Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns

Court of Appeal of California, Second Appellate District, Division One.

June 10, 1992, Decided

No. B060139

Reporter

7 Cal. App. 4th 27 *; 9 Cal. Rptr. 2d 396 **; 1992 Cal. App. LEXIS 745 ***; 92 Cal. Daily Op. Service 4942; 92 Daily Journal DAR 7771

DO IT URSELF MOVING & STORAGE, INC., et al., Plaintiffs and Appellants, v. BROWN, LEIFER, SLATKIN & BERNS et al., Defendants and Respondents.

Prior History: [***1] Superior Court of Los Angeles County, No. C701037, Aurelio Munoz, Judge.

Disposition: The judgment is reversed. The parties shall bear their own costs on appeal.

Core Terms

discovery, sanctions, plaintiffs', trial court, audit, accounting, summary judgment, damages, summary judgment motion, evidentiary, defense counsel, moving party, documentation, continuance, punitive, abused

Case Summary

Procedural Posture

Plaintiffs, corporation and associated individuals, sought review of a judgment of the Superior Court of Los Angeles County (California), which entered summary judgment in favor of defendant accountants and granted defendants' motion to impose an evidence preclusion sanction on plaintiffs. Plaintiffs had filed a complaint against defendants alleging causes of action for breach of contract, negligence, breach of fiduciary duty, and accounting.

Overview

filed a complaint against defendant accountants, alleging causes of action for breach of contract, negligence, breach of fiduciary duty, and accounting. The parties stipulated to discovery, but plaintiffs refused to comply. The trial court granted motion to impose an evidence defendants' preclusion sanction pursuant to Cal. Civ. Proc. Code §§ 2021 and 2023. The trial court granted defendants' motion for summary judgment on the ground that plaintiffs would be unable to prove their case without the evidence that the trial court ordered stricken. On appeal, the court reversed the trial court's grant of summary judgment. The court upheld the evidentiary sanctions order, holding that the trial court did not abuse its discretion in imposing it. Plaintiffs willfully failed to comply with their discovery obligations. The court held that the trial court erred in granting summary judgment to defendants because the burden was on defendants to show that there was no triable issue of material fact. Although plaintiffs could not prove liability or damages due to the sanctions, that issue was not a proper part of a summary judgment motion.

Outcome

The court reversed trial court's grant of summary judgment, which had been granted in favor of defendant accountants. The court upheld the trial court's evidentiary sanctions order against plaintiffs, corporation and associated individuals, because the trial court did not abuse its discretion. Plaintiffs' probable inability to meet their burden of proof at trial due to the sanctions was not a proper part of the summary judgment motion.

about:blank Page 1 of 12

Plaintiffs, corporation and associated individuals,

7 Cal. App. 4th 27, *27; 9 Cal. Rptr. 2d 396, **396; 1992 Cal. App. LEXIS 745, ***1

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > Stipulations

HN1[♣] Methods of Discovery, Stipulations

See Cal. Civ. Proc. Code § 2021.

Civil Procedure > Discovery &
Disclosure > Discovery > Misconduct During
Discovery

HN2[♣] Discovery, Misconduct During Discovery

See Cal. Civ. Proc. Code § 2023.

Civil Procedure > Appeals > Standards of Review > General Overview

HN3[♣] Appeals, Standards of Review

An order of the trial court is presumed correct and all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is the appellant's burden to affirmatively demonstrate error and, where the evidence is in conflict, the court will not disturb the trial court's findings.

Civil Procedure > Discovery &
Disclosure > Discovery > Misconduct During
Discovery

Discovery sanctions should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. The trial court has a wide discretion in granting discovery and by the provisions of Cal. Civ. Proc. Code § 2034. It is granted broad discretionary powers to enforce its orders but its powers are not unlimited. The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment.

Civil Procedure > Pleading &
Practice > Pleadings > Rule Application &
Interpretation

HN5[♣] Pleadings, Rule Application & Interpretation

A point which is merely suggested by a party's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion.

Civil Procedure > Discovery &
Disclosure > Discovery > Misconduct During
Discovery

Civil Procedure > Discovery & Disclosure > General Overview

HN6[♣] Discovery, Misconduct During Discovery

The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary,

about:blank Page 2 of 12

Civil Procedure > Discovery & Disclosure > General Overview

HN4[♣] Discovery, Misconduct During Discovery

capricious, or whimsical action. Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply, and (2) the failure must be wilful.

Page 2 of 11

7 Cal. App. 4th 27, *27; 9 Cal. Rptr. 2d 396, **396; 1992 Cal. App. LEXIS 745, ***1

Civil Procedure > ... > Summary
Judgment > Opposing Materials > General
Overview

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > General
Overview

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Movant
Persuasion & Proof

HN7[♣] Summary Judgment, Opposing Materials

On a motion for summary judgment or summary adjudication of issues, the burden is always on the moving party to show there is no triable issue of material fact. Until this is done, the resisting party has no burden to produce opposing evidence or to disprove anything at all.

Civil Procedure > ... > Pretrial
Judgments > Nonsuits > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > General
Overview

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Movant
Persuasion & Proof

Civil Procedure > Summary

Law > Appropriateness

HN8[♣] Pretrial Judgments, Nonsuits

A summary judgment in favor of a defendant is proper if it is claimed the action has no merit and such claim is proved to be correct. There is nothing in the statute which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, the moving party must generally negative the matters which the resisting party would have to prove at the trial. Vanderbilt Growth Fund, Inc. v. Superior Court, 105 Cal. App. 3d 628, 164 Cal. Rptr. 621 (1980), to the extent it expresses a contrary view, is disapproved.

Headnotes/Summary

Summary CALIFORNIA OFFICIAL REPORTS SUMMARY

A corporation and two individuals filed an action alleging causes of action for breach of contract, negligence, breach of fiduciary duty, and accounting. Shortly before the date set for trial, the parties stipulated to continue the trial, in order to allow plaintiffs to complete an audit, which was to be made available to all parties along with supporting documentation. After several unsuccessful requests for the audit report, defendants filed a motion to impose an evidence preclusion sanction (Code Civ. Proc., § 2023). The

about:blank Page 3 of 12

CIVII I TOCCUUTO / ... / Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of trial court, noting that more than 13 months had passed and that plaintiffs had indicated that the audit would not be completed, entered an order precluding plaintiffs from introducing accounting evidence in support of their complaint. Defendants then filed a motion for summary judgment on the ground that plaintiffs would be unable to prove their case without the precluded evidence. The trial court granted the motion, finding that plaintiffs

Page 3 of 11

7 Cal. App. 4th 27, *27; 9 Cal. Rptr. 2d 396, **396; 1992 Cal. App. LEXIS 745, ***1

were unable to prove the amount of their damages. (Superior Court of Los Angeles County, No. CA(2)[$\stackrel{1}{\simeq}$] (2) C701037, Aurelio Munoz, Judge.)

The Court of Appeal reversed the judgment. Initially, the court held that the trial court had not abused its discretion by precluding plaintiffs' evidence. Although defendants' preclusion motion was the first motion to deal with discovery, a formal order to comply with discovery would have been futile, since plaintiffs conceded that they were unable to furnish the promised items. In addition, the court held that the sanction was properly tailored to address the harm caused by the withheld discovery, and that a lesser sanction would have permitted plaintiffs to benefit from their stalling tactics. However, the court held that the trial court erred by granting summary judgment in favor of defendants, even though plaintiffs conceded that they were unable to prove liability or damages precluded evidence. Although without the plaintiffs' inability to meet their burden of proof could form the basis of a motion for judgment following the presentation of plaintiffs' case-inchief (Code Civ. Proc., § 631.8), it was not a proper part of defendants' summary judgment motion, since defendants bore the burden of showing that there was no triable issue of material fact. (Opinion by Devich, J., with Spencer, P. J., and Ortega, J., concurring.)

Headnotes

Discovery and Depositions § 31 — Enforcement of Right to Discovery — Sanctions of Trial Court — Purpose and Propriety.

--Discovery sanctions should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. The trial court has a wide discretion in granting discovery, and by the provisions of Code Civ. Proc., § 2034 (exchange of expert witness information), it is granted broad discretionary powers to enforce its orders, but its powers are not unlimited. The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he or she seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment.

 $CA(3a)[\stackrel{\blacktriangle}{=}]$ (3a) $CA(3b)[\stackrel{\bigstar}{=}]$ (3b)

Discovery and Depositions § 31 — Enforcement of Right to Discovery — Sanctions of Trial Court — Precluding Evidence — Propriety as Initial Sanction.

--In an action for breach of contract, negligence, breach of fiduciary duty, and accounting, in which

about:blank Page 4 of 12

$CA(1)[^{1}](1)$

Appellate Review § 140 — Scope of Review — Presumptions — Findings.

--On appeal, an order of the trial court is presumed correct and all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is the appellants' burden to affirmatively demonstrate error and, where the evidence is in conflict, the appellate court will not disturb the trial court's findings.

plaintiffs promised, but failed, to produce an audit report and supporting documentation, the trial court did not abuse its discretion by granting defendants' motion for a sanction precluding plaintiffs from introducing accounting evidence, even though the motion was the first motion to deal with discovery issues. Although authorities have interpreted the Civil Discovery Act of 1986 (Code Civ. Proc., § 2016 et seq.) to require that a party disobey a court order prior to the imposition of sanctions harsher than monetary sanctions, plaintiffs conceded that they were unable to provide the promised items of discovery. Accordingly, a formal order to comply would have been futile.

Page 4 of 11

7 Cal. App. 4th 27, *27; 9 Cal. Rptr. 2d 396, **396; 1992 Cal. App. LEXIS 745, ***1

$CA(4)[\frac{1}{2}]$ (4)

Appellate Review § 109 — Briefs — Requisites — Argument and Authority.

--A point which is merely suggested by a party's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion on appeal.

$$CA(5)[\stackrel{1}{\simeq}](5)$$

Discovery and Depositions § 31 — Enforcement of Right to Discovery — Sanctions of Trial Court — Precluding Evidence — Punitive Sanction.

--In an action for breach of contract, negligence, breach of fiduciary duty, and accounting, in which plaintiffs promised, but failed, to produce an audit report and supporting documentation, the trial court did not abuse its discretion by granting defendants' motion for a sanction precluding the introduction of accounting evidence, even though the sanction did not seek the objects of the discovery. The sanction was not punitive, since the court was attempting to tailor the sanction to the harm caused by the withheld discovery.

action. Only two facts are absolutely prerequisite to imposition of the sanction. First, there must be a failure to comply, and second, the failure must be willful. Plaintiffs failed to timely comply with their discovery obligation, and the record was replete with instances of plaintiffs' attempts to delay trial and withhold promised items of discovery.

$$CA(7)[\stackrel{1}{2}](7)$$

Discovery and Depositions § 31 — Enforcement of Right to Discovery — Sanctions of Trial Court — Precluding Evidence — Less Drastic Alternative.

--In an action for breach of contract, negligence, breach of fiduciary duty, and accounting, in which plaintiffs promised, but failed, to produce an audit report and supporting documentation, the trial court did not abuse its discretion by precluding plaintiffs from introducing accounting evidence, even though there were other sanctions which would have been less drastic. The imposition of a lesser sanction would have permitted plaintiffs to benefit from their stalling tactics, and the trial court properly tailored the sanction to the particular abuse.

 $CA(8)[\frac{1}{2}](8)$

about:blank Page 5 of 12

 $CA(6)[\stackrel{1}{2}](6)$

Discovery and Depositions § 31 — Enforcement of Right to Discovery — Sanctions of Trial Court — Grounds — Willful Noncompliance.

--In an action for breach of contract, negligence, breach of fiduciary duty, and accounting, in which the trial court precluded plaintiffs from introducing accounting evidence due to plaintiffs' failure to produce the evidence during discovery as promised, the record supported the trial court's determination that plaintiffs had willfully failed to comply with their discovery obligation. The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical

Discovery and Depositions § 31 — Enforcement of Right to Discovery — Sanctions of Trial Court — Grounds — Prejudice.

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--In an action for breach of contract, negligence, breach of fiduciary duty, and accounting, in which plaintiffs promised, but failed, to produce accounting evidence in exchange for a continuance of the trial date, the trial court properly precluded plaintiffs from introducing accounting evidence, even though defendants did not show that they were prejudiced by plaintiffs' dilatory conduct. As the party moving for discovery sanctions, defendants were only required to demonstrate plaintiffs' willful failure to comply with discovery, and not that defendants were prejudiced by the delay. Moreover, any sanction other than preclusion would have

Page 5 of 11

7 Cal. App. 4th 27, *27; 9 Cal. Rptr. 2d 396, **396; 1992 Cal. App. LEXIS 745, ***1

forced defendants to proceed to trial without the benefit of the bargained-for evidence.

 $CA(9a)[^{1}] (9a) CA(9b)[^{1}] (9b)$

Summary Judgment § 19 — Hearing and Determination — Effect of Conceded Absence of Evidence.

--In an action in which the trial court, as a discovery sanction, precluded plaintiffs from introducing accounting evidence, the trial court erred by granting summary judgment in favor of defendants, even though plaintiffs conceded that they were unable to prove liability or damages without the precluded evidence. Even if plaintiffs' concession was a judicial admission, plaintiffs' inability to meet their burden of proof might be a basis of a motion for judgment following the presentation of their case-in-chief (Code Civ. Proc., § 631.8), but it was not a proper part of defendants' summary judgment motion. On a motion for summary judgment or summary adjudication of

proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, the moving party must generally negative the matters which the resisting party would have to prove at the trial. It is not enough to simply show that the plaintiff has admitted having no evidence to back up certain claims, and therefore would be nonsuited if the case went to trial.

Counsel: Ramsey, Prestholt & Holmberg and Willi H. Siepmann for Plaintiffs and Appellants.

Musick, Peeler & Garrett, Eric L. Troff and Robert G. Warshaw for Defendants and Respondents.

Judges: Opinion by Devich, J., with Spencer, P. J., and Ortega, J., concurring.

Opinion by: DEVICH, J.

Opinion

[*31] [**397] Do It Urself Moving & Storage,

about:blank Page 6 of 12

issues, the burden is always on the moving party to show there is no triable issue of material fact. Until this is done, the resisting party has no burden to produce opposing evidence or to disprove anything at all. (Disapproving *Vanderbilt Growth Fund, Inc.* v. *Superior Court* (1980) 105 Cal.App.3d 628 [164 Cal.Rptr. 621] to the extent that it upheld the grant of a motion for summary adjudication of issues on the basis that the moving party had demonstrated that the resisting party could not prove the extent of its damages.)

 $CA(10)[\stackrel{1}{2}](10)$

Summary Judgment § 3 — Propriety — Defendant's Burden.

--A summary judgment in favor of a defendant is proper if it is proved that the action has no merit. There is nothing in the statute which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of

Inc. (DIU), Robert Winet, and Melinda Winet (collectively plaintiffs) appeal from the summary judgment entered in favor of Brown, Leifer, Slatkin & Berns (BLSB), Eugene Brown, and Gerald Slatkin (collectively defendants). We reverse.

Background

On October 5, 1988, DIU filed a complaint against defendants and others alleging causes of action for breach of contract, [**398] negligence, breach of fiduciary duty, and accounting. ¹

Trial was scheduled [***2] to commence on April 16, 1990. On March 12, 1990, following the denial of its ex parte motion to continue the trial date, DIU noticed a motion to continue the trial date for six months. In its points and authorities, DIU indicated that "the primary reason there is good cause for this short continuance is that DIU will be totally unable

Page 6 of 11

7 Cal. App. 4th 27, *31; 9 Cal. Rptr. 2d 396, **398; 1992 Cal. App. LEXIS 745, ***2

to prove liability and damages against [defendants] ... until DIU's recently retained accountants have completed their audit of DIU's and [defendants'] records."

On April 11, 1990, prior to the hearing on plaintiffs' motion, the parties entered a stipulation (the stipulation) whereby, inter alia, they agreed to a [*32] court trial; the trial would be continued "to a date not earlier than December 1, 1990"; "the audit being conducted by DIU [was to] be completed no later than August 1, 1990, and the written report of said audit [was to] be [made] available to all parties after that date"; the Winets were added as plaintiffs to the action; and "all claims for punitive damages and intentional conduct" were dismissed with prejudice.

On September 28, 1990, counsel for defendants requested a copy of the audit pursuant to the

Code of Civil Procedure sections 2021 and 2023. ² On May 10, 1991, the trial court granted the motion, noting:

[***4] "Plaintiffs shall be precluded from introducing any accounting evidence in support of their complaint for the following reasons. This matter was [*33] originally set for trial over a year ago. At the last minute the parties entered into a stipulation that the trial go before a retired judge, discovery would be continued and that a completed accounting would be completed before August 1, 1990. As the stipulation stated: 'The primary reason ... for this short continuance is that DIU will be Totally unable to prove liability and damages against the accountants ... until DIU's [**399] Recently retained accountants have completed their audit ...' [3] The stipulation then went on to state that the audit was ongoing and would be completed

about:blank Page 7 of 12

¹ A first amended complaint alleging the same causes of action, but not seeking an accounting, was filed on November 22, 1989.

stipulation. On October [***3] 10, 1990, counsel for plaintiffs informed counsel for defendants that the "audit was complete, or nearly complete." Plaintiffs' counsel also suggested that settlement discussions be arranged. Such a meeting was scheduled for October 17, 1990. At this meeting, plaintiffs' counsel informed defense counsel that an audit was not possible, and offered a six-page summary of plaintiffs' accountants' preliminary findings in place of the audit report. This summary referred to supporting documentation, but did not contain copies of such documentation. Defense counsel was promised that copies of the summary and the supporting documentation would be provided.

On February 28, 1991, following several unsuccessful requests for the audit report and the supporting documentation, defense counsel sent plaintiffs' counsel a letter indicating that defendants would move to exclude such evidence from trial should plaintiffs persist in withholding the information.

On April 25, 1991, defendants filed a motion to impose an evidence preclusion sanction pursuant to

² All statutory references are to the Code of Civil Procedure.

HN1[Section 2021 provides, in pertinent part:

"Unless the court orders otherwise, the parties may by written stipulation ... modify the procedures provided by this article for other methods of discovery."

HN2[] Section 2023 provides, in relevant part:

"(a) Misuses of the discovery process include, but are not limited to, the following:

"[Text omitted.]

"(4) Failing to respond or submit to an authorized method of discovery.

"[Text omitted.]

"(b) To the extent authorized by the section governing any particular discovery method or any other provision of this article, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process.

"[Text omitted.]

"(3) The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence."

³ As noted above, this statement was contained in the points and authorities filed in support of DIU's noticed motion for continuance; it does not appear in the stipulation.

Page 7 of 11

7 Cal. App. 4th 27, *33; 9 Cal. Rptr. 2d 396, **399; 1992 Cal. App. LEXIS 745, ***4

in four months. Now, more than 13 months later the audit has not yet been completed and the court has in effect been told that it will never be completed. Moreover counsel for plaintiffs have failed to provide any back up documentation to the minuscule report that has been provided and even that was not sent until such time as permission had been received from another lawyer in a totally unrelated case. This leads the court to wonder if the other counsel [***5] had not consented would counsel have refused to turn over the information.

"Finally the weakness of plaintiffs['] position is underscored by plaintiffs offering to stipulate to 'the use of any audit or accounting previously provided by II defendants

should be further pointed out that the report of the [accountants'] findings, dated March 28, 1991 was sent to defense counsel on May 3, 1991. The copies of supporting evidence pertaining to the March 28, 1991 report were obtained on May 17, 1991 and messengered to defense counsel on May 17, 1991. [P] 7. Defendants are currently in possession of all relevant financial evidence that plaintiffs' [sic] plan to use at the time of trial and no new [***7] trial date has been scheduled. Therefore, defendants have not been prejudiced by the delay in obtaining the accounting evidence."

The parties' motions were heard together on June 14, 1991. The minute order of that date provides:

about:blank Page 8 of 12

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"Counsel was to have turned over information to defense counsel by last September at the latest. They have not even bothered to answer calls much less turn over the required information. Finally this case which was supposed to have been tried last April has now been delayed more than a year and it is still no closer to trial than it was at the time of the 'short continuance'. The court feels counsel for plaintiffs have misused the discovery process and accordingly grants the requested sanctions."

On May 17, 1991, defendants filed a motion for judgment on the ground summary that plaintiffs [***6] would be unable to prove their case without the evidence the trial court ordered stricken. In a declaration submitted by plaintiffs in opposition to the summary judgment motion, plaintiffs' accountant stated: "Assuming that the court does not allow any evidence of the work we performed in our attempted accounting of DIU's records, I could still testify, based on my review of photocopies of records received directly from [BLSB], as to the negligence of [BLSB] in its supervision and direction of the activities of Marcia Gale, DIU's bookkeeper."

On May 20, 1991, plaintiffs filed alternative motions for reconsideration or clarification of the evidence preclusion order. In a supporting declaration, [*34] plaintiffs' counsel stated: "6. It

THE INCHOLL TO TECOHSIDE AUOU IS Plaintiffs have delayed this case for more than a year, have failed to participate in the discovery process and in essence still admitted to the court at the last status conference that there is no way of proving that they have suffered any damages. Additionally, in its original granting of the motion the court set forth numerous reasons why the motion should be granted including the fact that [] plaintiffs had granted themselves continuance for over a year by abusing the discovery process. Now, with a straight face, they are attempting to use the lack of a trial date as a reason for reconsideration. [P] ... The motion for summary judgment is granted. Plaintiffs cannot prove amount of damages."

ISSUES

Plaintiffs contend that the trial court abused its discretion by precluding admission of plaintiffs' accounting evidence and erred in granting summary judgment.

[**400] DISCUSSION

1. Evidentiary Sanctions

[***8] Plaintiffs assert the trial court "committed reversible error by imposing evidentiary sanctions ... which were, in effect, terminating sanctions." Specifically, although conceding "that they may

Page 8 of 11

7 Cal. App. 4th 27, *34; 9 Cal. Rptr. 2d 396, **400; 1992 Cal. App. LEXIS 745, ***8

have been dilatory in promising what they could not deliver [i.e., the audit reports]," plaintiffs argue the trial court abused its discretion since (a) "the motion for evidentiary sanctions was the first motion to deal with discovery issues in the case, and there was no previous court order on the specific issue of the accounting report"; (b) "discovery sanctions, which are purely punitive and do not seek the objects of the discovery[,] may not be imposed"; (c) plaintiffs' "noncompliance was *not* willful and was at most negligent and based on a

CA(3a) [♣] (3a) Without citation of authority, plaintiffs present the conclusional argument that the trial court abused its discretion since "the motion for evidentiary sanctions was the first motion to deal with discovery issues in the case, and [***10] there was no previous court order on the specific issue of the accounting report."

CA(4)[$^{\bullet}$] (4) Initially, we note the well-settled rule that HN5[$^{\bullet}$] " '[a] point which is merely suggested by [a party's] counsel, with no supporting

misjudgment"; (d) less drastic sanctions were available; and (e) defendants were not prejudiced "other than that inherent in any delay." We disagree.

[*35] CA(I)[1) HN3[1] "The order of the trial court is presumed correct and all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is [the] appellants' burden to affirmatively demonstrate error and, where the evidence is in conflict, this court will not [***9] disturb the trial court's findings. [Citations.]

"[Text omitted.]

CA(2) (2) HN4 [\uparrow] "Discovery sanctions 'should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.' [Citations.] ' "The trial court has a wide discretion in granting discovery and by the provisions of section 2034 ... it is granted broad discretionary powers to enforce its orders but its powers are not unlimited. ... [P] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]" ' [Citations.]" (Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal.App.3d 481, 487-488 [282] Cal.Rptr. 530].)

a. Prior Court Order

argument or authority, is deemed to be without foundation and requires no discussion.' [Citation.]" (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 619, fn. 2 [263 Cal.Rptr. 813].)

CA(3b) (3b) Moreover, while the cases and treatises have interpreted the Civil Discovery Act of 1986 (§ 2016 et seq.), and the statutory scheme which preceded it, to require that, prior to the imposition of sanctions harsher than monetary sanctions, a party must have disobeyed a court order compelling discovery (see, e.g., Young v. Rosenthal (1989) 212 Cal.App.3d 96, 114 [260 Cal.Rptr. 369]; Deyo v. Kilbourne (1978) 84 Cal.App.3d 771, 789 [149 Cal.Rptr. 499]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1991) P 8:10, p. 8A-6; Civil Discovery Practice in Cal. (Cont.Ed.Bar 1988) § 8.93, p. 516; New Civil Discovery [***11] Act (The [*36] Rutter Group 1986) P 8:734, pp. 202-203), these authorities are distinguishable from the circumstances of the case at bench. Here, it is conceded that plaintiffs are unable to provide the promised items of discovery. Under circumstances of this case, a warning to plaintiffs, in the form of a formal order to comply, would have been futile. (See County of El Dorado v. Schneider (1987) 191 Cal.App.3d 1263, 1277 [237 Cal.Rptr. 51].)

b. Punitive Sanctions

CA(5) [•] (5) Plaintiffs characterize the evidentiary sanctions imposed by the trial court as "punitive," and assert that such sanctions "do not

Page 9 of 11

7 Cal. App. 4th 27, *36; 9 Cal. Rptr. 2d 396, **400; 1992 Cal. App. LEXIS 745, ***11

seek the objects of the discovery."

[**401] Contrary to plaintiffs' assertion, the trial court's evidentiary sanction was not punitive; rather, "in choosing this sanction, the court was attempting to tailor the sanction to the harm caused by the withheld discovery. [Citation.]" (*Sauer v.*

question is whether the trial court abused its discretion by imposing the sanction it chose. (Laguna Auto Body v. Farmers Ins. Exchange, supra, 231 Cal.App.3d at p. 491.) Moreover, imposition of a lesser sanction would have permitted plaintiffs to benefit from their stalling tactics. (Sauer v. Superior Court. supra, 195

about:blank Page 10 of 12

Superior Court (1987) 195 Cal.App.3d 213, 229 [240 Cal.Rptr. 489]; see also Wilson v. Jefferson (1985) 163 Cal.App.3d 952, 958-959 [210 Cal.Rptr. 464]; Caryl Richards, Inc. v. Superior Court (1961) 188 Cal.App.2d 300, 305 [10 Cal.Rptr. 377].) [***12]

c. Willful Noncompliance

CA(6) [↑] (6) HN6 [↑] "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply ... and (2) the failure must be wilful [citation]." (Calvert Fire Ins. Co. v. Cropper (1983) 141 Cal.App.3d 901, 904 [190 Cal.Rptr. 593].)

It is beyond dispute that plaintiffs failed to timely comply with their discovery obligations. With regard to the willfulness of their noncompliance, plaintiffs urge that their conduct "was at most negligent." Contrary to this characterization of their actions, the record is replete with instances of plaintiffs' attempts to delay trial in this matter and withhold promised items of discovery. The trial court's determination that plaintiffs have misused the discovery process is amply supported by the record.

d. Less Drastic Alternatives

CA(7) [↑] (7) Again without citation to authority, plaintiffs assert that the "court had at its disposal other potential sanctions, especially monetary ones, which would have been less [***13] drastic than the ones at hand." However, the question [*37] before this court is not whether the trial court should have imposed a lesser sanction; rather, the

Cal.App.3d at p. 230.) The trial court did not abuse its discretion by tailoring the sanction to the particular abuse. (*Id* at p. 229.)

e. Prejudice

CA(8) (8) Finally, plaintiffs argue that defendants were not prejudiced "other than that inherent in any delay." However, defendants did not have a burden of showing that they were prejudiced by plaintiffs' dilatory conduct. As the moving parties, defendants were only required to demonstrate plaintiffs' willful failure to comply with discovery. (Calvert Fire Ins. Co. v. Cropper, supra, 141 Cal.App.3d at p. 904.) Moreover, any [***14] sanction other than one which precluded plaintiffs from introducing the withheld discovery would have forced defendants to proceed to trial without the benefit of the bargained-for evidence. Sauer v. Superior Court, supra, 195 Cal.App.3d at p. 230.)

2. Summary Judgment

CA(9a)[\frown] (9a) Plaintiffs assert that the trial court erred in granting summary judgment. We agree.

The gravamen of defendants' summary judgment motion was that plaintiffs' assertion in the March 12, 1990 motion for continuance that they will be unable to prove either liability or damages without the accounting audit evidence constituted a judicial admission, and entitled defendants to judgment in their favor. Indeed, in granting summary judgment, the trial court noted that "plaintiffs cannot prove amount of damages."

Preliminarily, we note that defendants' attempt to elevate an unsworn statement made as part of the points and authorities supporting a motion to the

Page 10 of 11

7 Cal. App. 4th 27, *37; 9 Cal. Rptr. 2d 396, **401; 1992 Cal. App. LEXIS 745, ***14

level of a judicial admission is unfounded. However, even if such a statement could be considered a judicial admission summary judgment adjudication of issues on the basis that the moving party had demonstrated the resisting party "could not prove the extent of its [] damages allegedly

about:blank Page 11 of 12

would nevertheless be inappropriate.

As this court indicated in *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 338 [282 Cal.Rptr. 368], [***15] *HN7*[*] [**402] "on a motion for summary judgment or [summary adjudication of issues], the burden is always on the [*38] moving party to show there is no triable issue of material fact. [Citation.] ... Until this is done, the [resisting party] has no burden to produce opposing evidence or to disprove anything at all. [Citations.]" (Italics and fn. omitted.)

CA(10) [10] HN8 [1] "A summary judgment in favor of a defendant is proper 'if it is claimed the action has no merit' [citation] and such claim is proved to be correct. There is nothing in the statute which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, the moving party must generally negative the matters which the resisting party would have to prove at the trial. [Citations.]" (Barnes v. Blue Haven Pools (1969) 1 Cal.App.3d 123, 127 [81 Cal.Rptr. 444]; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, supra, P 10:243, p. 10-59 [the "defendant's burden is to disprove the complaint. It is not [***16] enough to simply show that the plaintiff has admitted having 'no witnesses' or 'no evidence' to back up certain claims (and therefore would be nonsuited if the case went to trial). [Citation.]" (Italics omitted.)].)

Unfortunately, the law in this area has been clouded by an opinion issued by this division. In *Vanderbilt Growth Fund, Inc. v. Superior Court* (1980) 105 Cal.App.3d 628, 636-637 [164 Cal.Rptr. 621], without discussing *Barnes v. Blue Haven Pools, supra*, 1 Cal.App.3d 123, this court upheld the grant of a motion for summary

sustained as a result of [the moving party's] negligence and breach of contract." (105 Cal.App.3d at p. 637, fn. omitted.) Regardless of whether the issue in question is liability or damages, no sound basis exists to have different rules governing the burden of proof a party must meet when bringing a motion for summary judgment or summary adjudication of issues. Accordingly, [***17] Vanderbilt Growth Fund, Inc. v. Superior Court, supra, 105 Cal.App.3d 628, to the extent it expresses a contrary view, is disapproved.

CA(9b) [↑] (9b) In light of the trial court's evidentiary sanctions order, which we have upheld, we have little doubt that plaintiffs will not be able to meet their burden of proof at trial. However, while that issue may form the basis of a motion for judgment following the presentation of plaintiffs' case-in-chief (§ 631.8), it is not a proper part of a summary judgment motion. (*Barnes v. Blue Haven Pools, supra*, 1 Cal.App.3d at p. 127.)

Therefore, we must reverse the summary judgment.

[*39] Disposition

The judgment is reversed. The parties shall bear their own costs on appeal.

Spencer, P. J., and Ortega, J., concurred.

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Page 11 of 11

about:blank Page 12 of 12