IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

LE & ASSOCIATES, PS, a professional service corporation, Respondent, v. ROBERTO DIAZ-LUONG, and LAN THI NGUYEN, husband and wife and the marital community comprised thereof, Appellants.	)	No. 66695-9-I UNPUBLISHED OPINION FILED: July 9, 2012

Ellington, J. — Roberto Diaz Luong (Diaz) and Lan Thi Nguyen improperly downloaded electronic client files from the law firm from which they were separating. They copied these files and printed hard copies, and used the information to solicit business, in violation of their separation agreement. When the firm filed suit to enjoin this conduct, Diaz and Nguyen lied, destroyed evidence, and were ultimately found in contempt. We affirmed the contempt order in a previous appeal.[1] In this appeal of a second order of contempt, Diaz and Nguyen contend the sanctions are punitive because they lack the present ability to purge their contempt, the sanctions are excessive, and there is insufficient evidence to support the court's findings. We again

[1] Le & Assocs. PS v. Diaz-Luong, noted at 157 Wn. App. 1040, 2010 WL 3311862.

affirm.

BACKGROUND

Roberto Diaz and Lan Nguyen are former associates of Le & Associates, PS (the firm). On October 23, 2007, they entered into a separation agreement with the firm, which identified specific cases on which they would continue to work and established a method of sharing fees with the firm on those cases.

On their last day of work, Nguyen and Diaz downloaded the firm's entire client database, including clients' personal identification and medical information and confidential attorney notes. They had no permission from the firm or the clients.

In December 2007, the firm sued Nguyen and Diaz alleging they had improperly obtained client files, wrongfully solicited firm clients, and engaged in other unlawful activity. The firm alleged claims of quantum meruit, tortious interference, replevin, violations of the Trade Secrets Act and conversion, among others.

The trial court entered a preliminary injunction in February 2008. Among other provisions, the court ordered Nguyen and Diaz not to "in any way use, copy, modify, add or delete any information, entries or electronic file information of the files or database of the [firm.]"[2] It required Nguyen and Diaz to "identify . . . all computers that now contain or once contained the misappropriated Le [f]irm client database, or any part thereof,"[3] pay for an information technology (IT) professional to examine all computers and hard drives, and return to the firm "all hard copies of any client files obtained by defendants from [the firm] at any time, and shall under no circumstances

[2] Clerk's Papers at 361.

[3] Clerk's Papers at 362.

make any copies thereof."[4] Nguyen and Diaz were also required to certify under penalty of perjury their compliance with all provisions of the order.

Nguyen and Diaz did not identify any computers that contained or once contained all or part of the client database. They identified a single portable USB hard drive, but not the computer(s) with which they accessed the drive. They then falsely claimed they had downloaded the files to the USB drive in the Les' presence and with their permission.

Forensic analysis of the USB drive revealed that it could not have been the one used to download the database. Additionally, the dates of the files on the drive had been manipulated in an attempt to show it was the original USB drive. Eventually, Diaz admitted he used another device to copy the database, transferred it to the second USB drive, and accidentally destroyed the original. He had done this several weeks after the court ordered him not to copy, modify, or delete any of the files.

In April 2008, the firm asked the court to find Diaz and Nguyen in contempt for violating the terms and conditions of the preliminary injunction. Using a screwdriver, Diaz then destroyed the hard drives in his laptop computer, Nguyen's laptop computer, and their desktop computer.

Judge Laura Inveen entered findings and conclusions and an order of contempt on June 11, 2008. Judge Inveen found Nguyen and Diaz had failed to identify computers that contain or once contained all or part of the database and violated the injunction by copying files, destroying the USB drive, and destroying the computer hard

[4] Clerk's Papers at 363.

drives. She found Diaz's explanations for this conduct not credible, and "[g]iven the false testimony, the falsification of evidence and their refusal to comply with the [c]ourt's order, . . . serious remedial sanctions should be imposed to compel their compliance."[5] The court therefore ordered Nguyen and Diaz each to pay sanctions of $1,000 per day until they fully complied with the court's orders. The order also required them to assign to the firm any right they may have to attorney's fees on deposit with the court in the matter of Powers v. Rabanco.

The court expressly found Nguyen and Diaz had the present ability to comply with the court's orders, including the certification and identification of additional computers or other media containing the firm's client data, payment of forensic IT charges, and payment of the sanctions imposed to coerce compliance. The court denied their subsequent motions for reconsideration and to stay the order.[6]

The following day, on June 12, 2008, Nguyen and Diaz submitted new declarations certifying compliance with the order to identify all electronic media that might have contained firm data. In identical declarations, Nguyen and Diaz stated they had no electronic or hard copies of firm client files "[e]xcept for documents and files pertaining to clients of Diaz & Nguyen (which [we] understand to fall outside the strictures of the February 9, 2008 [o]rder)."[7] They also stated they "have no money to pay" IT expert Michael Andrew for his work on the case.[8]

[5] Clerk's Papers at 523.

[6] These orders were the subject of the first appeal.

[7] Clerk's Papers at 758, 766.

[8] Clerk's Papers at 770.

In January 2009, the court again found them in contempt. The court found the June 2008 declarations "do not comply with the terms of its orders in that they contain qualifications, limitations, and omissions not permitted by the [o]rders."[9] The court also rejected Nguyen and Diaz's claim of inability to pay for the forensic IT expert's work because they "have provided no documentation to support [the] assertion."[10] It ordered Nguyen and Diaz to comply immediately with the prior orders.

This court issued a temporary emergency stay in February 2009 to allow time to consider whether the contempt order sufficiently protected confidential client information that might be contained in Nguyen and Diaz's files. Commissioner Mary Neel ordered that the "status quo shall be maintained in all respects. Thus, for example, appellants shall insure that no one copies, deletes, destroys or in any way alters any computer, storage device, media, electronic data, drives, files, information or data, or anything else identified in the trial court's orders."[11]

In March 2009, Commissioner James Verellen issued a partial stay pending a decision in the appeal. He required Nguyen and Diaz to turn over their computer equipment so that Andrew could make a forensic copy without changing or deleting the original data, which Andrew was to examine and provide a report to a special master or to the court for in camera review.

In August 2010, we affirmed the trial court in all respects, including the unchallenged finding that Diaz and Nguyen had the present ability to comply with the

[9] Clerk's Papers at 728.

[10] Clerk's Papers at 728.

[11] Clerk's Papers at 803.

court's orders. We held that "the monetary sanctions were civil remedial sanctions, not punitive sanctions."[12]

In February and March 2009, Nguyen and Diaz filed undertakings claiming compliance with the various court orders.

Andrew submitted his report in October 2009. On February 25, 2010, largely relying on his report, the firm again sought contempt sanctions and also asked the court to prohibit Nguyen and Diaz from advancing their affirmative defenses in the lawsuit until they complied with the orders already entered.

Andrew's report was based on his examination of Diaz's Dell laptop, Nguyen's Hewlett Packard laptop, and two USB thumb drives, on which he discovered many files that originated at the firm and pertained to the firm's clients. From various esoteric characteristics of these files, Andrew opined, on a more probable than not basis, that another, undisclosed, computer and/or storage device existed that had been used to contain and/or access the firm's data.

In September 2010, after hearing the parties' evidence, Judge Andrea Darvas entered the orders that are the subject of this appeal. Judge Darvas found that Andrew's testimony was more credible than that of the defense expert, Alison Goodman. In addition to several instances of completed contempt,[13] Judge Darvas found the Les had proven several allegations of ongoing contempt. At issue here are

[12] Le & Assocs., 2010 WL 3311862, at *7.

[13] The court found Nguyen and Diaz also committed contempt by failing to timely identify flash drives and lying about their existence, using data-destroying software to destroy data on their flash drives and at least one laptop and lying about it, and violating this court's order to refrain from copying, destroying, deleting, or modifying in any way any computer, storage devices, electronic data, drives, files, etcetera.

the court's findings that Nguyen and Diaz: (1) never identified the computer used to falsify a second USB drive; (2) failed to disclose a computer that more likely than not contained client data; (3) continued to possess electronic client files; (4) continued to possess hard copies of client files; and (5) failed to pay costs resulting from their repeated contempt, including Andrew's fees.

The court ordered Nguyen and Diaz to pay the court $1,000 per day "from the date compliance was required and the sanction was entered (June 16, 2008) until such time as they fully comply with the Injunction, Contempt Order and Sanctions Order."[14] They were to pay the amount of the accrued sanctions to date "within 10 days or submit separate sworn declarations as to why they will not or cannot comply."[15] The court also ordered them to comply immediately with all terms of the injunction, contempt order, and sanctions order, to pay plaintiffs for all losses including attorney fees, and to reimburse the firm for Andrew's fees. Finally, the court stayed Nguyen and Diaz's affirmative claims against the firm until they demonstrate compliance.

In March 2011, Judge Darvas entered findings and conclusions and a judgment awarding additional attorney fees to the firm.

Nguyen and Diaz appeal the September 2010 contempt order and the March 2011 order and judgment.

DISCUSSION

Standard of Review

"Whether contempt is warranted in a particular case is a matter within the sound

[14] Clerk's Papers at 2537.

[15] Clerk's Papers at 2537.

discretion of the trial court; unless that discretion is abused it should not be disturbed on appeal."[16] Whether a purge condition exceeded the court's authority or violated a contemnor's due process rights are questions of law, reviewed de novo.[17]

Ability to Comply

A court may find a person in contempt and impose remedial sanctions if it finds that the person "has failed or refused to perform an act that is yet within the person's power to perform."[18] "[T]he law presumes that one is capable of performing those actions required by the court . . . . [I]nability to comply is an affirmative defense."[19]

Nguyen and Diaz contend the court erred by imposing sanctions for failing to identify an additional computer that contains or once contained the firm's client files because they lack the present ability to comply. They argue that no such computer exists, and that Andrew's testimony to the contrary unraveled to the point that the court abused its discretion by relying upon it.

The testimony about the existence of an undisclosed computer was highly technical. Declarations and depositions by the two experts comprise about 1,000 pages of the record, and their testimony lasted three days. Though the parties describe the testimony in excruciating detail, here a brief overview will suffice.

In his report, Andrew explained that he had identified a number of folders on the

---

[16] King v. Dep't of Soc. & Health Servs., 110 Wn.2d 793, 798, 756 P.2d 1303 (1988).

[17] In re Interest of M.B.,101 Wn. App. 425, 454, 3 P.3d 780 (2000).

[18] RCW 7.21.030(2).

[19] Britannia Holdings Ltd. v. Greer, 127 Wn. App. 926, 933, 113 P.3d 1041 (2005) (internal quotation marks omitted) (quoting Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)).

Nguyen and Diaz laptop hard drives that were named after 43 former clients of the firm.

Within a number of these folders were files that he could tell, from certain immutable attributes, had been created before October 23, 2007, when Nguyen and Diaz separated from the firm. Andrew also found evidence that Nguyen and Diaz had used a pen drive and a computer that they had never disclosed. From this evidence, Andrew concluded "to a reasonable degree of professional certainty on a more probable than not basis" that Nguyen and Diaz had utilized an undisclosed computer and storage device.[20]

Nguyen and Diaz challenged Andrew's conclusions. They presented expert testimony from Alison Goodman, who pointed out certain inconsistencies in attributes of the files on which Andrew relied. Andrew acknowledged the anomaly, but found it insignificant in light of the other evidence. Further, while Andrew conceded he could not explain the anomalies with certainty, he offered several possibilities. And while no single file established the existence of other computers or devices that contain or contained firm files, Andrew opined the "aggregate of the evidence" compelled this conclusion.[21]

The trial court expressly adopted Andrew's opinions. The court found "that Mr. Andrew's background, education, and experience in computer forensics are more extensive than Ms. Goodman's, and that Mr. Andrew performed a much more thorough analysis of the forensic data than Ms. Goodman did. Therefore, the [c]ourt finds his opinions in this matter to be more credible on balance."[22]

---

[20] Clerk's Papers at 639.

[21] Report of Proceedings (June 16, 2010) at 62.

[22] Clerk's Papers at 2529.

Andrew's testimony provided substantial evidence that Nguyen and Diaz failed to designate a computer and/or storage device that contains or contained the firm's files but have the present ability to do so. Appellate courts do not "second guess the trial court's determinations as to the credibility of witnesses and the persuasiveness of the evidence presented at trial."[23]

Nguyen and Diaz also contend they lack the present ability to purge contempt with respect to the undisclosed computer because "it requires the participation of Andrew for it to be effectuated."[24] They suggest that because Andrew would likely be asked to examine any computer they identified to determine whether even more undisclosed devices exist, they are not fully in control of their ability to purge the contempt. The argument is meritless. The court order requires Nguyen and Diaz only to "identify . . . all computers that now contain or once contained the misappropriated Le [f]irm client database, or any part thereof."[25] Although Andrew's opinion may bear on *whether* they have complied, it is not necessary *in order* for them to comply.

Nguyen and Diaz also contend the court erred in finding they have the ability to purge contempt of the order to identify the computer they used when they falsified the USB thumb drive, which they then misrepresented as the one they used to download the client database. They point out that Diaz testified he used his Dell laptop to transfer the files from the original USB drive (USB1), which he then destroyed, to the USB drive he provided Andrew (USB2), and argue this evidence overcomes any

---

[23] Simpson v. Thorslund, 151 Wn. App. 276, 287, 211 P.3d 469 (2009).

[24] Br. of Appellant at 40.

[25] Clerk's Papers at 362.

presumption that might arise from his intentional spoliation of evidence by destroying the Dell's hard drive. But the court found this testimony inconsistent with Diaz's other statement that he destroyed the Dell's hard drive because it contained no firm data. "[S]ince the forensic evidence and the findings of the [c]ourt in support of its Contempt Order of June 2008 show that a large number of Le files were copied onto USB2, then moved off USB2, and some then returned to USB2," if the Dell had been used to perform these functions, "then the Dell's hard drive must have contained Le files, and Mr. Diaz averred that it did not."[26] Since the evidence indicates that some computer other than Diaz's destroyed Dell was used to falsify the USB drive, the court did not err in concluding that Nguyen and Diaz may purge the contempt simply by identifying that computer.

Sanctions

Where the purpose of a contempt sanction is not to compensate the complainant but to coerce compliance with a court order, the sanction must be set considering the "character and magnitude of the harm threatened by continued contumacy," the "probable effectiveness" of sanctions, and the "defendant's financial resources and the consequent seriousness of the burden."[27]

Nguyen and Diaz contend the court erred by imposing sanctions without considering their financial resources.[28] They argue that "although the evidence of

---

[26] Clerk's Papers at 2525.

[27] United States v. United Mine Workers of America, 330 U.S. 258, 304, 67 S. Ct. 677, 91 L. Ed. 884 (1947).

[28] Nguyen and Diaz also argue the court erred by imposing sanctions in excess of the firm's actual loss. That argument ignores the nature of the sanction. Compensatory penalties must be based upon the complainant's actual loss, but there is

defendants' financial worth is scant in this record, it is patently unreasonable to fine two neophyte attorneys just launching their practice over $1.5 million--climbing at a rate of $2,000 per day--to force compliance with an order in a case that involves total damages in the tens of thousands of dollars."[29]

But the reason "the evidence of defendants' financial worth is scant" is because Nguyen and Diaz have failed to supply it. The court ordered them to pay the accrued sanctions within 10 days or "submit separate sworn declarations as to why they will not or cannot comply."[30] They have never done so, and have thus provided no basis for the trial court or this court to conclude the sanctions exceed their resources.

Nguyen and Diaz also contend the sanctions were inappropriate because they "appear to be having no actual coercive effect."[31] They cite In re Interest of M.B. for the proposition that "should it become clear that the civil sanction will not produce the desired result, the justification for the civil sanction disappears."[32] In that case, however, the issue was whether placing juvenile status offenders in custody for a determinate period was coercive or punitive (and therefore criminal in nature and requiring more due process protections). The court held that, so long as courts supply a means by which to purge contempt by committing an affirmative act, a sanction

---

no such requirement for sanctions imposed to coerce compliance. United Mine Workers, 330 U.S. at 303-04; General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1380 (9th Cir. 1986).

[29] Br. of Appellant at 43.

[30] Clerk's Papers at 2537.

[31] Br. of Appellant at 44.

[32] 101 Wn. App. 425, 440, 3 P.3d 780 (2000).

remains coercive and does not offend due process.[33] M.B. provides no support for the notion that a court may not impose coercive sanctions simply because the contemnor is determined not to comply.

Nguyen and Diaz also argue the sanctions here have "crossed the line into punitive."[34] They contend "[f]ines that so substantially outweigh the harm they are meant to remediate must necessarily cease to be considered remedial" and instead "become about vindicating the authority of the court."[35] They cite no authority for this proposition. And again they mistake the purpose of the sanction, which is not to remediate harm to the firm but to achieve compliance with a lawful court order. Further, the per diem sanctions imposed here are the same as those imposed in the first contempt order. This court has already "conclude[d] that the monetary sanctions were civil remedial sanctions, not punitive sanctions."[36]

Challenges to Findings

Nguyen and Diaz contend the court erred in entering certain findings of contempt. They argue the finding that they are committing ongoing contempt by continuing to possess electronic firm files "appears to collapse into" the finding that they have failed to disclose a computer that contains or has contained the firm's electronic records.[37] That is not so. Andrew testified that he found firm files on the computers and thumb drives Nguyen and Diaz turned over to him, completely apart

[33] Id. at 440, 446-47.

[34] Br. Appellant at 44.

[35] Id.

[36] Le & Assocs., 2010 WL 3311862, at *7.

[37] Br. of Appellant at 46.

from any files on the undisclosed computer. Nguyen and Diaz offer no argument with respect to those files except to complain that Andrew should have deleted the files himself. This is unpersuasive, especially since Nguyen and Diaz refused to pay Andrew for any of his work.

Nguyen and Diaz also challenge the finding that they are committing ongoing contempt by retaining paper copies of firm files. They argue this finding "makes no sense" because it pertains to files of clients who left the firm and voluntarily chose to have Diaz and Nguyen as their attorneys.[38] They cite the permanent injunction as evidence that "its provisions do not apply to former Le & Associates clients who became bona fide Diaz & Nguyen clients."[39] This is a misrepresentation.

The permanent injunction enjoined Nguyen and Diaz from further possession of the electronic client database, or any part thereof, or any copies of any sort of the information from that database except for "information solely relating to clients who have *expressly consented in writing* to [d]efendants' possession of such information."[40]

Nguyen and Diaz have not produced releases allowing them to retain these documents. Their argument is thus unavailing.

Finally, Nguyen and Diaz contend they should not be held in contempt for failing to reimburse the firm for Andrew's fees because they repeatedly offered to pay this obligation out of the so-called Powers funds, which apparently represented fees from a case in which Diaz and Nguyen obtained the judgment. This offer does not purge their

[38] Br. of Appellant at 46.

[39] Br. of Appellant at 47.

[40] Clerk's Papers at 2794 (emphasis added).

contempt, however, because their right to the money was contested by the firm and the funds were held in the court registry. The court required Diaz and Nguyen to assign to the firm "any right they may have to attorney's fees on deposit in the matter of Powers v. Rabanco . . . to ensure [d]efendants' compliance with the financial obligations of the [c]ourt's [i]njunction and the remedial and compensatory sanctions arising out of their contempt."[41]

Although the court ultimately ordered that the fund be used to reimburse the Les for fees paid to Andrew, the court also ordered, "[T]o the extent that the funds held in the registry of the court in Powers v. Rabanco are insufficient to pay all of the fees and costs awarded herein, [p]laintiff shall have judgment against the defendants for all sums ordered to be paid in excess of the sums in the court registry."[42] Thus, the funds held in the registry were subject to competing claims, and the financial sanctions far exceeded the total amount in the registry.[43] Nguyen and Diaz's offer to pay Andrew from the registry was thus illusory.

Further, Nguyen and Diaz asked the court to pay Andrew from the Powers fees because they claimed they had no other resources. But they provided no evidence of financial inability to the trial court and made no attempt to pay even a portion of Andrew's fee. As the trial court pointed out, they resisted the fee on two other grounds

[41] Clerk's Papers at 528.

[42] Clerk's Papers at 2630. We were advised at oral argument that no judgment has yet been entered.

[43] We are not advised of the amount held in the court registry, but the underlying judgment was $460,000. Nguyen and Diaz owe more than $1 million in remedial sanctions alone.

before claiming inability to pay.[44] The court properly found that Nguyen and Diaz's failure to make any attempt to comply with the court's order regarding payment of Andrew's fees constitutes contempt.

For the reasons expressed above, we affirm. We grant the firm's request for attorney fees and costs on appeal.[45]

WE CONCUR:

[44] "In their first response to the Motion for Contempt, [d]efendants asserted that they had not paid the costs of Mr. Andrew's forensic examination of their computers because they claimed that Mr. Andrew had forfeited any right to payment. In their second response to the motion, they claimed that they had not received all of Mr. Andrew's invoices. At the hearing of this matter, [d]efendants claimed that they were financially unable to pay the bills." Clerk's Papers at 2534.

[45] RCW 7.21.030(3); RAP 18.1; In re Marriage of Curtis, 106 Wn. App. 191, 202, 23 P.3d 13 (2001).