

Turn Back the Clock

Primo Hospitality Group, Inc., et al. v. Haney et al.

By Audrey Priolo, Litigation Procedure Attorney

Californians will turn back their clocks on November 3, 2019 for daylight savings, however, turning back the clock in litigation is more onerous. *Primo Hospitality Group, Inc., et al. v. Haney et al.*, opined on the timing on service of a CCP 128.7 Motion for Sanctions when a new attorney substitutes into a case during the 21-day safe harbor period. Defendant John Torbett (“Torbett”) served Plaintiff Primo Hospitality Group, Inc.’s (“Primo”) original counsel, Richard Weiner, with a motion for sanctions on the ground that Primo’s entire action lacked merit.

Weiner withdrew as counsel before the 21-day safe harbor expired. Primo hired a second attorney, Marc Libarle, who appeared at a hearing representing his intent to substitute into the case. Torbett served Libarle with a letter and motion for sanctions under 128.7 prior Libarle’s filing of a substitution of counsel form. Torbett sought sanctions against Libarle personally, claiming any reasonable attorney would not have brought or maintained the lawsuit because it undoubtedly lacked any merit.

Libarle opposed the 128.7 motion, including the argument that Torbett failed to give proper notice. The trial court granted the motion for sanctions against Libarle stating “no reasonable attorney would have brought or maintained this lawsuit believing it to be meritorious.” Libarle appealed. The Court of Appeals stated, “[w]hile section 128.7 does allow for reimbursement of expenses, including attorney fees, its primary purpose is to deter filing abuses, not to compensate those affected by them. It requires the court to limit sanctions ‘to what is sufficient to deter repetition of [the sanctionable] conduct or comparable conduct by others similarly situated.’”

The Court of Appeals held that Torbett failed to properly serve notice on Libarle after the substitution of attorney was filed. Although, Libarle indicated his intention to represent Primo, Libarle could not be held personally responsible for sanctions under 128.7 until he was given a full 21-day safe harbor period to remedy his actions. Libarle was awarded his costs on appeal. This case is a cautionary tale of a party acting too early. Torbett could have been awarded sanctions under 128.7. However, the early service resulted in sanctions being awarded against Torbett on appeal.

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