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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

NEWTON – THE CHILDREN'S LEARNING CENTER, INC., Plaintiff and Respondent, v. DE RITZ, LLC, Defendant and Appellant.	A167738 (San Mateo County Super. Ct. No. 20CIV02750)

De Ritz, LLC (De Ritz) appeals from an order awarding Newton – The Children's Learning Center, Inc. (Learning Center) monetary sanctions in the amount of $50,919 along with the cost of referring the parties' discovery dispute to a referee. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Learning Center offers child afterschool care, summer camps, and enrichment camps. Beginning in 2014, Learning Center leased different suites of an office building located in San Mateo from De Ritz, the building's owner. In 2018, Learning Center began negotiating a new lease as it was seeking to expand the space for its management operations and to obtain a new space for teaching music and cooking classes. De Ritz agreed to provide

significant tenant improvements and the parties entered into a lease agreement in November 2018.

The lease was to start in January 2019, with one unit ready for occupancy before that time and another unit to be ready before the end of March. De Ritz failed to complete the tenant improvements, however, and the premises were not ready within that timeframe. Nevertheless, Learning Center began occupying the usable portions of one unit in March as it could not afford to disrupt its business operations. De Ritz sought to turn over possession of the other unit in July but the incomplete state of the unit and the poor quality of construction rendered it unusable, and Learning Center was never able to make use of it. De Ritz never completed any of the tenant improvements and, at one point, refused to do any further work on the units. Concerned about the safety of its space, Learning Center contacted the City of San Mateo. After the City inspected the units in March 2020, it "red-tagged" the premises as unsafe to occupy. On March 12, 2020, Learning Center vacated the premises and removed the last of its effects on June 29, 2020.

In July 2020, Learning Center filed a complaint against De Ritz for breach of the lease and other claims arising out of De Ritz's failure to complete the agreed upon tenant improvements. During discovery, Learning Center sought information regarding the improvements, including the identity and qualifications of the individuals who performed the work. In its responses to Learning Center's discovery requests, De Ritz claimed it did not know who performed the tenant improvement work because it had employed Marco Huerta to handle the improvements, lease negotiations, and building operations. But it also emerged that Huerta was employed by an entity — FCE Benefits — that appeared to be an alter ego of De Ritz.

Discovery also revealed FCE Benefits was housed in the same building as De Ritz; Huerta was described as an assistant to Steve Porter, the CEO of FCE Benefits and the managing member of De Ritz; and another employee was employed by and did work for both entities using an office, computer, email account and phone supplied by FCE Benefits. At his deposition, Huerta testified that he frequently used his company phone to communicate with Porter about the tenant improvements.

Notwithstanding the close relationship between FCE Benefits and De Ritz, De Ritz only produced six emails about the lease and tenant improvements in response to Learning Center's discovery requests. It also came to light that FCE Benefits fired Huerta about one month after Learning Center filed the complaint, and that his company cell phone had been "scrubbed" at that time. After discovery disputes arose, the parties agreed to the appointment of a discovery referee under Code of Civil Procedure section 638.[1]

A. Motions to Compel Discovery Responses — First Report by Discovery Referee

When the matter was referred, Learning Center claimed that De Ritz had provided inadequate responses to 70 discovery requests. Many of Learning Center's discovery requests centered around its attempts to obtain more information regarding the communications that were "scrubbed" from Huerta's phone. Among other things, Learning Center sought information regarding other electronic devices on which De Ritz and Huerta exchanged emails and texts. De Ritz, on the other hand, claimed it was owed answers to 17 requests for production of documents. As for the issue of sanctions, the

[1] Undesignated statutory references are to the Code of Civil Procedure unless otherwise stated.

parties agreed to defer it to a later time. The discovery referee issued a report and recommendation regarding the discovery dispute.

B. Trial Court Order Regarding First Referee Report

The trial court adopted the discovery referee's report as an order of the court in June 2022 (June 2022 Order). The order required De Ritz to provide responses or further responses to 54 demands and ruled in favor of De Ritz on four of its demands.

C. Motion for Monetary and Other Sanctions — Second Report by Discovery Referee

De Ritz served supplemental responses, but Learning Center asserted that many of them were still deficient. As such, in September 2022, Learning Center moved for issue, evidence, and monetary sanctions against De Ritz. Learning Center argued De Ritz had engaged in spoliation of evidence and had failed to comply with the June 2022 Order compelling further responses to its discovery requests. With respect to the spoliation issue, Learning Center pointed out that Huerta testified that he frequently used the phone and email account provided by FCE Benefits (De Ritz's apparent alter ego) to email and text Porter, contractors, vendors and others regarding the tenant improvements. Yet De Ritz only produced six emails exchanged between Huerta and Porter. Learning Center asserted De Ritz intentionally or recklessly destroyed evidence when it "scrubbed" Huerta's phone in August 2020, after the complaint was filed.

De Ritz opposed the motion. It argued it did not engage in spoliation of evidence and further asserted that the referee was limited to awarding only those reasonable expenses incurred as a result of misuse of the discovery process.

The discovery referee issued a report in which he first observed the action appeared to be a "relatively straightforward" landlord tenant dispute, but the "discovery battle" that had developed was "out of proportion with the issues to be decided at trial" due to "De Ritz's obstruction" of Learning Center's "legitimate discovery efforts." The referee rejected De Ritz's arguments regarding the spoliation of evidence and determined De Ritz and FCE Benefits were alter egos, and that De Ritz had an obligation to preserve and produce evidence in the possession of FCE Benefits. The referee also noted many of De Ritz's supplemental responses were still deficient and found that its spoliation of evidence on Huerta's FCE Benefits phone warranted sanctions.

The referee concluded the report with a detailed discussion of his recommendations regarding the evidence, issue, and monetary sanctions requested by Learning Center. In the sections titled "Evidence Sanctions" and "Issue Sanctions," the referee recommended evidence but not issue sanctions. In the section titled "Monetary Sanctions," the referee recommended monetary sanctions of $17,625 for the attorney fees incurred by Learning Center on the first motion to compel and $22,344 for the fees incurred on the sanctions motion — for a total of $39,969. The referee found these fees were reasonable and necessary given De Ritz opposed the first motion to compel without substantial justification and that the supplemental responses violated the June 2022 Order. Additionally, the referee recommended the entire cost of the reference be shifted to De Ritz.

D. Trial Court Order Regarding Second Referee Report

In March 2023, the trial court adopted in its entirety the discovery referee's second report, including the referee's recommended imposition of evidence sanctions and monetary sanctions in the amount of $39,969 along

with the cost of the discovery reference which at that time was $8,627, over De Ritz's objections.[2] It also granted Learning Center's request for an additional $10,950 in monetary sanctions for the expenses incurred in responding to De Ritz's objections. De Ritz appeals from the trial court's award of monetary sanctions.

DISCUSSION

De Ritz asserts the trial court erred by imposing monetary sanctions for De Ritz's spoliation of evidence, and by awarding attorney fees for work that arose out of requests for sanctions that were not imposed or that were not awardable.[3] We disagree.

I. Standard of Review

We review an order imposing discovery sanctions under the abuse of discretion standard. (*New Albertsons, Inc. v. Superior Ct.* (2008) 168 Cal.App.4th 1403, 1422 (*New Albertsons*).) "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant

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[2] De Ritz filed a 26-page motion to reject the discovery referee's recommendations and was ordered by the trial court to file an amended memorandum that complied with the 15-page limit under California Rules of Court, rule 3.1113(d). The trial court also indicated that De Ritz could not file a reply if it did not timely file and serve an amended memorandum. De Ritz proceeded to untimely file an amended memorandum that again exceeded the 15-page limit. In light of De Ritz's failure to timely comply with the page limit requirements, the trial court declined to consider the memorandum, the amended memorandum, or the reply.

[3] In its reply brief, De Ritz also suggests — for the first time — that allowing Learning Center to recover monetary sanctions based on De Ritz's spoliation of evidence would violate De Ritz's right to due process. Learning Center has moved to strike the reply brief and for an order requiring De Ritz to file a "replacement brief" that includes citations to Learning Center's brief. We deny the motion, but decline to consider issues raised for the first time in reply. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice." (*Ibid.*) Put another way, orders imposing discovery sanctions are subject to reversal only for "arbitrary, capricious, or whimsical action." (*Van v. LanguageLine Solutions* (2017) 8 Cal.App.5th 73, 80.) This standard affords "considerable deference" to the trial court, "provided that the court acted in accordance with the governing rules of law." (*New Albertsons*, at p. 1422.)

II. Monetary Sanctions for Spoliation of Evidence

De Ritz challenges the award of monetary sanctions on a few grounds, most of them predicated on its assertion that the trial court erred by awarding monetary sanctions for spoliation of evidence.[4] De Ritz's arguments fail, however, because the trial court did not award monetary sanctions on this ground.

As mentioned above, the referee's report that the trial court adopted as its order is broken down into sections addressing each of the three types of sanctions sought by Learning Center — evidence, issue, and monetary sanctions. In the monetary sanctions section, the trial court stated that Learning Center sought attorney fees for the "first motion to compel and [this] motion for sanctions." These fees were then granted based on the finding that De Ritz opposed Learning Center's original motion to compel

[4] There is a lack of clarity regarding the monetary sanctions De Ritz is challenging. For example, the introduction describes the order as imposing a total of $41,511 in monetary sanctions. Elsewhere in the brief, however, De Ritz states that its appeal seeks reversal of an order imposing discovery sanctions in the amount of $50,869. It is unclear how De Ritz arrived at this figure. But it is possible this amount consists of the above fees plus $17,625 the trial court awarded for fees in connection with the initial motion to compel, minus the reference fee of $8,627, as that would yield a sanctions amount of $50,919 which is relatively close to the $50,869 cited in De Ritz's brief.

without substantial justification, was ordered in the June 2022 Order to provide 54 supplemental responses, and then served supplemental responses that violated that order in numerous instances. The order did not indicate that monetary sanctions were imposed to redress De Ritz's spoliation of evidence.

Instead, the issue of spoliation of evidence was addressed and analyzed extensively in the portion of the trial court's order on evidence sanctions. In this section of the report, the order found there was "little doubt" that relevant information was stored on — and then scrubbed from — Huerta's phone; that De Ritz failed to preserve these texts and/or emails; and that De Ritz violated the June 2022 Order by, among other things, failing to comply with the order's directive that De Ritz identify all electronic devices it used to communicate about the lease and tenant improvements. The order then imposed evidence sanctions on these bases.

Read as a whole, the trial court's order imposed *monetary sanctions* to compensate Learning Center for having to bring the initial motion to compel and the later motion for sanctions for discovery misconduct, and *evidence sanctions* for De Ritz's spoliation of evidence. Accordingly, De Ritz's contentions predicated on the flawed premise that monetary sanctions were imposed for De Ritz's spoliation of evidence fails.

In any event, even if the trial court did impose monetary sanctions for De Ritz's spoliation of evidence, this would not have constituted an abuse of discretion. De Ritz argues the trial court erred because Learning Center's notice of motion only referenced De Ritz's failure to comply with the June 2022 Order, and not spoliation of evidence, in connection with its request for monetary sanctions; that Learning Center erroneously relied on section 2023.030, subdivision (a), which does not provide an independent basis for

monetary sanctions absent another authorizing statute within the Discovery Act; and that monetary sanctions are not awardable for spoliation of evidence as a matter of law. Each of these arguments lacks merit.

First, De Ritz cites no authority for the proposition that a notice of motion for sanctions must explicitly tie each request for sanctions to the specific discovery abuse that is being alleged. As such, its position is unsupported. (See *People v. Hardy* (1992) 2 Cal.4th 86, 150 [declining to address issue that was unsupported by either argument or citation to relevant authority].) Further, our research has not uncovered any authority substantiating De Ritz's argument. We also observe that section 2023.040 — the statute setting forth the requirements for a request for sanctions — does not include any requirement that a notice of motion specifically tie each sanction request to the discovery misconduct with which it is associated. Rather, that statute merely states in relevant part that a notice of motion must "specify the type of sanction sought." (§ 2023.040.)

Next, De Ritz itself acknowledges that Learning Center did not only cite section 2023.030, subdivision (a), in support of its request for monetary sanctions. Rather, Learning Center also cited the relevant statutes that authorized awards for monetary sanctions relative to the discovery methods it utilized, such as interrogatories and requests for production of documents.[5] De Ritz attempts to disregard Learning Center's references to these statutes by baldly asserting the "spoliation of evidence issue did not pertain to interrogatories or requests for production." There is no basis for this

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[5] For this reason, this matter is clearly distinguishable from *City of Los Angeles v. PricewaterhouseCoopers, LLC* (2022) 84 Cal.App.5th 466, 475, rev. granted Jan. 25, 2023, S277211— a case on which De Ritz heavily relies. In that case, the party filed a motion for sanctions solely under sections 2023.010 and 2023.030 without reference to any other authorizing statute under the Discovery Act. This is not the case here.

contention. As mentioned, *ante*, many of the interrogatories and requests for production at issue pertained to De Ritz's spoliation of evidence and were directed towards obtaining information regarding the tenant improvement communications that were "scrubbed" from Huerta's phone.

Lastly, De Ritz is incorrect in its assertion that monetary sanctions are not awardable for spoliation of evidence as a matter of law. The California Supreme Court has clearly stated that "[d]estroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery," and would be subject to "potent" sanctions including monetary, contempt, issue, evidence and terminating sanctions. (*Cedars-Sinai Med. Ctr. v. Superior Ct.* (1998) 18 Cal.4th 1, 12.)

In sum, we conclude that De Ritz fails to demonstrate any error in the trial court's award of monetary sanctions.

III. Sanctions for Expenses Related to Motion for Sanctions

De Ritz contends the trial court abused its discretion in awarding $22,344 in attorney fees incurred by Learning Center relative to its motion for sanctions. It argues a court must tailor a fee award to only fees resulting from sanctionable conduct and points out that, here, Learning Center was not entitled to attorney fees stemming from the time spent briefing and arguing for issue sanctions (which were not awarded) and sanctions for spoliation of evidence (which it alleges were not awardable). De Ritz asserts Learning Center "lump[ed] together every billing activity" and the trial court granted Learning Center's fees in its entirety without distinguishing between fees spent on sanctions that were awarded and awardable and those that were not.

At the outset, De Ritz's contention is forfeited because it is unaccompanied by any record citations to the documentation or

substantiation provided by Learning Center in support of its request for attorney fees. It is a "cardinal principle[]" of appellate review that "[a]n appellant who fails to cite accurately to the record forfeits the issue or argument on appeal that is presented without the record reference." (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 589.) Further, De Ritz fails to cite any authority in support of the proposition that attorney fees can only be recovered for time spent briefing and arguing the specific sanctions that were ultimately awarded by a trial court. (See *People v. Hardy*, *supra,* 2 Cal.4th at p. 150 [declining to address issue that was unsupported by citation to relevant authority].)

Even if De Ritz's assertion did not fail for these reasons, we perceive no abuse of discretion in the trial court's order. Section 2023.030, subdivision (a), provides that, to the extent authorized by the chapter governing any particular discovery method, a court may award monetary sanctions in the form of "reasonable expenses" incurred as a result of the subject discovery misconduct. "Reasonable expenses may include attorney fees, filing fees, referee fees, and other costs incurred." (*Cornerstone Realty Advisors, LLC v. Summit Healthcare Reit, Inc.* (2020) 56 Cal.App.5th 771, 790.) The trial court has discretion to apportion sanctions or award any amount "reasonable under the circumstances" based on the success of the motion by the moving party. (*Mattco Forge v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1437.) Here, we conclude it was not arbitrary, capricious or whimsical for the trial court to conclude that the entirety of the fees expended on the motion for sanctions, which requested a range of different possible sanctions, was reasonable and necessary. (See *Van v. LanguageLine Solutions*, *supra*, 8 Cal.App.5th at p. 80.)

DISPOSITION

The March 2023 order imposing discovery sanctions is affirmed. Learning Center is entitled to its cost on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

HITE, J. *

We concur:

STREETER, Acting P.J.

GOLDMAN, J.

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* Judge of the Superior Court of California, City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.