

DOPPE v. BENTLEY MOTORS, INC.

California Court of Appeal, Fourth District, 2009.

174 Cal.App.4th 967, 94 Cal.Rptr.3d 802.

FYBEL, ASSOCIATE JUSTICE.

I. INTRODUCTION

In this case, we make the extraordinary, yet justified, determination that the trial court abused its discretion by failing to impose terminating sanctions against defendant for misuse of the discovery process. The record demonstrates defendant engaged in repeated and egregious violations of the discovery laws that not only impaired plaintiff's rights, but threatened the integrity of the judicial process.

August B. Doppes sued Bentley Motors, Inc. (Bentley), for violation of the Song-Beverly Consumer Warranty Act (Civ.Code, § 1790 et seq.), breach of express warranty, breach of implied warranty, and fraud, after Bentley failed to repair, repurchase, or replace a 2001 Bentley Arnage that had an obnoxious odor in the interior. Over the course of litigation, Bentley persistently misused the discovery process, withheld documents, and violated four discovery orders or directives from the discovery referee. A report and recommendation prepared by the discovery referee just a few weeks before trial declared: "Although Bentley has been repeatedly ordered to provide full and complete discovery, Bentley has steadfastly failed to do so. [¶] The history of Bentley's failure to make discovery is chronicled in Plaintiff's numerous discovery motions."

The discovery referee, in an abundance of caution and with exercise of great moderation, recommended denying Doppes's request for terminating sanctions and instead recommended giving the jury a special instruction as a form of issue sanctions.

The trial court did not abuse its discretion in approving the discovery referee's report and recommendation. However, in the middle of trial, it was learned Bentley still had not complied with discovery orders and that Bentley's discovery abuses were worse than originally known. Rather than grant Doppes's renewed request for terminating sanctions, the trial court gave another special instruction regarding Bentley's discovery practices. As we shall explain, at that point, the trial court erred by not imposing terminating sanctions against Bentley.

The jury found in favor of Doppes on his causes of action under the Song-Beverly Consumer Warranty Act and for breach of express and implied warranties. The judgment on those claims is affirmed. The jury found against Doppes on his fraud cause of action and made a finding that Bentley did not intentionally violate the Song-Beverly Consumer Warranty Act. As sanctions for Bentley's discovery abuses, we reverse the judgment on the fraud cause of action and remand with directions to enter Bentley's default on that cause of action, to make a finding to be entered on the judgment that Bentley

intentionally violated the Song-Beverly Consumer Warranty Act, and to consider civil penalties and other relief against Bentley.

Doppes also contends the trial court abused its discretion in failing to award him the full amount of attorney fees sought in two motions. We conclude the amount of attorney fees awarded on the first motion must be increased to compensate Doppes for the cost of discovery motions, but otherwise affirm the trial court's award. We remand with directions to the court to reconsider the second motion in light of this opinion.

II. FACTS AND PROCEDURAL HISTORY

A. The "Obnoxious Odor" Problem

In April 2002, Doppes purchased a new, model year 2001, Bentley Arnage automobile from Newport Auto Center (NAC). Soon after purchasing the automobile, he noticed an "obnoxious odor" in its interior. At Doppes's request, NAC tried unsuccessfully to repair the car on several occasions, resulting in the car being out of service for 171 days. Doppes demanded that Bentley replace the car or make restitution * * *. Bentley refused.

An internal Bentley document issued June 7, 2001, entitled "Odour Reduction & Rear Seat Belt Draft Reduction Procedure," states: "Obnoxious odour present in the passenger compartment when the vehicle is driven with the sunroof tilted or the door drop glass lowered 1 to 2 inches from the glasses['] fully raised position. The odour is also detected in the luggage compartment at a higher concentration." Doppes was not informed of this document or of the information in it when he purchased his Bentley automobile.

B. The Better Business Bureau Hearing

Doppes first sought relief from the Better Business Bureau. At a hearing before the Better Business Bureau in March 2004, Bentley employee Colin Ham testified that, as of that date, he knew of only three cars with odor problems and that Bentley addressed the problem by placing foam blocks in the body cavities of the cars to obstruct the flow of cold air. Ham also testified he instructed NAC not to provide Doppes with internal documentation of the odor problem. The Better Business Bureau hearing officer ruled in Bentley's favor.

Documents produced later showed that Ham knew of at least 11 odor complaints by March 2004, and knew the problem was not cold airflow but odor emanating from corrosion protection wax. Documents showed too that, by June 2001, Bentley knew of an obnoxious odor problem in all of its four-door cars for model year 2001. * * * .

C. Doppes's Lawsuit and the Document Request

Later in 2004, several months after the Better Business Bureau hearing, Doppes

filed his initial complaint against Bentley and NAC. The operative complaint became the third amended complaint * * * .

In October 2004, Doppes served Bentley with a deposition notice of Bentley's person most knowledgeable of all warranty complaints concerning the Bentley Arnage for the 2001 and 2002 model years, including those related to the rust inhibitor used on the car frames. Doppes also requested Bentley to produce all documents relating to (1) customer complaints concerning the rust inhibitor used on the 2002 Bentley Arnage; (2) all notices to Bentley dealers for the period 2001 to date concerning the rust inhibitor used on the Bentley Arnage; (3) all warranty repairs during the period of January 2002 to date of the Bentley Arnage related to the rust inhibitor used on the vehicle; (4) all customer complaints of a wax oil smell caused by the rust inhibitor on the 2002 Bentley Arnage; and (5) vehicle tests conducted on the 2002 model year Arnage to confirm whether there was a wax oil smell arising from the vehicle's rust inhibitor.

D. The First Motion to Compel Attendance and to Produce Documents

In May 2005, Bentley produced Ham as its person most knowledgeable in response to the deposition notice. Ham brought with him only certain documents relating to the purchase and repair of Doppes's Bentley automobile and brought no documents concerning customer complaints of odor.

In response, Doppes moved to compel attendance of the person most knowledgeable at the deposition and the production of documents. The trial court granted the motion * * * . In the formal order * * * , Ham was ordered to appear for his deposition on August 17 and to produce documents on or before August 9. At that time, no sanctions were awarded.

E. Bentley Fails to Comply with the Order to Produce

Bentley did not produce any documents by the court-ordered production date of August 9, 2005. Instead, in a letter dated August 19, 2005, Bentley's counsel represented it was producing some responsive documents but it "was required to develop a system to query its warranty computer" in order to comply with the discovery order. Bentley's counsel stated, "[w]ith this correspondence, we have produced documents containing lists of warranty claims and the corresponding vehicles identified by chassis number."

* * *

In essence, over a year after Doppes's original document request and four months after the discovery order, Bentley acknowledged it had not fully complied with the court order.

F. The First Motion for Terminating Sanctions and the Second Motion to Compel Production of Documents

Doppes moved for terminating sanctions against Bentley for misuse of the

discovery process. * * * .

In early December 2005, Doppes again moved to compel Bentley to produce documents in compliance with the July 20, 2005 order and for monetary or evidentiary sanctions if Bentley again failed to comply. * * * [T]he court granted the motion, ordered Bentley to produce documents responsive to seven categories no later than December 23, 2005. * * *

Bentley did not produce any documents in response to this discovery order. Instead, Bentley submitted two declarations (one from its counsel and another from Richard Mills, a former customer service manager), stating no further production was required because “Bentley Motors, Inc. has produced all documents within its possession, custody or control.”

G. The Appointment of a Discovery Referee

At the [document] hearing * * *, the trial court appointed a discovery referee.

* * *

H. The Discovery Referee’s June 5, 2006 Report

* * * [T]he discovery referee submitted his report to the court. * * * [T]he trial court approved the report as drafted. The court’s order included the following findings:

1. The record establishes that defendant Bentley failed to timely produce relevant and properly demanded, but potentially damaging, documents.

* * *

9. In addition to the difficulties interposed by Bentley with regard to depositions, it appears that many documents which have been requested, and must necessarily exist, have not been produced. The record leaves good reason to believe that Bentley is either withholding documents, or has failed to conduct a diligent search to find them. Perhaps these documents in fact do not exist, but in that event Bentley should provide, pursuant to [Code of Civil Procedure] § 2031.230, a declaration or declarations detailing the efforts expended to locate such documents. No such detailed explanation has been provided.

10. Plaintiff has thus been significantly prejudiced. First, Plaintiff has been delayed in the preparation of its case (and has incurred unnecessary expense) . . . Had Bentley produced documents disclosing its knowledge of the odor problem when first requested to do so, or later when first ordered by the Court to do so, or even when ordered to do so a

second time by the Court, Plaintiff[] would most likely have had ample time to obtain the depositions of * * * [other Bentley employees with knowledge of the problem]. Third, it still as of this date appears that Bentley has not produced all responsive documents.”

* * * [T]he court agreed with the discovery referee the evidence and issue sanctions against Bentley were in order, but gave Bentley an opportunity to “ ‘cure’ ” the problems it had created. The court ordered Bentley to produce the following documents by June 25, 2006 or provide declarations describing in detail the efforts made to locate them: “(1) instructions on how to apply the rust inhibitor, (2) repair invoices or other records of odor reduction work and/or odor repair on all Bentleys from model years 1999 to . . . 2006, (3) all documents recording approval for installation of odor reduction kits for model years 1999 to 2006, (4) all documents denying approval for installation of odor reduction kits for model years 1999 to 2006, (5) any correspondence (other than email) from Bentley dealers to Bentley USA or UK regarding customer odor complaints, (6) documents notifying dealers that odor reduction kits were available, (7) all responsive documents referenced in other documents produced, and (8) all other documents of any description referring or relating to the odor problem or complaints of odor in Bentley automobiles for model years 1999 to 2006.”

* * *

*J. Doppes’s Second Motion for Terminating Sanctions;
the August 23, 2006 Discovery Referee’s Report and Recommendation*

In August 2006, Doppes submitted a motion to the discovery referee requesting “a terminating sanction by an order rendering a judgment by default against Bentley.” Alternatively, Doppes requested issue and evidence sanctions. Doppes supported his motion with 113 exhibits, chronicling the history of the discovery dispute. Doppes submitted a proposed recommendation with the discovery referee proposing the court instruct counsel and the jury that 33 issues of fact, identified in the proposed recommendation, be taken as established.

* * *

Nevertheless, the discovery referee recommended “a more moderate course” than the terminating sanctions or jury instructions sought by Doppes. The discovery referee stated:

It is true that Plaintiff, this Court, and eventually the jury, have been deprived of certain discovery which should have been provided to shed light on the truth of this case. Nevertheless, erring (if at all) on the side of moderation, I believe that the major damage to Plaintiff’s trial preparation can be repaired by certain narrowly-worded issue sanctions, while still allowing the jury to resolve this case on the merits (which will largely concern the jury’s evaluation of the severity of the odor). Accordingly, I

recommend that issue sanctions be formulated with restraint, tending toward more narrow rather than toward broader sanctions.

* * *

K. Discovery Continues After Trial Begins

On August 28, 2006, the first day of trial, Doppes filed objections to the discovery referee's August 23 report and recommendation, objecting to the discovery referee's failure "to recommend each and every portion of the Proposed Recommendations," including the proposed jury instructions on 33 issues of fact. On August 28, the trial court heard extensive argument on the objections and overruled them. The trial court adopted the discovery referee's report and recommendation and denied Doppes's request for terminating sanctions.

* * *

L. Doppes's Midtrial Request for Sanctions

* * * Doppes again requested the trial court impose sanctions against Bentley for noncompliance with discovery orders. Doppes requested the court to do one of three things: (1) instruct the jury immediately according to the discovery referee's August 23, 2006 report and recommendation, with additional instructions on Bentley's conduct and the inferences the jury could draw from that conduct; (2) declare a mistrial, award Doppes his attorney fees and costs, and refer the matter back to the discovery referee; or (3) issue terminating sanctions as previously requested.

* * *

N. The Jury Verdict

The jury found that Bentley violated the Song-Beverly Consumer Warranty Act and concealed a material fact, but that neither the violation nor the concealment was intentional, and found that Bentley breached express and implied warranties. The jury awarded Doppes \$214,300 as reimbursement for a new vehicle and \$100,000 for breach of express and implied warranties.

The judgment, entered in March 2007, awarded Doppes \$214,300 as reimbursement concurrent with return of the Bentley automobile (to avoid double recovery, the judgment did not include an award for breach of express and implied warranties) and prejudgment interest at a 7 percent annual rate.

* * *

IV. TERMINATING SANCTIONS FOR MISUSE OF DISCOVERY

A. Legal Principles

Imposition of sanctions for misuse of discovery lies within the trial court's discretion, and is reviewed only for abuse. Doppes argues this is the rare occasion when the trial court abused its discretion by not imposing a terminating sanction—the ultimate sanction for discovery abuse—for Bentley's conduct. We agree.

California discovery law authorizes a range of penalties for conduct amounting to “misuse of the discovery process.” (Code Civ. Proc., § 2023.030). As relevant here, misuses of the discovery process include “[f]ailing to respond or to submit to an authorized method of discovery;” “[m]aking, without substantial justification, an unmeritorious objection to discovery;” “[m]aking an evasive response to discovery;” and “[d]isobeying a court order to provide discovery.”

Code of Civil Procedure section 2025.450, subdivision (d) authorizes a trial court to impose an issue, evidence, or terminating sanction under Code of Civil Procedure section 2023.030 if a party or party-affiliated deponent “fails to obey an order compelling attendance, testimony, and production.” Section 2023.030 authorizes a trial court to impose monetary sanctions, issue sanctions, evidence sanctions, or terminating sanctions against “anyone engaging in conduct that is a misuse of the discovery process.”

As to issue sanctions, subdivision (b) of Code of Civil Procedure section 2023.030 provides: “The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.”

As to evidence sanctions, subdivision (c) of Code of Civil Procedure section 2023.030 provides: “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.”

As to terminating sanctions, Code of Civil Procedure section 2023.030, subdivision (d) provides: “The court may impose a terminating sanction by one of the following orders: [¶] (1) An order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process. [¶] (2) An order staying further proceedings by that party until an order for discovery is obeyed. [¶] (3) An order dismissing the action, or any part of the action, of that party. [¶] (4) An order rendering a judgment by default against that party.”

The trial court has broad discretion in selecting discovery sanctions, subject to reversal only for abuse. The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should “ ‘attempt[] to tailor the sanction to the harm caused by the withheld discovery.’ ” The trial court cannot impose sanctions for misuse of the discovery process as a punishment.

The discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination. “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.’” If a lesser sanction fails to curb misuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions until the sanction is reached that will curb the abuse. “A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.”

B. The Trial Court Erred by Failing to Impose Terminating Sanctions Against Bentley at Trial

The discovery referee’s reports and recommendations, both approved by the trial court, found that Bentley engaged in persistent and serious misuse of the discovery process. The discovery referee stated in the June 5, 2006 report and recommendation, “[t]he record establishes that defendant Bentley failed to timely produce relevant and properly demanded, but potentially damaging, documents.” In the August 23, 2006 report and recommendation, the discovery referee found “Bentley has not adequately explained its failure to provide full and complete evidence,” “Bentley’s discovery responses have not been complete and leave much in doubt,” “[a]lthough Bentley has been repeatedly ordered to provide full and complete discovery, Bentley has steadfastly failed to do so,” and “the history of Bentley’s discovery obstruction can be found in Plaintiff’s motions.” The discovery referee concluded: “The record leaves good reason to believe that Bentley is either withholding documents, or has failed to conduct a diligent search to find them.” The trial court approved both reports and recommendations.

Bentley does not challenge the discovery referee’s findings. Bentley does not deny it misused the discovery process. Bentley argues only that the trial court did not abuse its discretion in declining to impose terminating sanctions.

By the time trial started, Bentley had violated four discovery orders or directives * * *. It is also clear that Ham lied during the Better Business Bureau hearing and was not forthcoming in his deposition. The discovery referee found Bentley had stonewalled in producing highly relevant documents and Doppes had suffered severe prejudice as a result. In the June 5, 2006 report and recommendation, the discovery referee had given Bentley a chance to “ ‘cure’ ” the problems it had created. Bentley failed to do so.

* * *

But Doppes’s request for additional sanctions during trial revealed Bentley’s conduct was worse than originally known. Despite monetary and issue sanctions, Bentley had flagrantly engaged in such further discovery abuses so as to compel the trial court to impose the next level of sanctions-terminating sanctions.

The evidence presented in support of the request for additional sanctions, though disputed in some ways by Bentley, did show serious, continuing discovery abuses. * * *

At that point, once it was learned *during trial* that Bentley still had failed miserably to comply with discovery orders and directives, we hold the trial court had to impose terminating sanctions. Each degree of sanctions had failed. The trial court and discovery referee had been remarkably moderate in dealing with Bentley, ultimately imposing only a form of issue sanction after repeated violations of discovery orders that would have justified terminating sanctions. Yet, during the middle of trial, it was learned that Bentley still had not complied with discovery orders and directives, had been irresponsible at best in preventing destruction of e-mails, had not fully permitted data mining of e-mails as previously ordered, and had failed to produce documents it should have produced months earlier. Bentley's discovery abuses were "willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules." Terminating sanctions against Bentley were imperative.

* * *

VI. DISPOSITION

The judgment on the causes of action against Bentley under the Song-Beverly Consumer Warranty Act, for breach of express warranty, and for breach of implied warranty are affirmed. The judgment in favor of Bentley on the fraud cause of action is reversed. The matter is remanded to the trial court with directions to (1) strike Bentley's answer and enter a default and default judgment against Bentley on the fraud cause of action; (2) make an express finding in the judgment that Bentley intentionally violated the Song-Beverly Consumer Warranty Act; (3) enter an order granting the post-trial motion for attorney fees in the total amount of \$402,187; (4) reconsider the post-judgment motion for attorney fees in accordance with this opinion; and (5) conduct further proceedings not inconsistent with this opinion, including a default prove-up on the fraud cause of action, imposition of civil penalties under Civil Code section 1794, and consideration of other relief sought in the complaint. Appellant to recover costs incurred on appeal.