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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TUTOR-SALIBA-PERINI, J.V., et al., Plaintiffs, Cross-Defendants, and Appellants, v. THE LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY et al., Defendants, Cross-Complainants and Appellants.	B143430 (Los Angeles County Super. Ct. No. BC123559 c/w BC132928)
TUTOR-SALIBA-PERINI, J.V., et al., Plaintiffs, Cross-Defendants, and Appellants, v. THE LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY et al., Defendants, Cross-Complainants and Appellants.	B158407 (Los Angeles County Super. Ct. No. BC123559 c/w BC132928)

APPEALS from a judgment of the Superior Court for the County of Los Angeles, Joseph R. Kalin, Judge. Reversed and remanded.

Horvitz & Levy, Barry R. Levy, Frederic D. Cohen, Katherine Perkins Ross, Jason R. Litt; Castle & Associates and Nomi L. Castle for Plaintiffs, Cross-defendants and Appellants, Tutuor-Saliba-Perini, J.V., Tutor-Saliba Corporation, Perini Corporation and Castle & Lax.

Sedgwick, Detert, Moran & Arnold, Marilyn Klinger, Hall R. Marston, Victor A. Bullock and Colin Batchelor for Cross-defendant, and Appellant, Travelers Casualty & Surety Company.

Horvitz & Levy, Barry R. Levy, Frederick D. Cohen, Jason R. Litt, Patricia Lofton, Katherine Perkins Ross; Castle & Associates, Nomi L. Castle; Watt, Tieder, Hoffar & Fitzgerald, Michael G. Long for Cross-defendants, and Appellants, Fidelity and Deposit Company of Maryland and Swiss Reinsurance America Corporation.

Robins Kaplan Miller & Ciresi, David C. Veis and Richard S. Busch for Surety Association of America on behalf of Cross-defendants and Appellants Fidelity and Deposit Company of Maryland, Swiss Reinsurance America Corporation and Travelers Casualty and Surety Company.

Wasserman, Comden, Casselman & Pearson, David B. Casselman, Mark S. Gottlieb, David Polinsky, Elsa H. Jones, Michael T. Fox, Jay N. Rosenwald; Herrig, Vogt & Stoll, John R. Herrig, C. Patrick Stoll; Office of the Counsel, William Pellman, Robert Reagan, Steven Carnevale, and Augustin M. Zuniga for Defendant, Cross-complainant and Appellant, The Los Angeles County Metropolitan Transportation Authority.

Parker, Milliken, Clark, O'Hara & Samuelian and Brenton F. Goodrich for California State Association of Counties and the League of California Cities as Amicus Curiae on behalf of Defendant, Cross-complainant and Appellant, The Los Angeles County Metropolitan Transportation Authority.

Monteleone & McCrory, Thomas P. McGuire and Michael F. Minchella for Southern California Contractors Association as Amicus Curiae.

Kamine Ungerer, Bernard S. Kamine and Michaelbrent Collings for Engineering Contractors Associations as Amicus Curiae.

Tutor-Saliba-Perini, J.V. and its joint venture partners Tutor-Saliba Corporation and Perini Corporation (collectively TSP), on the one hand, and the Los Angeles Metropolitan Transportation Authority (MTA), on the other, squared off for six years of extraordinarily acrimonious, bare-knuckles litigation over TSP's claim for additional compensation for its work as one of the prime contractors on the Metro Red Line subway project. Increasingly rancorous discovery disputes led to a number of sanctions awards, culminating with a mid-jury-trial order imposing terminating sanctions against TSP on its affirmative claims and severely limiting its defenses to MTA's cross-complaint for breach of contract and violations of the false claims act (FCA) (Gov. Code, § 12650 et seq.) and the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.). Following completion of an abbreviated trial on the remaining issues of damages, a $60 million judgment, including an award of $31 million in attorney fees, was entered in favor of MTA on its cross-complaint.

In briefs that occasionally mimic the unproductive vitriol that characterized the parties' exchanges in the trial court, TSP and MTA continue to argue about almost everything that happened below.[1] We need not reach many of the issues raised in the appeals and cross-appeal, however, because the mid-trial order for terminating and issue sanctions, and along with it the judgment in favor of MTA, must be reversed and the matter remanded for further proceedings in the trial court: TSP did not receive either

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[1] Counsel even squabble over the proper organization of the argument sections of their respective appellate briefs.

proper notice of the type of sanctions being sought and the grounds asserted by MTA or adequate time to prepare its response. Moreover, the sanctions as imposed were impermissibly overbroad.

We also reverse the trial court's orders granting summary adjudication in favor of MTA on multiple motions directed to "issues" rather than "causes of action" within the meaning of Code of Civil Procedure section 437c, subdivision (f).[2] Finally, we reverse several of the monetary sanctions imposed against TSP's counsel Castle & Lax for purported discovery violations.

FACTUAL AND PROCEDURAL BACKGROUND

As the lowest responsible bidder, TSP was awarded the prime contracts for three adjacent Metro Red Line stations and tunnels along the Wilshire corridor, designated B211, B221 and B231. Each contract required TSP to fully perform for a fixed price equal to its low bid, subject to reimbursement for additional costs arising from any material changes to the contract including delays caused by MTA, undisclosed geologic conditions, acts of God and subsequent MTA modifications to the project plans upon which TSP based its bid. To receive such reimbursement, TSP was required to prepare "change orders," which were submitted for approval to MTA's outside construction manager and MTA staff.

Although a substantial number of TSP's change-order claims for the B221 and B231 contracts were paid by MTA, others were disputed. In 1995 TSP filed suit to recover approximately $16 million for change-order claims denied by MTA. The complaint alleged causes of action for breach of contract and breach of implied warranty.[3]

In early 1999, after the parties had announced ready for trial, MTA was granted leave to file a cross-complaint against TSP alleging breach of contract and violations of

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[2] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

[3] The breach of warranty claims alleged TSP had relied on unclear plans and specifications provided by MTA and, as a result, had incurred greater costs than anticipated.

FCA and UCL. The theory underlying MTA's cross-complaint was, in large part, that TSP had deliberately underbid the contracts in order to have the lowest responsible bid, while always intending to submit a substantial volume of specious change orders to recoup its real costs and generate a sizeable profit. The cross-complaint also sought to recover on public works bonds from cross-defendants Fidelity and Deposit Company of Maryland, Swiss Reinsurance America Corporation and Travelers Casualty & Surety Company (collectively the Sureties).

1. *Discovery Disputes Regarding Pre-bid Documents*

By the time MTA filed its cross-complaint, extensive discovery -- and repeated discovery battles -- had already taken place. Retired Justice David Eagleson was appointed by the trial court as the discovery referee to hear the parties' disputes and to make recommendations to the court. During this period several motions to compel were directed to documents TSP had prepared prior to submitting its bids. TSP objected to production of this material because it contained confidential information about TSP's competitive bid preparation process. Initially, both Justice Eagleson and the trial court (Judge Valerie Baker) declined to require TSP to produce these documents because they were not relevant to TSP's breach of contract claims.[4] Subsequently, in considering motions in limine Justice Eagleson and the trial court (Judge Harvey Schneider) ruled that, because certain previously produced documents were apparently based on TSP's proprietary pre-bid documents, TSP had to disclose the pre-bid documents or it would be precluded from using the derivative material. In response to this order TSP produced a box of proprietary documents that had been reviewed in camera by Justice Eagleson.

After filing its cross-complaint, MTA successfully moved to re-open discovery. Renewed demands for discovery fueled increasingly nasty discovery battles over the next

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[4] Judge Baker also found TSP's proprietary interests in the documents outweighed MTA's need for them in connection with defending against TSP's breach of implied warranty causes of action, claims as to which TSP's pre-contract expectations could not be considered entirely irrelevant.

two years, again largely focused on pre-bid documents allegedly withheld by TSP during earlier rounds of discovery. Ultimately the trial court (Judge Joseph R. Kalin) imposed pretrial monetary and issue sanctions against TSP and its counsel Castle & Lax based on their failure to provide discovery.

2. *MTA's Motions for Summary Adjudication*

Beginning in late 1999 MTA filed a series of motions for summary adjudication pursuant to section 437c, subdivision (f)(1), directed to a number of the specific claims for reimbursement made by TSP within its causes of action for breach of contract and breach of warranty. In addition to opposing the motions on the merits, TSP argued that, because none of the motions would completely dispose of an entire cause of action, all the motions should be summarily denied. The trial court rejected TSP's position in a preliminary ruling on November 15, 1999, finding that it could "summarily adjudicate independent claims within a Cause of Action," under *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848 (*Lilienthal*) and *Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110 (*Fineman*). When it eventually reached the merits of MTA's motions, the court granted most of them, eliminating more than 80 percent ($13 million) of TSP's affirmative claims.[5]

3. *The Mid-trial Terminating, Issue and Evidentiary Sanctions Order*

The jury trial on TSP's remaining claims and on MTA's cross-complaint finally began on May 17, 2001. During the eighth week of trial, counsel for TSP cross-examined one of its subcontractors using six pre-bid documents MTA believed should have been, but were not, previously produced during discovery. Based on this misconduct, on July 2, 2001 MTA filed a motion for terminating sanctions that, while

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[5] In its cross-appeal MTA contends that, although the trial court was correct in most of its rulings in this case, the court erred in denying MTA's motion for summary adjudication of its affirmative claim seeking restitution of nearly $7.4 million paid to TSP for work performed by an unlicensed subcontractor. The ruling on this summary adjudication motion raises the same *Lilienthal/Fineman* issue as do the motions determined in MTA's favor.

directed to "all claims pertaining to pre-bid documents," specifically identified only TSP's "rebar coupler claim" as the object of the request for termination.

TSP was given one day to file a written response. On July 5, 2001, following the July 4 national holiday, the trial court began hearing argument on MTA's motion. On the morning of July 6, with oral argument not yet concluded, MTA filed a supplemental reply brief in which it asserted TSP had withheld numerous documents in addition to the six that had been disclosed in court and, for the first time, requested terminating sanctions on all claims remaining in TSP's complaint, all claims in MTA's cross-complaint and all TSP's defenses to the cross-complaint. After a further, brief hearing, the trial court orally granted MTA's motion for full terminating, issue and evidentiary sanctions on July 6.

A written order, based on the court's July 6 ruling, was filed July 16, 2001. That order stated, "Pursuant to Section 2023(b)(2) Code of Civil Procedure the Court is imposing issues sanctions as follows: [¶] The facts shall be taken as established that there is no liability on the part of MTA on any of the causes of action by TSP against MTA in its pleadings. [¶] The facts shall be taken as established that the cross-defendants are liable to MTA as to each cause of action alleged in the pleadings of cross-complainant. [¶] Pursuant to Section 2023(b)(3) Code of Civil Procedure, the Court is imposing an evidence sanction prohibiting TSP and the cross-defendants from offering any documentary evidence regarding the damages alleged by MTA. [¶] Plaintiff and Cross-Defendants may call witnesses, cross-examine witnesses and argue the issue of damages to the jury but may not make use of any documentary evidence."

4. *The Verdict and Judgment for MTA*

Following issuance of the trial sanctions order, trial continued with MTA presenting evidence on its cross-complaint, largely through the testimony of expert witnesses. MTA was also permitted to amend its cross-complaint to expand the Sureties' alleged responsibility from $136,000, as originally alleged, to the full range of damages and penalties sought from TSP.

Having ruled that MTA had established a prima facie case of liability on each of its causes of action, the court instructed the jury TSP was liable for breach of contract and for 1,048 violations of FCA and 1,048 violations of UCL. After deliberating for six days, the jury awarded MTA more than $17 million in contractual and statutory damages and penalties under FCA and UCL against TSP and the Sureties. The jury also awarded MTA $11 million as disgorgement of profits from TSP. The judgment entered by the trial court included an additional $2.4 million in prejudgment interest and $31 million in attorney fees and costs.[6]

ISSUES RAISED ON APPEAL AND CROSS-APPEAL

TSP has appealed from the judgment in favor of MTA, arguing MTA failed to introduce evidence to support either its false claims act or unfair competition causes of action, the trial court abused its discretion when it imposed trial sanctions that precluded TSP from prosecuting its affirmative claims and defending against MTA's cross-complaint on the merits, the trial court erred in granting motions for summary adjudication that did not completely dispose of an entire cause of action, the damages awarded TSP are excessive and juror misconduct requires reversal and a new trial. The Sureties have also appealed, arguing that only MTA's $136,000 liquidated damages claim is within the scope of their performance bonds, the trial court abused its discretion when it imposed its mid-trial sanctions order against the Sureties and not simply TSP and the court further abused its discretion in permitting amendment of MTA's cross-complaint against the Sureties after imposing the mid-trial terminating sanctions.

MTA has cross-appealed from the trial court's denial of its motion for summary adjudication of its right to damages and restitution for TSP's alleged breach of the B221 and B231 contracts by demanding and receiving payment for work performed by an

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[6] TSP appealed separately from the award of attorney fees; and the two appeals were consolidated. Because we reverse the judgment, issues involving the award of fees are moot.

unlicensed subcontractor.[7] TSP's trial counsel Castle & Lax has separately appealed from three pretrial orders that collectively imposed more than $30,000 in sanctions against the firm for discovery violations, two relating to the continuing dispute regarding TSP's production of proprietary pre-bid documents and one involving a quarrel over the logistics of a referee-ordered document production.

DISCUSSION

1. *The Trial Court's Sanctions Order Violated TSP's Right to Due Process of Law*

The Civil Discovery Act of 1986 (§ 2016 et seq.) (Discovery Act), as well as principles of due process under the federal and California Constitutions, require adequate notice and opportunity for a fair hearing before discovery sanctions may be imposed. (§ 2023, subd. (b) [discovery sanctions may only be imposed "after notice to any affected party . . . and after opportunity for hearing"]; *County of El Dorado v. Schneider* (1987) 191 Cal.App.3d 1263, 1273 ["the federal due process clause imposes limitations on the power of courts . . . to order discovery sanctions that deprive a party of his opportunity for hearing on the merits of his claim"]; *In re Marriage of Quinlan* (1989) 209 Cal.App.3d 1417, 1422 [even when sanctions are justified by "a serious breach of an attorney's professional duty," they may not be imposed without notice and an opportunity to be heard].) When the stakes are as high as they were with respect to MTA's sanctions motion, more than one or two days' notice -- let alone a few minutes' notice -- is required. (*Lesser v. Huntington Harbor Corp.* (1985) 173 Cal.App.3d 922, 932-933 [one-to-two days' notice of motions for sanctions under § 128.5 insufficient when motions asked for unsuccessful plaintiff to pay all of defendant's attorney fees and costs for $7 million lawsuit that had been in litigation for six years].)

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[7] In denying this motion the trial court stated from the bench, although not in the minute order reflecting its ruling, that MTA was not entitled to restitution or damages on this claim as a matter of law. TSP did not subsequently file either its own motion for summary adjudication or a motion in limine to preclude submission of this issue to the jury. Nonetheless, MTA did not present any evidence at trial on its claim for restitution of money paid to TSP for work performed by an unlicensed subcontractor.

MTA's July 2, 2001 motion for terminating sanctions alleged failure to produce certain pre-bid documents used by TSP in cross-examining an MTA witness and specifically sought issue and evidence sanctions as to the rebar coupler claim (although it also made vague, more general reference to "claims relevant to pre-bid documents"). TSP was given only one day to respond in writing to the motion. MTA then filed a short reply, and argument on the motion was immediately heard by the court.

This expedited schedule might have been permissible to consider, mid-trial, the narrowly limited terminating sanction requested by MTA. On the second day of argument, however, MTA filed a "further reply brief" expanding its request for terminating sanctions to include all of TSP's claims and the entire cross-complaint, including TSP's affirmative defenses to the cross-complaint. MTA's newly expanded motion not only radically escalated the extent of the sanctions sought but also added new factual allegations, significantly broadening the charges of discovery abuse leveled at TSP. Following a brief hearing, and without first giving TSP adequate time to consider its response, the court granted MTA's new sanctions request in its entirety.

By depriving TSP of advance notice of the grounds upon which MTA sought sanctions and denying it adequate time to respond to the belated, expanded motion, the trial court violated TSP's due process rights. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 652 ["Constitutional due process principles are offended by the summary imposition of sanctions . . . . "]; see *In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1219 ["Notice that sanctions were sought under section 128.7 was not sufficient to warn . . . that sanctions might be awarded under section 128.5. Therefore, the order imposing sanctions . . . must be reversed."]; *In re Marriage of Quinlan*, *supra*, 209 Cal.App.3d at p. 1419 ["an order imposing sanctions . . . cannot be based upon grounds not asserted before its rendition without the attorney having had adequate notice of or opportunity to respond to the threat of sanctions"].)[8]

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[8] Because we reverse the sanctions order based on inadequate notice to TSP, we

2. *The Trial Court's Sanctions Order Was Impermissibly Overbroad*

Even if TSP had been given adequate time to respond to a sufficiently specific notice of MTA's request for sanctions, we would reverse the trial court's order as impermissibly overbroad. A fundamental tenet of California discovery law is that any sanctions imposed must be proportionate to the seriousness of the discovery violation and directly related to the actual harm caused by the offending party's failure to produce requested materials. The object is "to let the punishment fit the crime." (See W. Gilbert & A. Sullivan, The Mikado (1885) act II, song 17 "A More Humane Mikado.")

"There is abundant case law to the effect that the purpose of discovery sanctions 'is not "to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits,"' [citation] but to prevent abuse of the discovery process and correct the problem presented [citations]." (*McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210.) "One of the principal purposes of the Discovery Act . . . is to enable a party to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice *on the merits.* [Citations.]" (*Caryl Richards*, *Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 303.) "[T]he sanction should not operate in such a fashion as to put the prevailing party in a better position than he would have had if he had obtained the discovery sought and it had been completely favorable to his cause. [Citations.]" (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793.)

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need not separately address the issues raised in the Sureties' appeals. For guidance on remand, however, it would be error for the trial court to preclude the Sureties from presenting defenses to MTA's claims against TSP absent well-supported findings, made following adequate notice and a meaningful opportunity to respond, that they had also participated in discovery abuses and were, therefore, properly sanctioned for their own conduct. (§ 2023, subd. (b) [authorizing sanctions only "against anyone engaging in conduct that is a misuse of the discovery process"]; see *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1180 [issue, evidence and terminating sanctions may be imposed "if a party disobeys a court order compelling discovery"].)

a. *The Trial Court Failed to Preclude Only Those Claims as to which the Withheld Pre-bid Documents Were Relevant*

Consistent with the basic principle of proportionality, issue or evidence sanctions are appropriate only to the extent the discovery withheld was relevant to those issues or evidence. (See *McArthur v. Bockman* (1989) 208 Cal.App.3d 1076, 1080-1081 [entry of default as sanction for failing to appear at deposition was overbroad when deposition testimony would have been relevant only to issue of punitive damages].) For example, in *Wilson v. Jefferson* (1985) 163 Cal.App.3d 952, the defendant attempted "to forestall discovery . . . that [a particular affirmative] defense was specious." (*Id.* at p. 958.) As a sanction for the discovery misconduct, the trial court struck the defendant's answer and entered his default. (*Id.* at p. 954.) The Court of Appeal reversed, holding that, because defendant's misconduct "related only to that affirmative defense and was not necessarily referable to and certainly not dispositive of other issues present in the cause . . . [¶] . . . [¶] . . . to entirely exclude [him] from the litigation based on his dereliction not only went beyond what was necessary to protect [plaintiff's] interests vis-à-vis her discovery efforts, but unjustifiably precluded him from any defense respecting aspects of the case which only inadequately were connected to that dereliction." (*Id.* at pp. 958-959.)

In the present case the trial court found "TSP and its attorneys have intentionally concealed, withheld and destroyed records and documents relevant and crucial to the trial and disputes before this Court." However, the trial court's order failed to describe the "records and documents" withheld with any specificity. Moreover, neither MTA's motion for sanctions nor the trial court's order correlated (or even attempted to do so) the discovery withheld to the claims in the case save for the rebar coupler claim that was the focus of MTA's original motion. Indeed, only in its supplemental reply memorandum, filed an hour before the completion of the sanctions hearing, did MTA actually request "full terminating sanctions," asserting the documents withheld "impact so many different issues and claims." However, rather than specify which documents affected which

claims, MTA based its request for full terminating sanctions on bare rhetoric, broadly asserting, "[I]t seems undeniable that the broad range of concealment already discovered, sanctioned and ordered abated, completely encompasses the issues to be tried." That conclusory and unsupported declaration of relevance is simply insufficient to justify precluding all of TSP's claims and defenses in the litigation. (See *Caryl Richards, Inc. v. Superior Court*, *supra*, 188 Cal.App.2d at p. 305 ["While under the statute the court undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law"]; *Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228 ["Where a party has refused to supply information relevant to a particular claim, an order precluding that claim is an appropriate sanction"].) Accordingly, it was an abuse of discretion for the trial court to preclude TSP from presenting evidence as to all the issues in the litigation.[9]

b. *The Trial Court Improperly Precluded Use by TSP of Documents Produced in Discovery*

The trial court further abused its discretion when it ruled TSP "may not make use of any documentary evidence" regarding the damages alleged by MTA. Preclusion of *all* documentary evidence, whether or not produced in discovery and whether or not relied on by MTA, improperly put the MTA in a far better position than if all requested discovery had been properly provided by TSP. (*County of El Dorado v. Schneider*, *supra,* 191 Cal.App.3d at p. 1282 ["it is a cardinal rule of California discovery practice, probably of constitutional origin, that discovery sanctions must be suitable to enable the party seeking discovery to obtain the objects of discovery; the sanction must not put the

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[9] The relevance of documents improperly withheld by TSP to the various claims and defenses in the litigation need not be decided on appeal. On remand, any new sanctions order should address this issue.

prevailing party in a better position than if discovery had been obtained nor may the sanction be a form of punishment"].)

On remand, if MTA wishes to pursue its motion for discovery sanctions, the trial court should provide TSP a full and fair opportunity to respond to the specific allegations upon which any renewed motion is based. In determining the appropriate sanctions, if any, the trial court should consider that, in the absence of an empanelled jury and the accompanying time constraints on the production and analysis of previously withheld documents, less severe sanctions may be sufficient to redress the harm done by any improper withholding of documents.

3. *MTA Failed to Present Sufficient Evidence to Support Its Claims Under the Unfair Competition Law*

Reversal of the trial court's sanctions order will necessarily require retrial of most of TSP's claims and MTA's cross-claims. Nonetheless, TSP argues that, to the extent MTA's evidence in the original trial failed to satisfy its initial burden of proof, even with the substantial assistance of the procedurally flawed sanctions order, entry of judgment in favor of TSP should be ordered. We agree, but only in part.

a. *TSP Is Not Entitled to Judgment Based on MTA's General Failure to Present Prima Facie Evidence of TSP's Liability*

In ordering sanctions from the bench on July 6, 2001, the trial court seemed to require MTA to present a prima facie case in support of its affirmative claims, as well as to prove its damages. The final form of the order entered in the court's minutes on July 16, 2001, however, contains no such requirement. To the contrary, the minute order on its face established liability with respect to all of the pleadings.[10]

The variance between the court's comments at the hearing and the terms of its minute order may have created some confusion as to whether MTA was required to

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[10] The July 16, 2001 minute order states in part, "the Court is imposing sanctions as follows: [¶] . . . [¶] The facts shall be taken as established that the cross-defendants are liable to MTA as to each cause of action alleged in the pleadings of cross-complainant."

present a prima facie case of liability. However, when such a variance exists, the terms of the written order control. (*Newman v. Overland, etc., Co.* (1901) 132 Cal. 73, 75 ["The order which is entered in the minutes is the only record of the court's action, and is to be measured by its terms, and not by the reasons which the court may give for it."]; *Frost v. Los Angeles Ry. Co*. (1913) 165 Cal. 365, 369 ["The judge may and should see that the order made is correctly entered, and it is presumed that he has done so"]; see *People v. Superior Court* (1971) 20 Cal.App.3d 684, 686, fn. 3 ["[T]he terms of the minute order control in our examination of the validity of the order of dismissal."].) Accordingly, TSP is not entitled to judgment based on any purported failure of MTA to present a prima facie case of liability.

b. *On Remand, the Trial Court Should Enter Judgment in Favor of TSP on MTA's Claims Under the Unfair Competition Law*

In addition to broadly contesting the sufficiency of MTA's prima facie case, TSP argues it is entitled to judgment on MTA's claims under UCL because MTA is not a "person" within the meaning of the statute and, therefore, lacks standing to sue.[11] TSP also argues that, even if MTA could seek equitable relief under UCL, MTA's claims for civil penalties are defective as a matter of law because only authorized prosecutors suing in the name of the People of the State of California may recover civil penalties under Business and Professions Code section 17206.[12] We agree as to both points.

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[11] County counsel is authorized under certain circumstances to prosecute UCL claims involving violations of county ordinances in civil enforcement actions filed in the name of the People of the State of California. (Bus. & Prof. Code, §§ 17204, 17206.) Although county counsel has represented MTA throughout these proceedings, its UCL claims do not allege violations of any county ordinance; and MTA's cross-complaint was not pursued in the name of the People. MTA's standing, therefore, cannot properly be based on county counsel's purported status as an authorized prosecutor.

[12] In its cross-complaint MTA sought both civil penalties and disgorgement of all of TSP's profits as remedies for its alleged violations of UCL. Disgorgement of profits unfairly obtained is an appropriate equitable remedy in a private action under UCL to the extent those profits "represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." (*Korea Supply Co. v. Lockheed Martin Corp*. (2003)

Business and Professions Code section 17204 provides, "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance . . . in the name of the people of the State of California upon their own complaint or upon the *complaint of any board, officer, person, corporation or association or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition*."[13] (Italics added.) Business and Professions Code section 17201 provides, "As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."

In *Santa Monica Rent Control Bd. v. Bluvshtein* (1991) 230 Cal.App.3d 308, 318, we affirmed the trial court's order sustaining a demurrer to a government agency's claim under UCL, holding "The Unfair Practices Act defines 'person' as 'natural persons, corporations, firms, partnerships, joint stock companies, associations, and other organizations of persons.' (Bus. & Prof. Code, § 17201.) Appellant is a government agency; it is none of the things included in the definition of person. Therefore, it has no standing to bring an action for an injunction pursuant to the Unfair Practices Act, and the demurrer to the third cause of action was properly sustained." Our holding in *Bluvshtein* has been followed by a number of other appellate courts, which have agreed a

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29 Cal.4th 1134, 1148.) Nonrestitutionary disgorgement of profits is not an available remedy in an individual UCL action. (*Ibid*.)

[13] Prior to its amendment by Proposition 64, approved by the voters on November 3, 2004, the final portion of Business and Professions Code section 17204 read, "or by any person acting for the interests of itself, its members or the general public." Because the issue before us concerns the definition of "person" itself and is not affected by the recent amendment limiting private party standing to "persons" who have suffered actual injury, we need not address whether Proposition 64 is to be applied retroactively to cases filed before its November 3, 2004 effective date.

governmental entity may neither sue nor be sued as a "person" under UCL. (See *California Medical Assn. v. Regents of University of California* (2000) 79 Cal.App.4th 542, 550-551 [University of California is not a "person" under UCL]; *Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1201-1203 [lottery commission is not a "person" under UCL]; *Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 831 [same]; *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 209-211 [county is not a "person" under UCL].)[14]

Notrica v. State Comp. Ins. Fund (1999) 70 Cal.App.4th 911, upon which MTA relies, is not to the contrary. In *Notrica* the court recognized that, although the State Insurance Compensation Fund (SCIF) is a public entity, it is statutorily empowered to act as a private insurer and is subject to suit in the same manner as any private insurer. Accordingly, the court held, "although SCIF is a 'public entity' SCIF is to be treated as a private enterprise pursuant to Insurance Code section 11873, legislation that SCIF sponsored." (*Notrica,* at p. 941.) Thus, the SCIF is a limited exception to *Bluvshtein* that proves the general rule.

Moreover, even if contrary to well-established precedent we were to recognize MTA's standing to bring UCL claims as a "person," MTA would not be entitled to recover civil money penalties from TSP under UCL. Business and Professions Code section 17206 authorizes a civil penalty not to exceed $2,500 for each violation of UCL "which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, or by any district attorney, or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance . . . ." That is, civil penalties may be collected only in

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[14] Although MTA itself lacks standing to sue under UCL, if it has been victimized by unlawful or unfair business practices in violation of UCL, an action for injunctive relief and restitution, as well as to recover civil money penalties, may be prosecuted on its behalf by the district attorney in the name of the People of the State of California. (Bus. & Prof. Code, §§ 17203 [injunctive and other equitable relief]; 17206 [civil money penalties].)

"public unfair competition actions." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.)

Although MTA's claims that TSP engaged in unlawful or unfair business practices in connection with the Metro Red Line contracts certainly could have been the subject of a public enforcement action filed by an authorized prosecutor in the name of the People of the State of California, MTA's cross-complaint is not such an action. On remand judgment on the UCL claims is to be entered in favor of TSP.

4. *The Trial Court Erred in Granting MTA's Thirteen Motions for Summary Adjudication*

MTA filed 22 motions for summary adjudication with respect to portions of TSP's affirmative claims on the B-series contracts. The trial court granted 13 of those motions, eliminating some $13 million in damages claimed by TSP.[15] The trial court's order granting those motions, which determined factually related contract issues but did not entirely resolve either cause of action for breach of contract, violated section 437c, subdivision (f)(1) ["[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty"] and, therefore, must be reversed. (*Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1255-1256 (*Hindin*) ["In 1990 the Legislature amended former section 437c, subdivision (f) 'to stop the practice of adjudication of facts or adjudication of issues

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[15] By minute order dated February 3, 2001 the trial court granted the following motions for summary adjudication: (1) motion re Pass Two claims; (2) motion re claim for additional compensation on bilateral change orders; (3) motion re claim for night restrictions; (4) motion re interest on change orders; (5) motion re change order 238; (6) motion re claims by TSP for city business taxes; (7) motion re Overland Mechanical, Inc.; and (8) motion re temporary powers. On February 7, 2001 the trial court issued another minute order granting the following motions for summary adjudication: (9) motion re station completion delays (TSP claim R); (10) motion re engineering costs for mechanical openings in CMU walls; and (11) motion re welding inspection and testing. On December 1, 2001 the trial court issued yet another minute order granting two more motions for summary adjudication: (12) motion re interest and damages on retention; and (13) motion re rebar couplers.

that do not completely dispose of a cause of action or defense.' [Citations.]"]; see *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323 [§ 437c, subd. (f)(1) was intended "'to stop the practice of adjudication of fact or adjudication of issues that do not completely dispose of a cause of action or defense'"].)

The trial court's reliance on *Lilienthal, supra,* 12 Cal.App.4th 1848, and *Fineman, supra,* 66 Cal.App.4th 1110, to proceed to the merits of MTA's summary adjudication motions was misplaced. To be sure, *Lilienthal* held that "a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action." (*Lilienthal,* pp. 1854-1855.) The Court of Appeal explained the term "cause of action" as used in section 437c, subdivision (f), refers to "the invasion of a primary right" (*id.* at p. 1853) or a "separate and distinct obligation." (*Id.* at p. 1854.) Analyzing the legal malpractice action before it, the Court concluded, "In the instant case, plaintiffs seek to recover damages based on two separate and distinct obligations. Each obligation creates a separate and distinct claim. The first obligation relates to legal services performed on the Murillo matter, and the second obligation relates to legal services performed on the Barton matter. There is no dispute that the two matters have no relation to each other and involve legal services performed at different times, with different and distinct obligations, and distinct and separate alleged damages. Under California law, the allegations relating to the Murillo and Barton matters involve two separate and distinct causes of action regardless of how pled in the complaint." (*Ibid.*)

In *Fineman, supra,* 66 Cal.App.4th 1110, the Court of Appeal affirmed a summary adjudication motion directed to some, but not all, of the checks at issue in the litigation. The plaintiff had sued Bank of America for honoring 83 company checks signed by only one of two required signatories. Bank of America moved for summary adjudication on the ground that claims as to 23 of the checks were time-barred. The trial court granted the motion; and the Court of Appeal affirmed, holding that, for purposes of section 437c,

subdivision (f), payment of each of the checks constituted a "separate and distinct wrongful act" under *Lilienthal*. (*Fineman*, at p. 1118.)

In *Hindin, supra,* 118 Cal.App.4th at pages 1257 to 1258, as had the court in *Lilienthal, supra,* 12 Cal.App.4th at page 1853, we explained that "[w]hether a complaint in fact asserts one or more causes of action for pleading purposes depends on whether it alleges invasion of one or more primary rights. . . . 'The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.]' [Citation.] 'As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. It must therefore be distinguished from the *legal theory* on which liability for that injury is premised.' [Citation.]"

In both *Lilienthal* and *Fineman* the "separate and distinct wrongful acts" summarily adjudicated constituted the entirety of the relationship between the parties with respect to the subject matter of the motion: the Murillo matter in *Lilienthal* and each separate check in *Fineman*. By contrast, MTA moved to summarily adjudicate discrete factual elements that, while perhaps identifiable as separate "issues" within TSP's complaint, did not constitute entire causes of action.[16]

TSP's second amended complaint pleaded four causes of action: (1) breach of contract, (2) breach of warranty, (3) breach of the covenant of good faith and fair dealing and (4) quantum meruit and unjust enrichment. Each cause of action as pleaded involved two contracts, B221 and B231, between TSP and MTA. Contract B221 was for construction of the Metro Red Line Wilshire/Normandie station; contract B231, the Metro Red Line Wilshire/Western station. Because TSP combined its claims relating to both contracts, each of its causes of action asserted two primary rights: the right to be fairly compensated under contract B221 and the right to be fairly compensated under

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[16] Throughout its brief on appeal MTA repeatedly refers to its "motions for summary adjudication of issues," a misnomer that unintentionally confirms the procedural error committed by MTA and the trial court.

contract B231. Therefore, a motion for summary adjudication of its breach of contract claim for one of those contracts, but not the other, although less than the entire cause of action as pleaded by TSP, would have been proper. Like the Murillo and Barton matters in *Lilienthal, supra,* 12 Cal.App.4th 1848, and the separate checks in *Fineman, supra,* 66 Cal.App.4th 1110, each of the two contracts represented a "separate and distinct matter" properly subject to summary adjudication. MTA's motions for summary adjudication, however, were not directed generally to MTA's alleged refusal to compensate TSP for additional work performed on one or both B-series contracts but to specific instances of MTA's refusal to accept TSP's change-order requests. Summary adjudication of these discrete factual issues, which disposed of only part of TSP's causes of action, was improper.[17] (See *Bagley v. TRW, Inc*. (1999) 73 Cal.App.4th 1092, 1094-1096 [plaintiff alleged seven theories of breach of employment contract, employment discrimination and wrongful termination and asserted he was eligible for 24 positions in the post-reorganization company; 130 separate summary adjudication motions directed to each of the 24 positions for which he was not hired under each of the legal theories advanced were not properly decided under § 437c, subd. (f)]; *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 92, 97-98 ["[T]he claim for punitive damages here is based on an interrelated set of facts and circumstances. If any one or more of the facts would support a claim for punitive damages, then summary adjudication is not available to eliminate from trial other facts relating to the claim for punitive damages."].)[18]

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[17] MTA incorrectly asserts its motions were proper because TSP could have brought a separate action for each of the claimed items of damages contested by MTA in its motions for summary adjudication. In fact, had TSP filed a breach of contract action alleging some of the breaches of contract B221 identified in the second amended complaint and later brought a separate action for additional breaches, MTA "'. . . could have invoked the primary rights theory to support a plea in abatement [if the first action was still pending when the second was filed] or, if the [first action was concluded in defendants' favor], the bar of res judicata.' [Citation.]" (*Hindin, supra,* 118 Cal.App.4th at pp. 1258-1259.)

[18] In light of our reversal of the judgment on this ground, we need not reach the

5. *The Trial Court Did Not Err in Denying MTA's Motion for Summary Adjudication Concerning TSP's Use of Unlicensed Contractors*

In addition to seeking summary adjudication to defeat various aspects of TSP's affirmative claims for relief, MTA moved for summary adjudication of its own claims for damages and restitution from TSP for TSP's alleged breach of the B221 and B231 contracts by demanding and receiving payment for work performed by Tri-City Reinforcing Corporation, an allegedly unlicensed contractor. As it had with its other summary adjudication motions, MTA argued this motion was procedurally proper under *Lilienthal, supra,* 12 Cal.App.4th 1848, and *Fineman, supra,* 66 Cal.App.4th 1110. The trial court agreed, but nonetheless denied the motion on the ground MTA was not entitled to restitution for work that had been performed in an acceptable manner.

MTA's cross-complaint alleges TSP breached contracts B221 and B231 in a number of respects; use of an unlicensed subcontractor in violation of a promise to perform its work in compliance with all applicable laws (and the related FCA violations asserted with respect to this allegedly illegal activity) is but one of the multiple deficiencies in contract performance MTA asserts. All of these breaches, however, involve the invasion of only two primary rights: the right to full, lawful performance by TSP under contracts B221 and B231. (See *Hindin, supra,* 118 Cal.App.4th at pp. 1255-1257 ["cause of action" constitutes an invasion of a primary right].)[19] Accordingly,

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issues of excessive damages, juror misconduct or attorney fees raised by TSP in its appeal. We also deny the requests for judicial notice, which relate to matters not relevant to the ground upon which we reverse.

[19] We might, in a proper circumstance, consider the violation of contractor licensing statutes as involving a different primary right from simple breach of contract. However, MTA did not plead any wrongful acts related to Tri-City or to the use of unlicensed subcontractors in its cross-complaint, and it may not summarily adjudicate a primary right that has not been put in issue by the pleadings. (*Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 690 ["the pleadings define the issues for summary judgment and summary adjudication"]; *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18 [summary adjudication based on factual assertions not pleaded in cross-complaint is improper absent amendment to cross-complaint]; see *Fineman, supra,* 66 Cal.App.4th at p. 1118 [separate and distinct

MTA's motion was properly denied because it failed to dispose of an entire cause of action. (§ 437c, subd. (f)(1).)

6. *The Discovery Sanctions Imposed Against Castle & Lax*

a. *Standard of Review*

Castle & Lax (C&L) has filed its own appeal from several trial court orders imposing monetary sanctions against it for pretrial discovery violations. We review the trial court's decision to impose discovery sanctions for abuse of discretion. "Discovery sanctions are subject to reversal only for "'arbitrary, capricious, or whimsical action."' [Citation.]" (*Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1601; see *Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988 [trial court's decision to impose sanctions is "subject to reversal only for manifest abuse exceeding the bounds of reason"].) C&L has the burden of showing an abuse of discretion. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 10.)

b. *The Trial Court Did Not Abuse Its Discretion in Imposing $17,500 in Sanctions Pursuant to Report 28*

The trial court imposed sanctions of $17,500 against C&L "based upon the past and continuing failure to produce all of TSP's pre-bid documents," pursuant to Justice Eagleson's recommendation in Report 28. C&L argues this sanction order was an abuse of discretion because the trial court's finding that C&L had engaged in a "continuing failure and refusal to comply with court orders compelling production of pre-bid documents" is not supported by substantial evidence; the sanctions were imposed based on C&L's assertion of valid and reasonable objections to discovery; and sanctions were imposed for conduct that does not violate the Discovery Act and in disregard of an earlier order rejecting MTA's request for sanctions. We find no abuse of discretion.

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wrongful acts pleaded as a single cause of action may be summarily adjudicated if they could have been pleaded separately].)

i. *Substantial Evidence Supports the Trial Court's Finding That C&L Continuously Failed to Comply With Court Orders Compelling Production of Pre-bid Documents*

C&L insists no evidence supports the trial court's finding that pre-bid documents had been withheld in violation of court orders. However, Justice Eagleson, who was present at the deposition of TSP president Ron Tutor, stated in his report that Mr. Tutor acknowledged during a break in the deposition proceedings that TSP had withheld documents it had been ordered to produce. Under the extremely deferential standard of review we must apply in this case, Justice Eagleson's personal recollection of that admission is sufficient to support the award of sanctions. (See, e.g., *Alliance Bank v. Murray, supra,* 161 Cal.App.3d at p. 10 [findings of fact made by the trial court to support an award of sanctions are given great deference on appeal].)

ii. *The Trial Court Did Not Abuse Its Discretion in Finding the Objections to Discovery Were Not Substantially Justified and That TSP Admittedly Violated the Discovery Act by Failing to Produce Documents It Had Been Ordered to Produce*

Section 2031, subdivision (m), provides in part, "The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Judge Baker and Justice Eagleson initially found in TSP's favor in declining to order production of pre-bid documents on the ground of confidentiality and lack of relevance. C&L argues, because its objections were once well-taken, its later objections on the same ground were also substantially justified and cannot properly form the basis for sanctions. (*Fuss v. Superior Court* (1969) 273 Cal.App.2d 807, 821 [trial court's initial decision upholding objection to discovery, even though erroneous, established "substantial justification" for the objection].) It further asserts its conduct was not sanctionable because it did not violate the Discovery Act.

C&L's position is unfounded. Because substantial evidence supports the trial court's finding that C&L did in fact violate certain discovery orders, it necessarily follows that it violated the Discovery Act, as well. The fact that some of C&L's conduct and objections may initially have been accepted by Judge Baker and Justice Eagleson, although certainly relevant to the trial court's decision whether to impose sanctions and, if so, at what level, does not insulate it from liability for sanctions for other, unjustified conduct such as its admitted failure to comply with later discovery orders made by Justice Eagleson and Judge Schneider. Moreover, the trial court awarded monetary sanctions of $17,500, rather than the full $22,781.30 requested by MTA in connection with Report 28, suggesting the trial court in fact considered its past rulings when it exercised its discretion to impose sanctions.

c. *The Trial Court Abused Its Discretion in Awarding Sanctions Pursuant to Report 37*

In Report 37 Justice Eagleson found that "TSP witnesses and its counsel made false claims of full production" and recommended sanctions of $7,500 against TSP and its counsel. The trial court adopted this report in May 2000 and imposed the recommended sanctions. C&L contends this conclusion was not based on substantial evidence and, therefore, the sanctions were not warranted. We agree.

i. *The Trial Court Erred in Relying on the Declaration of MTA's Expert*

In a declaration filed in support of the motion to compel that led to Report 37, MTA's expert Thomas Turner opined that, because TSP had not produced certain documents Turner would expect to find in its files, those documents must have been withheld. For example, Turner declared, "it is highly improbable that a contractor of TSP's sophistication would bid $13,500,000.00 of work without retaining some of the detailed estimating work papers for this work." He also opined, "It is apparent that not all cut-add sheets (and specifically the overall cut-add sheet) of the 'pre-bid' estimate have been produced." Turner further stated, "A prudent general contractor bidding a project of this size would also have a 'due diligence' file of its good faith efforts to find

disadvantaged business enterprises [DBE's] to comply with the 25% DBE set aside for this project. None of these 'due diligence' files were produced by TSP," and "as a prudent general contractor bidding a project of this size, TSP would have kept [20 additional] categories of documents." Turner concluded, "A substantial portion of these materials were not produced with the 'pre-bid' documents provided to date. In summary, it is my opinion that TSP still retains 'pre-bid' documents for Contract B221 that it has not produced to the MTA."

In response to Turner's declaration TSP submitted the declaration of Ron Tutor in which he stated that some of the documents described by Turner had been lost, others had already been produced to MTA and still others had never existed. MTA argues it was within the trial court's discretion to credit and rely on the Turner declaration rather than the Tutor declaration and this court is without authority to re-weigh the evidence.

If the issue were simply one of relative credibility and weight to give to conflicting declarations, we would agree with MTA. But Turner's surmise about what records TSP "should have" or "would have" possessed does not constitute substantial evidence that, in fact, TSP did have those records in its possession. (*Garza v. Workmen's Comp. App. Bd*. (1970) 3 Cal.3d 312, 318, fn. 3 ["An expert's opinion which rests upon guess, surmise or conjecture, rather than relevant, probative facts, cannot constitute substantial evidence"]; *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1149 ["An inference of fact must be based upon substantial evidence, not conjecture. . . . It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists"].) Mere disbelief of Mr. Tutor's explanations for the absence of these supposedly missing documents, moreover, does not provide substantial evidence that the documents were in fact in TSP's possession. (*Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1229 [disbelief of a witness's testimony does not constitute affirmative evidence of the contrary proposition].)

ii. *TSP's Witnesses Did Not Admit Documents Had Been Withheld*

MTA also contends the trial court properly found TSP made false claims of full production based on statements by Mr. Tutor and TSP vice-president John Randall in their respective depositions that some of the documents referred to in the Turner declaration had existed in the past but had not been produced because "we've lost them." MTA reasons that, because it knew certain relevant documents had been lost, TSP's claims of full production were necessarily false. MTA reads far too much into the acknowledgement of lost documents: Representations that TSP was not withholding any documents, that it had produced "everything" and that it had made "full production" are not inconsistent with admissions that certain documents had been lost. Although TSP's statements regarding production might be considered imprecise, they were consistent with the level of candor to be expected in discovery proceedings.[20] "Lost documents" and "withheld documents" are simply not the same thing, and the statements of Messrs. Tutor and Randall cannot constitute substantial evidence that C&L knowingly withheld documents from discovery.[21]

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[20] Section 2031, subdivision (g)(2), requires a party responding to a document request by representing it is unable to comply with a particular demand to "specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been or is no longer in the possession, custody, or control of the responding party." The representations of full production challenged by MTA, however, were not made in response to document demands but in declarations filed in opposition to a motion for discovery sanctions filed by MTA. In his declaration Mr. Tutor stated, "TSP is not withholding any 'pre-bid documents' nor would it have anything to gain from doing so at this point." Mr. Randall stated in his declaration that "all documents relating to Contract B221 have been made available to MTA for inspection and copying . . . TSP is not retaining any 'pre-bid' documents."

[21] Justice Eagleson's recollection of Mr. Tutor's off-the-record concession at his deposition, discussed above, although sufficient to support the sanctions award in connection with Report 28, was not advanced as a basis for sanctions in connection with Report 37. (See *Sabado v. Moraga* (1987) 189 Cal.App.3d 1, 10-11 ["past conduct which has already been considered by a court cannot justify the imposition of sanctions"].)

d. *The Trial Court Abused Its Discretion In Awarding Sanctions Pursuant to Report 32*

MTA was awarded of $5,311 in sanctions from C&L to compensate it for the expense of producing 1,000 boxes of documents at C&L's offices pursuant to a June 1999 request for documents and a subsequent order of production. Although all counsel involved in this incident demonstrated a disheartening lack of maturity and judgment, the sanctions award was improper.

In 1999, after MTA was granted leave to file its cross-complaint, TSP served a request for all documents upon which MTA intended to rely in proving the affirmative claims it was now asserting. MTA advised TSP that it had previously produced all (or at least most) of the documents in response to prior TSP demands. Believing MTA's response unsatisfactory, TSP moved to compel production in August 1999. The trial court referred the matter to Justice Eagleson.

During the hearing on the matter on November 11, 1999, Justice Eagleson signed Report and Recommendation No. 11, which directed MTA "to respond fully by providing responsive documents on or before November 22, 1999, at 5:00 p.m. by hand delivery, subject to the following limitations: [¶] . . . [¶] Documents earlier produced in response to other responses [*sic*] by the MTA need not be produced again if, and only if, said earlier responses can be clearly identified, not only by document date, but by date of production. If this is too cumbersome and time consuming 'previously produced documents' shall be produced again."

Notwithstanding the express language in Report 11 that MTA's documents be hand-delivered to TSP, MTA's counsel David Casselman offered the documents for inspection and copying at the warehouse where they were stored. TSP counsel Ronny Sendukas rejected the offer to inspect all of MTA's documents at the offsite warehouse and insisted MTA hand-deliver the documents not previously produced by MTA, as directed by Report 11. The following exchange then took place:

"MR. CASSELMAN: Would you like me to hand deliver 1,000 boxes? Do you want me to hand deliver them?

"MR. SENDUKAS: If you've got 1,000 boxes that haven't been previously produced, fine, hand deliver them.

"MR. CASSELMAN: No, no, that's not what the order says, Mr. Sendukas.

"MR. SENDUKAS: I've read the order and you're wrong.

"MR. CASSELMAN: Just tell me now, would you like 1,000 boxes delivered to your office tomorrow?

"MR. SENDUKAS: I would like compliance with the order.

"MR. CASSELMAN: Yes or no, would you like 1,000 boxes hand delivered to your office tomorrow?

"MR. SENDUKAS: That's a stupid question.

"MR. CASSELMAN: I'll take that as a no.

"MR. SENDUKAS: It's not a 'no.'

"MR. CASSELMAN: Then say 'yes.'

"MR. SENDUKAS: If you've got 1,000 new boxes, you better get them to my office tomorrow.

"MR. CASSELMAN: I will bring a redball truck to your office and we'll move them into your personal office and stack them up.

"MR. SENDUKAS: If they weren't previously produced, I suggest you do have an explanation for why they weren't produced previously.

"MR. CASSELMAN: Okay, then that means 'no.'

"MR. SENDUKAS: That means 'yes.'"[22]

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[22] The 284 volumes of clerk's transcript and 109 volumes of reporter's transcript in these consolidated appeals, which capture in vivid detail the parties' bitter discovery battles, reveal the above-quoted exchange is simply one example -- and by no means the most egregious -- of the lack of professional courtesy exhibited by trial counsel in this case. Although such behavior has become increasingly commonplace in what is supposed to be "civil" litigation, it is hard to fathom why lawyers believe such tactics

On November 12, 1999 MTA delivered 1,000 boxes to C&L's office, where the deposition of Maureen Tamuri, the MTA's "person most knowledgeable," was in progress. Mr. Casselman refused to leave the documents over night and asserted the 1,000 boxes had been delivered at Mr. Sendukas's insistence. Ultimately, at the urging of Justice Eagleson, who was present for Ms. Tamuri's deposition, Mr. Casselman agreed to make the documents available for review at a later date.

MTA sought reimbursement for the costs of the November 12 production as sanctions against C&L for demanding that it produce the 1,000 boxes of documents on that date, arguing its conduct constituted a misuse of the discovery process within the meaning of section 2023, subdivision (a). In his Report 32 Justice Eagleson recommended MTA's motion be granted. After a de novo hearing, the trial court signed the order accompanying Report 32 and imposed sanctions as requested: "On November 11, 1999, Mr. Casselman advised opposing counsel and the referee that all the responsive documents had been gathered up and placed in a warehouse. Mr. Casselman advised Mr. Sendukas and Mr. Robin that the prudent course of action would be to examine the documents at the warehouse. However, Mr. Sendukas insisted that the boxes be delivered to his office the following day, instead. Mr. Casselman said he would do just that, and did. [¶] As it turned out, there was relatively short review of the 1,000 boxes produced at the office building housing the law office of Castle & Lax. Later, the boxes were returned to the warehouse. They were further examined by representatives of Castle & Lax the following week. This useless exercise was caused solely by the intransigence of Messrs. Robin and Sendukas."

The trial court's sanctions order was an abuse of discretion. Although Justice Eagleson and the trial court both concluded C&L was the cause of the "useless exercise,"

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advance the interests of their clients. What is clear in this case is that counsel's inability to cooperate with each other directly contributed to the need for an expensive retrial of this case.

all Mr. Sendukas did was insist MTA comply with the referee's direction to MTA to hand-deliver the documents to TSP's counsel. It was Mr. Casselman's decision to deliver to C&L's offices the 1,000 boxes the next day, even though he was well aware that "nobody was going to review the boxes there that day." To the extent MTA believed a November 12 production at C&L's office was unreasonable because of the date or the location or both, it should have moved for a protective order or other clarification from the discovery referee before engaging in the theatrical act of bringing three truckloads of documents to opposing counsel's office while a significant deposition was in progress.

DISPOSITION

The judgment is reversed, and the cause remanded to the trial court for further proceedings not inconsistent with this opinion. The sanctions imposed on Castle & Lax pursuant to Report 28 are affirmed; the sanctions imposed pursuant to Reports 32 and 37 are reversed. All parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.