the parties resolve this case without trial. Plaintiff does not argue that any specific action is required of this court in response to these matters.

Plaintiff provides no factual or legal argument regarding how Ms. Crabb's alleged perjury impacted the outcome of his case. Nor does plaintiff provide any factual or legal background to the court's treatment of the alleged discovery impropriety by the defendants or its impact on his case. Nor does he produce any legal basis to conclude

that trial courts may not encourage settlement of civil lawsuits. His argument is thus devoid of legal and factual support. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) We therefore need not consider this argument. (Cal. Rules of Court, rule 14(a)(1)(C); *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1502, fn. 2.)

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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BAMATTRE-MANOUKIAN, J.