Filed 2/23/17 K.J. v. Los Angeles Unified School Dist. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

K.J., a Minor, etc., et al., Plaintiffs and Appellants, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	B269864 (Los Angeles County Super. Ct. No. BC505356)

APPEAL from an order of the Superior Court of Los Angeles County, William P. Barry, Judge. Appeal dismissed.

Werksman Jackson Hathaway & Quinn, Kelly C. Quinn and Mark W. Allen for Plaintiffs and Appellants.

Coleman and Associates, John M. Coleman; Law Offices of Bruce T. McIntosh and Bruce T. McIntosh for Defendants and Respondents.

Plaintiff and appellant K.J., a minor, purports to appeal the trial court's order requiring her attorney, Luis Carrillo, to pay attorney fees and costs as discovery sanctions to defendant and respondent Los Angeles Unified School District (LAUSD). Because K.J. was not sanctioned and attorney Carrillo has not appealed, we lack jurisdiction to review the sanctions order and therefore dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2013, after 12-year-old K.J. was allegedly sexually assaulted by an unknown male in a restroom at an LAUSD school, she sued LAUSD for negligence.[1]

In June 2015, LAUSD moved to compel K.J. to undergo a neuropsychiatric examination to be conducted by Dr. Mohan Nair. K.J. moved for a protective order. Although K.J.'s motion is not included in the record on appeal, other portions of the record demonstrate she sought to limit or preclude Dr. Nair from questioning her about the details of the sexual assault in order to avoid "retraumatizing" her. K.J. urged such questioning was unnecessary because she had already described the details of the assault at her deposition and to various medical professionals.

On July 15, 2015, the trial court denied K.J.'s motion for a protective order, granted LAUSD's motion to compel, and ordered K.J. to submit to a neuropsychiatric examination at Dr. Nair's office on July 28, 2015. The court declined to impose limitations on the scope of Dr. Nair's questioning during the examination.

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[1] The record on appeal does not contain a copy of the complaint, but there is no dispute that K.J. filed a negligence complaint making these allegations.

K.J. appeared for the examination at the appointed time, accompanied by her mother and attorney Carrillo. What happened next was disputed by the parties and gave rise to the discovery dispute that resulted in the sanctions at issue here. According to K.J., prior to the examination Carrillo simply asked Dr. Nair to be mindful of K.J.'s condition and limit his questions concerning the details of the sexual assault. According to LAUSD, Carrillo's instruction or request to Dr. Nair and Nair's office manager, in K.J.'s presence, "completely undermined" the trial court's July 15, 2015 order and "directly led" K.J. to refuse to answer questions during the examination. LAUSD also insisted that Carrillo "unilaterally departed" with K.J. before the examination was completed; K.J. countered that Nair cancelled the remaining portion of the examination when Carrillo advised him that K.J. had a statutory right to audiotape a segment of the examination involving a test that Nair claimed was proprietary.

On approximately July 31, 2015, LAUSD brought an ex parte application for monetary, issue, and terminating sanctions against K.J. and/or Carrillo. K.J. opposed the motion, and a series of briefs and supplemental briefs from both parties followed, supported by, inter alia, letters from or declarations by Dr. Nair, Nair's office manager, attorney Carrillo, and K.J.'s mother, as well as transcripts of portions of the audiotaped neuropsychiatric examination.

On September 16, 2015, the trial court issued to Carrillo an order to show cause (OSC) why he should not be adjudged guilty of contempt for willfully disobeying the court's July 15, 2015 order. The court's OSC was accompanied by the trial judge's three-page declaration explaining that Carrillo's statements at Dr. Nair's office "could be a willful violation" of its order. Because

a factual dispute existed regarding what actually occurred, the court ordered an evidentiary hearing.

On September 30, 2015, the evidentiary hearing transpired and the court found Carrillo was guilty of contempt. The court further stated, "I'm going to allow [LAUSD] to make an application for reasonable attorney's fees and costs associated with the contentious conduct on July 28th, 2015."

Accepting the trial court's invitation, on approximately October 2, 2015 LAUSD moved for sanctions against Carrillo for violating the court's July 15, 2015 order. K.J. opposed the sanctions motion.

On October 13, 2015, the trial court issued a written order finding Carrillo guilty of deliberate, willful, and premeditated disobedience in violation of its order that Dr. Nair's questioning of K.J. was not to be limited. The court opined that Carrillo's conduct at the neuropsychiatric examination was "a flagrant violation" of the court's ruling denying the motion for a protective order. The court imposed a 24-hour jail sentence and a $750 fine on Carrillo. The written order additionally stated that LAUSD "may make application for Fees and Costs associated with the Order to Show Cause re Contempt of Court issued to Luis A. Carrillo on September 16, 2015 and the Hearing on September 30, 2015."

On October 23, 2015, Carrillo challenged the contempt order in a petition for a writ of habeas corpus filed with this court, in the related proceeding of *In re Carrillo,* B267743. On October 26, 2015, we issued an order staying the trial court's October 13, 2015 order.

On or about November 9, 2015 LAUSD filed a supplemental motion for sanctions in the trial court. That motion

sought to recover "direct fees and costs associated with [the neuropsychiatric examination] issue, and the Contempt Hearing," including costs for Nair's and the office manager's appearance at the contempt hearing. In total, LAUSD sought $100,000 from Carrillo and his law office, comprised of $52,247.41 in fees and costs and $47,752.59 "in sanctions to deter future misconduct."

On November 19, 2015, the trial court granted LAUSD's sanctions motion in part, ordering Carrillo and his law firm to pay to LAUSD fees and costs of $16,111. The court explained the only issue it considered was "the issue of compensation . . . that should be . . . awarded to [LAUSD] because of the conduct that occurred" at the neuropsychiatric examination; "anything that happened working up to the [examination]" was excluded, as were costs related to the examination that would have been "incurred anyway." Apparently included in the $16,111 were fees related to the contempt hearing. Counsel for LAUSD queried whether the court's order covered fees and costs expended in regard to both the discovery dispute and the contempt hearing. The court replied that its order covered the "[t]otality." In response to a similar inquiry from K.J.'s counsel, the court clarified, "It's not so much for the contempt, it's for the extra work that was created by a discovery problem. . . . I am not looking at this as contempt sanctions. I mean, it's arising out [of] that incident and it came up in connection with a contempt hearing, but it's really a motion for interference with [the] discovery process. And that's why I think it's allowable." When K.J.'s counsel pointed out that this court had issued a stay order, the trial court explained: "This is different." "[T]his is intended to compensate [LAUSD] for extra work that was incurred in what I viewed as being an obstruction of the discovery process whether

or not it was contemptuous. [¶] So, this particular decision will stand, in my view, regardless of what the appellate decision is." "I'm not penalizing someone. [¶] . . . [¶] There is no penal component on this award."

On December 1, 2015, the trial court issued a written order on the motion. It required that "Luis A. Carrillo, individually, and/or the Law Offices of Luis A. Carrillo, jointly and severally," pay $16,111 to LAUSD.

On January 8, 2016 we issued a *Palma* notice[2] to the trial court. Treating the habeas petition as a petition for a writ of prohibition, we concluded there was not substantial evidence to establish beyond a reasonable doubt that Carrillo had willfully disobeyed the trial court's order of July 15, 2015. Thus, the trial court lacked jurisdiction to enter the October 13, 2015 contempt order and was required to find Carrillo not guilty. In light of this "clear legal error," we notified the parties of our intention to issue a peremptory writ of mandate.[3]

On January 14, 2016, the trial court indicated its intent to issue a new order finding Carrillo not guilty of contempt. On January 29, 2016, the trial court vacated its October 13, 2015 order and issued a new order finding Carrillo not guilty of deliberate, willful and premeditated disobedience of a court order. It further stated: "The Court's new order does not in any way reverse or change the Court's previous order, dated December 1, 2015, awarding sanctions totaling $16,111.00 to LAUSD, based

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[2] *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.

[3] We grant K.J.'s request that we take judicial notice of records in *In re Carrillo,* B267743. (Evid. Code, §§ 452, 453, 459.)

upon its finding that he [Carrillo] had violated discovery statutes and the Court's Rulings in that regard."

On February 4, 2016, we dismissed *In re Carrillo* as moot and vacated the stay.

On January 26, 2016, K.J. filed a notice of appeal. (Code Civ. Proc., § 904.1, subd. (a)(12).) The notice of appeal listed only K.J. as the appellant.

CONTENTIONS OF THE PARTIES

K.J. seeks reversal of the portions of the trial court's December 1, 2015 order awarding LAUSD fees and costs relating to the contempt proceeding. She argues that the order was void because it violated our temporary stay order. Further, she argues, even if the order was not void, the trial court abused its discretion by (1) ordering fees and costs related to the contempt proceeding, given that its order finding Carrillo in contempt was vacated; (2) ordering sanctions not authorized by the pertinent discovery statutes; and (3) ordering fees and costs LAUSD had not yet incurred.

LAUSD, on the other hand, argues that K.J. lacks standing to bring this appeal; the record on appeal is insufficient because it does not include K.J.'s motion for a protective order, which "might well provide a fuller and more complete picture of the basis" for the trial court's ruling; our stay order did not stay *all* proceedings in the underlying case; and the monies awarded were proper discovery sanctions.

LAUSD's first contention has merit. Accordingly, we do not reach the parties' other contentions, and order the appeal dismissed.

DISCUSSION

Code of Civil Procedure section 904.1, subdivision (a)(12), provides that an appeal may be taken from "an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." (Code Civ. Proc., § 904.1, subd. (a)(12); *Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 868.) However, because K.J. was not sanctioned, and attorney Carrillo has not appealed, we lack jurisdiction to review the sanctions ruling. (*People v. Indiana Lumbermens Mutual Ins. Co.* (2014) 226 Cal.App.4th 1, 10 (*Indiana Lumbermens*); *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42 (*Calhoun*); *In re Marriage of Knowles* (2009) 178 Cal.App.4th 35, 38, fn. 1; *Taylor v. Varga* (1995) 37 Cal.App.4th 750, 761-762, fn. 12; but see *Kane v. Hurley* (1994) 30 Cal.App.4th 859, 861, fn. 4.)

Our decision in *Indiana Lumbermens* is controlling. There, a surety company moved to set aside a summary judgment on a forfeited bail bond. (*Indiana Lumbermens, supra,* 226 Cal.App.4th at p. 3.) In its postjudgment order denying Indiana's motion to set aside the summary judgment, the trial court sanctioned Indiana's attorney, Rorabaugh, for making an allegedly misleading statement in a reply brief. On appeal, Indiana contended the sanctions order was erroneous. (*Id.* at p. 10.) We explained: "We lack jurisdiction to review the sanctions ruling because the sanctioned attorney, Rorabaugh, did not appeal. The sole appellant is Indiana, the defendant surety. However, Indiana is not aggrieved by the sanctions ruling because it was not ordered to pay sanctions (Code Civ. Proc., § 902), and it cannot appeal the sanctions award on Rorabaugh's behalf." (*Ibid.*)

We observed that *Calhoun* was directly on point. The appellate court in *Calhoun* held it lacked jurisdiction to review a sanctions ruling because "the purported appeal is not by the sanctioned attorney, Michael Calhoun, but by the plaintiff, George Calhoun. [Former s]ubdivision (k) of section 904.1[4] authorizes an appeal of a sanction ruling by the party against whom the sanctions were imposed. [Citation.] Thus, any right of appeal was vested in Michael, not George. Had Michael included himself as an additional appellant in George's notice of appeal, we could have liberally construed the notice of appeal in favor of its sufficiency [citations], but Michael did not do so. Absent any attempted appeal by the sanctioned party, the sanction ruling is not … reviewable." (*Calhoun, supra*, 20 Cal.App.4th at p. 42; accord, *In re Marriage of Knowles, supra,* 178 Cal.App.4th at p. 38, fn. 1 ["[w]hen a sanctions ruling is imposed only upon a party's attorney, the attorney is the aggrieved party with the right to appeal"].)

Here the court's sanction order was imposed only against attorney Carrillo and his law firm, not against K.J. Thus, Carrillo, not K.J., is the aggrieved party. But Carrillo is not a party to this appeal. The notice of appeal states that "K.J., a minor through her guardian ad litem, Erick J[.]," appeals the order. K.J.'s opening brief states that "K.J. appeals the Superior Court's December 1, 2015 Order erroneously awarding LAUSD $16,111.00 in fees and costs." Accordingly, as in *Indiana*

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4 See now Code of Civil Procedure section 904.1, subdivisions (a)(12) and (b). (*Indiana Lumbermens, supra,* 226 Cal.App.4th at p. 10, fn. 7.)

Lumbermens and *Calhoun,* we lack jurisdiction to review the sanctions order.

K.J.'s arguments to the contrary do not compel a different conclusion. She attempts to distinguish *Indiana Lumbermens* and *Calhoun* by suggesting that the problem in those cases was that the appellants' and the attorneys' claims were commingled, whereas here, no such commingling exists. But this was simply not the basis for the appellate courts' holdings in those cases. Both clearly hold that only the aggrieved party may appeal.

K.J. next argues that any "violation" is merely "technical and should not preclude this Court from hearing the merits" of the case. She observes, correctly, that it " 'is and has been the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.' " (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1249; Cal. Rules of Court, rule 8.100(a)(2).) Here, she argues, it is clear what order is being appealed and LAUSD cannot have been misled. That may be so, but in our view the weight of authority counsels against stretching the liberal construction requirement so far as to deem a notice of appeal to include an unnamed party.[5]

K.J.'s citation to *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, is unavailing. There, the trial court dismissed the plaintiff's personal injury complaint and imposed sanctions on her attorney, Alden. But both the plaintiff and the attorney appealed. (*Id.* at

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[5] *Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967 allowed a client to file an appeal of a sanction award that was ordered jointly against both the client and the attorney. (*Id.* at pp. 970, 972-974.) That is not the situation here.

p. 494 ["Alden also appeals, contending the trial court's imposition of monetary sanctions was improper"].) In considering whether the attorney had standing to appeal, the court noted that although Moyal was the only plaintiff at the trial court level, attorney Alden included himself as an additional appellant in the notice of appeal. (*Id.* at p. 497.) The attorney had a "distinct and separate right to appeal [the sanctions order] as a collateral matter." (*Ibid.*) The court observed that "[a]lthough on a collateral appeal it would be the better practice for an attorney to file a separate notice of appeal, since he or she is not a party to the action below," given the directive in favor of liberal construction and the policy in favor of hearing appeals on the merits, the attorney had standing. (*Ibid.*) In contrast, the problem here is not that Carrillo failed to file a separate notice of appeal; he has not filed a notice of appeal *at all*. Under these circumstances the appeal must be dismissed.

DISPOSITION

K.J.'s purported appeal from the trial court's December 1, 2015 order is dismissed. Respondent LAUSD to recover its costs on appeal.

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ALDRICH, J.

We concur:

EDMON, P. J.

GOSWAMI, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.