

Commonwealth Of Kentucky

Court Of Appeals

No. 97-CA-1512-MR

MORRIS MOORE

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JAMES A. KNIGHT, JUDGE
ACTION NO. 96-CI-141

AARON LEE GAUZE
and DARRIEL YOUNG

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, DYCHE and KNOX, Judges.

ABRAMSON, JUDGE: The single issue advanced in this appeal is whether the trial judge abused his discretion in imposing the sanction of dismissal for failure to obey an order compelling a response to specific interrogatories and requests for production of documents. In support of his contention that the judgment dismissing his case must be reversed, Appellant Morris Moore ("Moore") argues that a dismissal for discovery violations must

be predicated upon a finding of bad faith or willfulness, neither of which is present in this case. Having reviewed the record and applicable law, we affirm.

On June 13, 1996, Moore filed a pro se complaint seeking the recovery of damages allegedly incurred when Martin County Sheriff Darriel Young ("Young") and Deputy Sheriff Aaron Lee Gauze ("Gauze") used excessive force in arresting him. He alleged in that complaint that he was seeking damages for past and future medical expenses, past and future lost wages, past and future pain and suffering, past and future mental anguish, and permanent physical impairment. In an effort to evaluate Moore's claims and the extent of his injuries and damages, counsel for Young and Gauze served Moore with interrogatories and requests for production of documents on August 13, 1996. Although Moore attempted to respond to some of the interrogatories, a review of the record demonstrates that his answers were substantially incomplete, providing little information required for an evaluation of his claims. The record also discloses that by letter dated October 25, 1996, counsel for Young and Gauze confirmed a telephone conversation in which Moore was given an additional thirty days to supply the missing information without a motion to compel being filed.

On November 15, 1996, Moore informed counsel that he would need an additional 60 to 90 days to produce his medical records. Despite the fact that no information other than Moore's income tax returns for the years 1991 through 1995 was provided

within the thirty days, counsel for Young and Gauze did not seek a motion compelling compliance with the discovery requests until February 13, 1997, more than six months after the original discovery requests had been served. By order dated March 27, 1997, the trial judge directed Moore to respond in detail within thirty days to interrogatories numbered 4, 5, 6, 7, and 8 and to requests for production of documents numbered 2, 3, 4, and 5, as well as requiring him to execute the medical release authorization and social security authorization request no later than March 30, 1997. Moore did execute the requested authorizations, but he failed to comply with the remainder of the trial court's order.

Thereafter, on April 16, 1997, counsel for Young and Gauze moved to dismiss Moore's complaint under the authority of CR 37.02(2) for failure to comply with the order of March 27, 1997. After a hearing on May 23, 1997, the trial judge dismissed Moore's complaint on May 30, 1997, precipitating this appeal. Moore now argues in this forum that because of his limited legal knowledge any failure to comply with the discovery requests or the trial court's order should be deemed to be merely negligent and not willful. We disagree.

The record provides ample support for the sanction imposed by the trial judge. Clearly evident from documents of record is the fact that counsel for Young and Gauze afforded Moore considerable latitude due to the fact that he was not represented by an attorney. Moore clearly had the right to elect

to proceed pro se; however, having done so, it was nevertheless incumbent upon him to adhere to the ordinary course of litigation, including providing counsel with basic information essential to an evaluation of the merits of his claim. This is especially true in light of the fact that the requested information was peculiarly within Moore's knowledge and control. For example, some of the information Moore refused to provide concerned his employment history, his previous medical records, and bills related to the medical treatment allegedly incurred in connection with this claim. As noted by the Court in Greathouse v. American National Bank and Trust Company, Ky. App., 796 S.W.2d 868, 870 (1990), dismissal is not an abuse of discretion if a party has the ability to comply with a discovery order and does not. We are convinced that Moore had the ability to provide the requested information and simply did not do so, even after counsel voluntarily extended the time for providing it and after being specifically directed by the trial judge to do so. In our opinion, the failure to comply with the discovery order under these circumstances constitutes bad faith as contemplated by the holding in Nowicke v. Central Bank & Trust Company, Ky. App., 551 S.W.2d 809, 810 (1977):

The United States Supreme Court has on several occasions interpreted Fed.R.Civ. P. 37 on which our own Kentucky CR 37.02 is based. While indicating that the imposition of the severest sanctions available under Rule 37 must be "...tempered by the careful exercise of judicial discretion to assure that its imposition is merited...", it has also stated "effective discovery is

exceedingly vital..." and the severest sanctions should be imposed where the evidence indicates a willful failure to comply with the discovery procedure. In Re Professional Hockey Antitrust Litigation, D.C. 63 F.R.D. 641.

(Emphasis added.)

We are persuaded that the dismissal of Moore's complaint was not an exercise of unbridled discretion as condemned in Nowicke; it was a valid exercise of the trial judge's authority to control the course of litigation by invoking a sanction provided in CR 37.02. Because the record fully supports the conclusion that Moore simply chose not to comply with discovery and a valid court order, there is no basis for holding that imposition of the sanction of dismissal constituted an abuse of discretion.

Accordingly, the judgment of the Martin Circuit Court is affirmed.

ALL CONCUR.

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