

***Levine et al. v. Berschneider*, 2020 Cal.App. LEXIS 1022**

An attorney's duty of candor to the court includes an affirmative duty to apprise the court of material developments of fact or law in a case and not make misleading or false statements.

FACTS/PROCEDURE

Appellant John B. Richards, an attorney, successfully negotiated a settlement for tenants against their landlord, respondent Janet Berschneider. Roughly a month after the settlement was approved, appellant Richards filed an ex parte application to expedite the settlement agreement and served notice to respondent's counsel, Harry Safarian. The trial court set the matter for hearing on June 7, 2019. On June 3, 2019, respondent tendered the full settlement amount to appellant. Instead of informing the court of this, appellant appeared at the June 7th hearing and told the court he had not been contacted by opposing counsel. Based on appellant's statements, the trial court granted appellant's motion and found Safarian in contempt for willfully failing to comply with the settlement agreement.

Three days after the hearing, Safarian filed an ex parte application for relief from the court's order. The court held a second hearing during which Appellant contended that his statements to the court were not false because the trial court never asked him whether he received the settlement checks. Appellant also made two jurisdictional arguments. First, appellant stated he was making a special appearance and argued that the trial court lacked personal jurisdiction over him because he was not properly served with the ex parte application. Second, appellant argued the court lacked subject matter jurisdiction because there was no statutory basis for an award of sanctions. The trial court rejected appellant's arguments and entered an order vacating the sanctions against Safarian. The court then issued an order to show cause against appellant based on his lack of candor to the court. At the third and final hearing, appellant again argued that he made no false statements to the court. The trial court was still unpersuaded by appellant's arguments and found him in contempt for violating his duty of candor and ordered him to pay sanctions of \$5,310. The court also rejected both of appellant's jurisdictional arguments.

HOLDING/DISCUSSION

The Court of Appeal for the Second District affirmed. In response to appellant's subject matter jurisdiction argument, the court held its statutory basis for an award of sanctions came under Code of Civil Procedure section 128.5. Section 128.5 permits a court to order sanctions if an attorney acts in bad faith by making frivolous claims or needlessly causing delay. Although appellant did not affirmatively lie to the trial court, appellant failed to disclose that the trial court's initial order against Safarian was moot because respondent had already tendered the full settlement amount. The court held this omission constituted a misrepresentation of a material fact, which, like false statements, justifies sanctions under section 128.5. The court quickly rejected appellant's personal jurisdiction argument as well, finding that appellant waived this objection by appearing in court and arguing on the merits of the case. Finally, the court rejected appellant's argument that his intentional omission did not violate his duty of candor to the court. A trial court does not have a "duty to inquire whether any material fact had changed" prior to a scheduled hearing. Instead, attorneys, as officers of the court, have "an affirmative duty to inform the court when a material statement of fact or law has become false or misleading in light of subsequent events." Here, appellant intentionally omitted the fact that he had already received the full settlement amount. This type of material omission is equally as unscrupulous as an outright false statement because both types of statements would be made to gain an unfair advantage in a case. As such, the court held that under the duty of candor, "no distinction can therefore be drawn among concealment, half-truth, and false statement of fact."