Filed 10/1/03 Conway v. Beaton 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JULIE CONWAY et al., Plaintiffs and Appellants, v. SHEILA BEATON et al., Defendants and Respondents; DENNIS A. CAREY, Objector and Appellant.	B159841 (Los Angeles County Super. Ct. No. SC061502)

APPEAL from an order of the Superior Court of Los Angeles County, Paul G. Flynn, Judge. Reversed and remanded with directions.

Law Office of Bruce Adelstein and Bruce Adelstein for Plaintiffs and Appellants Julie Conway and Lloyd Conway.

Robinson Sohigian & Schmidt and Michael R. Sohigian for Appellant Dennis Carey.

Miller Milove & Kob, Jeffrey S. Kob and W. Richard Sintek for Defendants and Respondents JB Oxford & Company and Jeffrey Goldstein.

Mitchell Silberberg & Knupp, Peter B. Gelblum and Stephanie Barber Hess for Defendant and Respondent Edward Jones & Company.

Eisner & Associates and Michael Eisner for Defendant and Respondent Sheila Beaton.

INTRODUCTION

Plaintiffs appeal the denial of their motion for relief from an order of dismissal entered after the trial court ordered terminating sanctions against them for abuse of discovery. Plaintiffs' former attorney appeals the imposition of sanctions entered against him for failing to appear for his deposition.

The underlying order imposing terminating sanctions was erroneously entered upon an ex parte application, making it subject to being set aside as a void order pursuant to Code of Civil Procedure section 473, subdivision (d).[1] Because defendants did not obtain a court order compelling plaintiffs' appearance at their depositions and plaintiffs therefore did not willfully fail to comply with a court order, issuance of terminating sanctions constituted "surprise" which justified granting plaintiffs' motion for relief pursuant to section 473, subdivision (b). Entry of terminating sanctions and subsequent dismissal where a lesser sanction was available was also a "surprise" justifying the grant of relief. We therefore reverse the denial of the section 473 motion for relief and accompanying monetary sanctions imposed against plaintiffs.

---

[1] Unless otherwise specified, statutes in this opinion will refer to the Code of Civil Procedure.

The order imposing sanctions against plaintiffs' former attorney was erroneous because defendant did not effectuate valid personal service of the deposition subpoena on the former attorney, because the sanctions order was issued against the former attorney after judgment was entered and thus served no purpose in accomplishing the objects of discovery, and because defendant made no showing of "extremely good cause" or that defendant could satisfy the limited circumstances in which opposing counsel could be deposed. We therefore reverse the sanctions order against the former attorney.

FACTS AND PROCEDURAL HISTORY

The operative complaint identified plaintiffs as Julie Conway and Lloyd Conway, joint trustees of the Tiffany Conway Trust ("the Trust"). The complaint identified defendants Kevin Beaton and Sheila Beaton; Jeffrey Goldstein, an employee, agent, and account executive of defendant J. B. Oxford & Company ("Oxford"); Jay Fassler, an employee, agent, and account executive of defendant Mellon Investor Services[2] ("Mellon"); Edward Jones & Company; Estee Lauder Companies, Inc. ("Estee Lauder"); and Wells Fargo Bank.

The complaint alleged that on behalf of the Trust, Lloyd Conway orally agreed that Sheila Beaton would buy 2,380 shares of Estee Lauder stock from Estee Lauder Companies, Inc., hold it in trust for the Trust, and thereafter assign the stock to plaintiffs as trustees of the Trust. Lloyd Conway agreed to pay for the stock and paid Sheila Beaton approximately $1,800 as compensation. On April 30, 1999, Julie Conway opened an account at Oxford and appointed Oxford broker and trustee of the stock for the Trust. The complaint alleged that Oxford failed to timely register shares in the Trust's name for a May 10, 1999, two-for-one stock split, causing 2,380 shares of additional Estee Lauder stock to be issued in Sheila Beaton's name rather than to plaintiffs; that Mellon

---

[2] The complaint erroneously identified Mellon Investor Services as "Chase-Mellon Shareholder Services." This opinion will refer to this defendant as "Mellon" or "Mellon Investor Services."

fraudulently or negligently allowed Sheila Beaton to transfer Estee Lauder stock to Edward Jones & Co.; and that Sheila Beaton fraudulently transferred Estee Lauder stock to Edward Jones & Co. as collateral for her personal loan of $55,000, retained other Estee Lauder shares for her own benefit and account, and sold stock to a third party on December 13, 1999.

The complaint alleged causes of action for breach of fiduciary duty, breach of contract, negligence, intentional misrepresentation, negligent misrepresentation, imposition of a constructive trust, and unjust enrichment.

On June 29, 2001, Michael Eisner, attorney for defendant Sheila Beaton, served plaintiffs' counsel with a notice of taking deposition of Lloyd Conway on July 25, 2001. According to Eisner's declaration, Lloyd Conway cancelled his deposition and refused to schedule a new date. Eisner's declaration stated that he tried for 12 months to get plaintiff's counsel to agree on deposition dates, but counsel refused.

On September 10, 2001, counsel for defendant Oxford served plaintiffs' counsel with a notice of deposition for Lloyd Conway to take place on September 26, 2001. Plaintiffs' counsel, Raymond Riley, responded in a September 18, 2001, letter that he had depositions the entire week of September 24, 2001, and the following week, and requested proposed alternate dates for Lloyd Conway's deposition, noting that Oxford's counsel had "unilaterally noticed" the September 26, 2001, deposition.

At this time, plaintiffs substituted Dennis Carey as their attorney. Carey's September 24, 2001, letter canceled Lloyd Conway's September 26, 2001, deposition, as Carey's schedule did not allow it and Carey had not yet received the Conways' file from their previous attorneys. Carey stated he would contact all parties shortly to pick a new date. Eisner, however, informed plaintiffs' counsel that the September 26, 2001, deposition had to proceed as noticed. On September 26, 2001, Eisner had the court reporter take a statement of the non-appearance of Lloyd Conway and his counsel.

On February 12, 2002, Eisner served notices of deposition on Lloyd Conway and on Julie Conway for February 22, 2002. On February 14, 2002, Eisner sent a letter to

plaintiffs' counsel confirming that Lloyd Conway's February 22, 2002, deposition. The letter stated that if Mr. Conway did not appear, Eisner would bring an ex parte application seeking terminating sanctions against plaintiffs. Eisner's letter also stated that Eisner separately served Carey with a deposition subpoena, informed Carey of an applicable exception to the attorney-client privilege, and stated that defendants intended to elicit Carey's testimony on issues related to allegations made by Lloyd Conway in this case. On February 14, 2002, Beaton's attorney issued a deposition subpoena ordering Dennis Carey, plaintiffs' attorney, to appear and testify as a witness at a deposition on March 5, 2002. The attached proof of service was blank and bore no signature. However, a "proof of service by mail" reflected that Carey was served via facsimile and by personal service on February 14, 2002.

Carey's February 18, 2002, letter to Eisner stated that he did not receive notice for Lloyd Conway's deposition until February 14, 2002, which violated notice requirements of section 2025, subdivision (f). Carey stated that he had prior engagements and would not be available, and asked Eisner to call his office to set a date.

Eisner responded to Carey that service was properly made on February 12, 2002, and satisfied statutory requirements, and the Conways' depositions would proceed on February 22, 2002. Eisner's letter reiterated that he would move for terminating sanctions if plaintiffs did not attend depositions.

On February 21, 2002, Eisner faxed a letter to Carey concerning the depositions of Lloyd Conway, Julie Conway, and Carey. Eisner's letter stated that plaintiffs' depositions were properly noticed and would proceed on February 22, 2002, and again warned that Eisner would move for terminating sanctions if the Conways did not attend. Regarding the deposition subpoena served on Carey himself, Eisner's letter stated that the Conways' complaint contradicted statements made by Carey's client under oath and was evidence of Carey's assisting his client in perpetrating perjury and fraud. Eisner stated he intended to bring this issue before the court and to elicit Carey's deposition testimony on this issue and for use in seeking sanctions pursuant to section 128.7.

On February 22, 2002, Lloyd Conway and Julie Conway did not appear at their depositions.

On February 24, 2002, defendant Sheila Beaton, represented by Eisner, made an ex parte application for an order entering terminating sanctions, or, in the alternative, for an order compelling Lloyd Conway and Julie Conway to attend their depositions and for monetary sanctions. The application observed that for 20 months, Eisner tried to obtain plaintiffs' deposition testimony, that Lloyd Conway failed to appear for three scheduled depositions, and Julie Conway failed to appear for one scheduled deposition. The application sought terminating sanctions against plaintiffs because of their delay, evasion, refusal to comply with the discovery process, and failure to appear for depositions. Alternatively, defendant sought an order compelling plaintiffs' attendance at depositions and $7,962.50 in monetary sanctions.

On February 25, 2002, the trial court granted Beaton's ex parte application and ordered entry of terminating sanctions against plaintiffs.

On March 5, 2002, attorney Carey having failed to appear for his deposition, Michael Eisner, attorney for defendant Sheila Beaton, had the court reporter prepare a certificate of nonappearance for Carey.

On March 8, 2002, Estee Lauder and Mellon, joined by Oxford and Sheila Beaton, requested entry of an order dismissing the operative complaint, and all its claims and causes of action, with prejudice, entering judgment thereon, vacating the final status conference and trial dates, and dismissing Oxford's cross-complaint. On March 8, 2002, the trial court granted the request, ordered the third amended complaint dismissed with prejudice, and granted the request of Oxford and Goldstein to withdraw their cross-complaint against Sheila Beaton.

On April 4, 2002, plaintiffs moved for an order, pursuant to section 473, to set aside the order entering terminating sanctions based on the ground of attorney mistake. Carey's declaration of fault stated that on February 25, 2002, the trial court granted defendant Sheila Beaton's ex parte application for an order entering terminating sanctions

against plaintiffs. Carey's declaration stated that he was in trial that week, did not receive the message from Beaton's attorney, Michael Eisner, and therefore failed to attend the hearing on Beaton's ex parte application. Carey stated that he did not check his message box regularly during the trial and did not receive the ex parte notice. After his mistake of failing to attend the February 25, 2002, hearing, plaintiffs and Carey agreed to terminate their attorney-client relationship.

In connection with the section 473 motion, Carey filed opposition to defendant's ex parte application for an order entering terminating sanctions. It argued that (1) plaintiffs changed lawyers several times, which affected coordination of their depositions; (2) Lloyd Conway suffered from terminal cancer and it was difficult to coordinate his hospital stays with attorneys' schedules; (3) on February 14, 2002, plaintiffs received improper notice of the February 22, 2002, deposition, and Carey was in trial and could not attend on that date; (4) section 2025, subdivision (j)(3) does not authorize terminating sanctions; and (5) terminating sanctions can be obtained only through a noticed motion and not ex parte.

On April 9, 2002, defendant Sheila Beaton moved for $5,698 in sanctions from attorney Carey for discovery abuse. Based on section 2023, Beaton's motion alleged that because plaintiffs committed perjury and made false allegations in their pleadings, Beaton was entitled to depose Carey pursuant to the crime/fraud exception to the attorney-client privilege. The motion argued that although Carey was properly served with a subpoena and was required to appear for deposition, Carey refused to comply with his obligations and thus was subject to sanctions. Carey did not oppose the motion, assuming that given the dismissal of the case, the trial court would not entertain a motion for discovery sanctions without jurisdiction.

On April 17, 2002, Carey signed a substitution of attorney form consenting to the substitution of Steve Neimand as plaintiffs' counsel. Plaintiff Lloyd Conway and Neimand signed the substitution of attorney form on April 29, 2002.

On April 30, 2002, the trial court (1) denied plaintiffs' section 473 motion to set aside the order entering terminating sanctions and dismissal, and (2) granted defendant Beaton's motion and imposed $5,698 in sanctions against plaintiffs' former counsel, Carey, for discovery abuse and $13,400 in sanctions against plaintiffs Julie Conway and Lloyd Conway. The trial court also imposed $16,000 in sanctions against plaintiffs and in favor of Estee Lauder and Mellon, and awarded $4,000 in sanctions against plaintiffs and in favor of Oxford and Goldstein.

On May 20, 2002, Carey moved for reconsideration of the sanctions order against him. The trial court denied this motion.

On June 27, 2002, Carey timely filed a notice of appeal from the April 30, 2002, order imposing sanctions and from the June 20, 2002, denial of his motion for reconsideration. Sanctions for discovery abuse exceeding $5,000 are separately appealable. (§ 904.1, subd. (b); *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 161.) A former attorney who no longer represents his client can appeal a discovery sanction against him. (*Rail-Transport Employees Assn. v. Union Pacific Motor Freight* (1996) 46 Cal.App.4th 469, 475, fn. 7.)

On June 28, 2002, plaintiffs Julie Conway and Lloyd Conway filed a notice of appeal from the April 30, 2002, order denying their section 473 motion and imposing sanctions. The notice also purported to appeal from "all prior and subsequent appealable and non-appealable judgments and orders." We address the appealability of the June 28, 2002, notice of appeal in the "Discussion," *post*.

On April 21, 2003, pursuant to the parties' stipulation, the appeal filed June 28, 2002, by plaintiffs and appellants Julie Conway and Lloyd Conway as Trustees of the Tiffany Conway Trust, was dismissed as to defendants and respondents The Estee Lauder Companies, Inc. and Mellon Investor Services LLC only.

ISSUES

I. With regard to plaintiffs' appeal, Beaton raises an initial issue as to whether plaintiffs filed a timely notice of appeal. As we conclude that plaintiffs' notice of appeal

was untimely as to the order of dismissal and only valid as to the April 30, 2002, order denying their section 473 motion, the relevant issues on appeal as to plaintiffs are:

1. Whether the trial court erroneously refused to grant plaintiffs' section 473 motion and vacate the dismissal; and

2. Whether, because the underlying order of dismissal must be vacated, the monetary sanctions must also be vacated.

II. In his appeal, attorney Dennis A. Carey claims that:

1. He was not required to appear for his deposition because Beaton failed to serve him personally;

2. The trial court lacked jurisdiction to consider Beaton's motion for sanctions after dismissal of the action and where Beaton had not made a request to compel Carey to testify;

3. Beaton's deposition subpoena was an improper attempt to depose counsel without good cause;

4. Carey's failure to file opposition did not admit that Beaton's motion was proper or that sanctions should be imposed; and

5. The sanctions award for expenses Beaton did not pay was arbitrary and capricious.

DISCUSSION

I. *The Appeal of Plaintiffs Julie Conway and Lloyd Conway*

1. *Plaintiffs Filed an Untimely Notice of Appeal as to the March 8, 2002, Order of Dismissal, But Filed a Timely Notice of Appeal as to the April 30, 2002, Denial of Their Motion to Vacate*

Relying on California Rules of Court, rule 3(b), defendant Beaton argues that plaintiffs' failure to file their notice of appeal within 30 days after the April 30, 2002, service of the order denying their section 473 motion requires dismissal of their entire appeal. This argument is correct as to plaintiffs' appeal from the trial court's March 8,

2002, order of dismissal. It is not correct as to plaintiffs' appeal from the April 30, 2002, denial of their section 473 motion.

The relevant dates are as follows:

March 8, 2002: Trial court entered order of dismissal of the third amended complaint with prejudice and granting the request by Oxford and Goldstein to withdraw their cross-complaint against Beaton.

March 8, 2002: Defendants Estee Lauder and Mellon served a notice of entry of order of dismissal by mail.

April 4, 2002: Plaintiffs moved to set aside the March 8, 2002, order of dismissal, pursuant to section 473.

April 30, 2002: The trial court denied plaintiffs' section 473 motion to set aside the order entering terminating sanctions and dismissal. The minute order states: "Order is signed and filed this date. [¶] A copy of the Court's order is sent via U. S. Mail to all counsel appearing this date. [¶] Notice is waived."

June 28, 2002: Plaintiffs filed a notice of appeal from the April 30, 2002, order denying their section 473 motion and imposing sanctions and from "all prior and subsequent appealable and non-appealable judgments and orders."

California Rules of Court, rule 3(b) states: "If, within the time prescribed by rule 2 to appeal from the judgment, any party serves and files a valid notice of intention to move—or a valid motion—to vacate the judgment, the time to appeal *from the judgment* is extended for all parties until the earliest of:

"(1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order;

"(2) 90 days after the first notice of intention to move—or motion—is filed; or

"(3) 180 days after entry of judgment." (Italics added.)

The judgment was the March 8, 2002, order of dismissal. Notice of entry of that order of dismissal was also served on March 8, 2002. Thus plaintiffs' April 4, 2002, motion to vacate pursuant to section 473 was "within the time prescribed by rule 2 to

appeal from the judgment." The trial court's April 30, 2002, minute order stated that the order was signed and filed, and a copy was sent by mail, on April 30, 2002. Thus pursuant to rule 3(b)(1) of the California Rules of Court, plaintiffs had 30 days from April 30, 2002, to file their notice of appeal as to the March 8, 2002, order of dismissal. Plaintiffs did not file their appeal until June 28, 2002. " 'If a judgment or order is appealable, an aggrieved party must file a timely appeal or forever lose the opportunity to obtain appellate review.' " (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46, italics omitted; see also *Berge v. International Harvester Co*. (1983) 142 Cal.App.3d 152, 158.) If a party fails to appeal an appealable order within the prescribed time, a reviewing court lacks jurisdiction to review that order on a later appeal. (*In re Mariage of Lloyd* (1997) 55 Cal.App.4th 216, 219.) Therefore the notice of appeal was untimely as to the March 8, 2002, order of dismissal, which cannot be challenged in this appeal. (*In re Marriage of Cordero* (2002) 95 Cal.App.4th 653, 665-666.)

As to the April 30, 2002, order denying plaintiffs' section 473 motion, however, that ruling on a statutory motion is separately appealable as an order after judgment. (*Generale Bank Nederland v. Eyes of the Beholder Ltd*. (1998) 61 Cal.App.4th 1384, 1394.) The timeliness of an appeal from an order denying a motion to vacate is calculated from the date of entry of that order, not from entry of the prior judgment. (*Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1469.) Thus entry, and service, of the order denying the section 473 motion on April 30, 2002, commenced a 60-day period for filing plaintiffs' notice of appeal (Cal. Rules of Court, rule 2(a)(1)). As to their appeal from the April 30, 2002, order, therefore, plaintiffs' June 28, 2002, notice of appeal was timely filed. Plaintiffs' appeal is limited to issues arising from the April 30, 2002, order.

2. *The Denial of the Section 473 Motion Must Be Reversed*

a. *Standard of Review of a Section 473 Motion*

This court reviews rulings pursuant to section 473 according to an abuse of discretion standard. That discretion is not a capricious or arbitrary discretion but an

impartial discretion, guided and controlled by fixed legal principles in order to serve the ends of substantial justice. The moving party has the burden of establishing the basis for relief from judgment. (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1041.) Where possible, the law favors a hearing on the merits. Appellate courts are more disposed to affirm an order whose effect compels a trial on the merits than one which allows a default judgment to stand. The policies favoring relief from default, deference to the trial court's exercise of discretion, and trial on the merits do not transform the appellate courts into mere spectators. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1180-1181.)

b. *The Denial of the Section 473 Motion Was an Abuse of Discretion*

Section 473, subdivision (b) states that the trial court "may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." Subdivision (d) of the statute authorizes the trial court to "set aside any void judgment or order."

i. *The February 25, 2001, Terminating Sanctions Order Was Void*

One problem with the February 25, 2001, order entering terminating sanctions is that it was entered upon ex parte application. In the trial court, defendant argued that it could bring an ex parte application to control deposition scheduling, and cited section 2025, subdivision (f). This statute, however, authorizes an ex parte application to stay the taking of a deposition or to shorten or extend time to schedule a deposition.[3] It says nothing about an application for discovery sanctions, or an order for terminating sanctions, being made ex parte.

Section 2023, subdivision (b)(4) authorizes a trial court to impose a terminating sanction against someone engaging in conduct that is a misuse of the discovery process.

---

[3] Section 2025, subdivision (f) states, in relevant part: "On motion or ex parte application of any party or deponent, for good cause shown, the court may shorten or extend the time for scheduling a deposition, or may stay its taking until the determination of a motion for a protective order under subdivision (i)."

The trial court, however, can impose a terminating sanction only "after notice to any affected party, person, or attorney, and after opportunity for hearing[.]" (§ 2023, subd. (b).) Applications for an order imposing sanctions may not be made ex parte if a statute or rule requires notice. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 6.) *Alliance Bank* held that a minute order conditionally authorizing a party to bring an ex parte application on two days' written notice and conditionally ordering an award of additional attorney fees violated statutory notice and motion requirements in section 2034 and constitutional due process requirements, and was therefore invalid as in excess of the court's jurisdiction. (*Ibid*.) Actions in violation of reasonable notice requirements are invalid under due process provisions of the federal and state constitutions. (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 551.) "The requirement of notice is so fundamental to concepts of due process that it is deemed jurisdictional in nature." (*Oats v. Oats* (1983) 148 Cal.App.3d 416, 420.) Thus the ex parte nature of the terminating sanctions order made it a void order, and the trial court's later order denying plaintiffs' motion to vacate, in that it gave effect to that void order, was itself void. (*Rochin v. Pat Johnson Manufacturing Co*. (1998) 67 Cal.App.4th 1228, 1240.)

ii. *Issuance of a Terminating Sanctions Order, Where Plaintiffs Had Not Disobeyed a Prior Court Order Compelling Their Attendance at Depositions and Where a Lesser Discovery Sanction Was Available, Was a "Surprise" Making Denial of the Section 473 Motion an Abuse of Discretion*

The order entering terminating sanctions is erroneous for another reason. "A prerequisite to the imposition of the dismissal sanction is that the party has wilfully failed to comply with a court order." (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 488, disapproved on other grounds *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.) Particularly where the court imposes a terminating sanction for failure to comply with discovery, the Civil Discovery Act requires disobedience of a court order as a prerequisite for dismissal based upon discovery abuses. (*Ruvalcaba v.*

Government Employees Ins. Co. (1990) 222 Cal.App.3d 1579, 1581.) Dismissal should be used "only . . . after a party had an opportunity to comply with a court order." (*Ibid*.)

In this case defendants did not make a motion to compel or obtain a court order compelling plaintiffs' appearance at their depositions. The prerequisite to the order entering terminating sanctions did not exist. The imposition of sanctions, despite the absence of a court order compelling plaintiffs' attendance at their depositions, constituted a "surprise," defined as some condition or situation in which a party is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.) Plaintiffs did not willfully disobey a court order compelling their attendance at their depositions, and thus committed neither default nor negligence. Ordinary prudence could not have guarded against an order imposing terminating sanctions entered where the prerequisite to that order—a party's disobedience to a court order compelling attendance at deposition—had not occurred.

Moreover, the sanction of dismissal is ordinarily a drastic measure which should be employed cautiously (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793) and "sparingly" (*R.S. Creative, Inc. v. Creative Cotton, Ltd*. (1999) 75 Cal.App.4th 486, 496). "[L]esser sanctions, appropriate for the particular abuse, should be granted before a terminating sanction, such as dismissal, [is] utilized." (*Ruvalcaba v. Government Employees Ins. Co., supra,* 222 Cal.App.3d at p. 1581.) Thus discovery sanctions should be appropriate to the dereliction and should not exceed what is required to protect the party entitled to the discovery which was denied. (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 118.) The court may not impose sanctions which punish instead of being designed to accomplish the objects of discovery. (*Laguna Auto Body v. Farmers Ins. Exchange, supra*, 231 Cal.App.3d at p. 488.) Lesser sanctions authorized by section 2034, subdivision (b) include monetary sanctions (particularly as authorized by section 2025, subdivision (j)(3), for failure to attend or proceed with a deposition), issue

sanctions, evidentiary sanctions, a terminating sanction other than dismissal (see § 2023, subd. (b)(4)(A) and (B)), and a contempt sanction.

Defendants in this case did not obtain, and the trial court did not issue, a required order compelling plaintiffs' appearance at their depositions. Thus entry of a terminating sanction and later dismissal, where a lesser sanction was available, was again a "surprise" which justified the grant of relief from that judgment.

We therefore reverse the order denying the section 473 motion and remand the matter to the trial court with directions to vacate that order and to enter a new order granting the section 473 motion and vacating the February 25, 2002, order entering terminating sanctions and the March 8, 2002, order of dismissal based thereon.

C. *Reversal of the Section 473 Motion Requires Reversal of Sanctions in That Order*

The denial of plaintiffs' section 473 motion included an imposition of monetary sanctions payable to defendants in an amount totaling $33,400. Reversal of the order denying the section 473 motion requires reversal of sanctions imposed in that order.

II. *The Appeal of Former Attorney Dennis Carey*

Carey appeals the order granting Beaton's motion for $5,698 in sanctions.

Carey first claims he was not required to appear for his deposition because Beaton failed to serve him personally with the deposition subpoena. Beaton's sanctions motion states that defense counsel served Carey a deposition subpoena on February 14, 2002, setting a March 5, 2002, deposition. Carey asserts that he was not personally served, and cites the attached proof of service as lacking any signature or date and as otherwise blank.

Section 1987, subdivision (a) states in relevant part that "service of a subpoena is made by delivering a copy, or a ticket containing its substance, *to the witness personally*[.]" (Italics added.) "The method for obtaining discovery within the state from one who is not a party to the action is an oral deposition under Section 2025 . . . . [T]he process by which a nonparty is required to provide discovery is a deposition subpoena." (§ 2020, subd. (a).) "Personal service of any deposition subpoena is effective to require

of any deponent who is a resident of California at the time of service (1) personal attendance and testimony, if the subpoena so specifies[.]" (§ 2020, subd. (g); see also subd. (f).) California generally requires strict compliance with requirements for service of original process, subject to exceptions not relevant here. Service out of the witness's presence does not constitute personal delivery. (*In re Abrams* (1980) 108 Cal.App.3d 685, 690-695.) Knowledge of the service does not validate defective service of a witness subpoena. (*Id*. at p. 693; *House v. State of California* (1981) 119 Cal.App.3d 861, 876, fn. 11.) Service in compliance with statutory requirements is required for the court's jurisdiction. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808-809.)

On appeal, Beaton does not respond to Carey's claim that the trial court erroneously imposed sanctions against him or that he was not personally served with the deposition subpoena. Beaton provides no citations to the record on appeal or any argument to support valid personal service of the deposition subpoena on Carey. "[T]he courts are very strict in applying the statutory standards for proof of service; failure to strictly comply with those standards deprives the court of jurisdiction to act." (*Oats v. Oats, supra*, 148 Cal.App.3d at p. 420.) We therefore conclude that Carey was not personally served with the deposition subpoena, that service was ineffective, and that it was error to impose sanctions against him for failing to appear at that deposition.

The post-judgment imposition of sanctions against Carey was erroneously entered for other reasons. A court may not impose sanctions which impose punishment instead of being designed to accomplish the objects of discovery. (*Laguna Auto Body v. Farmers Ins. Exchange, supra*, 231 Cal.App.3d at p. 488.) After judgment was entered for defendants, sanctions against Carey served no further purpose in accomplishing the objects of discovery. They could only serve to punish Carey.

Defendant, moreover, obtained no order compelling Carey's appearance for his deposition. Therefore Carey's failure to appear was not an abuse of discovery pursuant to section 2023, subdivision (a)(7) ("[d]isobeying a court order to provide discovery"). Likewise, as defendant did not effectuate proper service on Carey, his failure to appear

was not an abuse of discovery pursuant to section 2023, subdivision (a)(4) ("[failure] to respond or to submit to an authorized method of discovery").[4]

Beaton also failed to provide authority for deposing opposing counsel. "[T]he practice of taking the deposition of opposing counsel should be severely restricted, and permitted only upon showing of extremely good cause[.]" (*Fireman's Fund Ins. Co. v. Superior Court* (1977) 72 Cal.App.3d 786, 790.) Beaton did not move to compel Carey's deposition and made no showing of "extremely good cause" why Beaton should be permitted to depose Carey. Beaton's April 9, 2002, motion for sanctions stated that Beaton wanted to depose Carey under "the crime/fraud exception to the attorney-client privilege" and referred to a letter from Beaton's counsel stating that Beaton intended to elicit Carey's deposition testimony "regarding the assistance he provided to Plaintiffs in perpetrating perjury and fraud, and that the information would be used to prevail in the underlying action." Aside from these conclusory generalizations, Beaton made no showing of "extremely good cause," and made no attempt to show that defendant Beaton could satisfy the limited circumstances in which opposing counsel could be deposed: "The circumstances under which opposing counsel may be deposed are limited to those where (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and not privileged; (3) the information is

---

[4] There appears to be one circumstance in which Carey could be subject to punishment without the necessity of a prior court order directing his compliance, but section 2020, subdivision (h) limits that punishment to contempt, not monetary sanctions. As a non-party, Carey could be subject to defendants' request for discovery pursuant to section 2020. Subdivision (g) of that statute makes personal service of a deposition subpoena effective for a non-party deponent. (We have found that defendants did not personally serve Carey, and thus did not satisfy this precondition for the contempt punishment.) Section 2020, subdivision (h) states: "A deponent who disobeys a deposition subpoena in any manner described in subdivision (g) may be punished for contempt under Section 2023 without the necessity of a prior order of court directing compliance by the witness, and is subject to the forfeiture and the payment of damages set forth in Section 1992." As stated, Beaton's request for sanctions relied on section 2023, not on section 2020 or 1992.

crucial to the preparation of the case." (*Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1496.)

We conclude that the trial court erroneously imposed sanctions on former attorney Carey and that this order must be reversed.

DISPOSITION

The April 30, 2002, order denying plaintiffs' section 473 motion, imposing sanctions against plaintiffs Lloyd Conway and Julie Conway and in favor of defendants, and imposing sanctions against Dennis Carey and in favor of defendant Beaton, is reversed. We remand the matter to the trial court with directions to vacate the April 30, 2002, order and to enter a new order granting the section 473 motion and vacating the February 25, 2002, order entering terminating sanctions and the March 8, 2002, order of dismissal based thereon. Costs on appeal are awarded to appellants.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P.J.

ALDRICH, J.