

**MICHAEL OKAFOR AND  
BLANCA MUNGUIA**

**VERSUS**

**SHANE RIDER AND STATE  
FARM**

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**NO. 2004-CA-1203**

**COURT OF APPEAL**

**FOURTH CIRCUIT**

**STATE OF LOUISIANA**

**NOT DESIGNATED FOR PUBLICATION**

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2002-10725, DIVISION "C-6"  
Honorable Christopher J. Bruno, Judge Pro Tempore

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**Judge Terri F. Love**

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(Court composed of Judge Dennis R. Bagneris Sr., Judge Michael E. Kirby,  
Judge Terri F. Love)

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**AFFIRMED**

This appeal arises out of the dismissal of a personal injury action for plaintiffs' failure to comply with discovery orders. For the reasons assigned, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

On July 9, 2002, plaintiffs, Michael Okafor and Blanca Munguia (hereinafter, appellants), filed a personal injury lawsuit against Shane Rider and Progressive Insurance Company (hereinafter, appellees) arising out of an automobile accident. On October 21, 2002, appellees propounded Interrogatories and Requests for Production of Documents to appellants. Appellants failed to respond, and appellees filed a Motion to Compel. The motion was heard on February 21, 2003. Appellants' counsel failed to attend, despite being served with a notice of the hearing. On February 28, 2003, a Judgment was signed ordering appellants to provide answers to written discovery within fifteen days and to pay \$250.00 in attorney's fees and costs. Appellants were served with the Judgment.

On June 10, 2003, appellees moved for dismissal of appellants'

lawsuit as the answers to the discovery requests were not provided. After hearing argument of both counsel, the trial court denied the Motion to Dismiss and instead ordered in open court that appellants provide verified answers within ninety days of August 29, 2003, or their case would be dismissed. Appellants were further ordered to pay \$500.00 in attorney's fees and costs. A written Judgment of the trial court's order was signed on September 9, 2003. Notice of the Signing of the Judgment was mailed on September 10, 2003.

On October 10, 2003, appellants appealed the trial court's award of attorney's fees and costs. On January 16, 2004, this court dismissed the appeal.

Appellees filed a second Motion to Dismiss, which was heard by the trial court on January 23, 2004. Counsel for appellants did not attend due to a conflict with a court appearance in another court. The trial court rendered Judgment on February 2, 2004, dismissing the case with prejudice. The Notice of Signing of Judgment was mailed on February 10, 2004.

In response to the February 2, 2004 Judgment, appellants filed a Motion for Reconsideration, Motion to Vacate Judgment, or in the alternative, Motion for New Trial. In connection with the motion, appellant, Bianca Munguia, filed an affidavit verifying her answers to interrogatories.

Appellees maintain, however, that regardless of the affidavit, the actual discovery responses were never submitted.

The matter was heard on May 7, 2004. Judgment was rendered in open court, denying appellants' Motion for Reconsideration, Motion to Vacate Judgment, and/or Motion for New Trial. The Judgment was signed on May 13, 2004. This appeal followed.

LEGAL ANALYSIS:

Appellants argue that the trial court's dismissal of their lawsuit was an abuse of discretion. More particularly, appellants maintain that the sanction was excessive under the circumstances, citing Horton v McCray, 93-2315 (La. 4/11/94), 635 So. 2d 199. In Horton, the Louisiana Supreme Court adopted from the federal courts four factors to consider before taking the drastic action of dismissal. These factors are: 1) whether the violation was willful or resulted from inability to comply; 2) whether less drastic sanctions would be effective; 3) whether the violations prejudiced the opposing party's trial preparation; and 4) whether the client participated in the violation or simply misunderstood a court order or innocently hired a derelict attorney.

In the present case, appellants submit that the sanction of dismissal is unconstitutionally unfair and too harsh when considering that appellants' counsel had difficulty in locating his clients. It is maintained that appellant,

Michael Okafor, was removed from the United States by immigration officials after the institution of the lawsuit, and appellant, Bianca Munguia, resides in Texas, does not speak any English and moved to an unknown address in 2003. (Ms. Munguia was finally located in January of 2004).

As pointed out by appellees, the Motion to Dismiss was not done ex parte. Appellants' counsel received notice of the hearing, but did not attend. Appellees further submit that the trial court considered appellants' counsel's stated difficulties regarding his clients' absence when rendering its decision. Finally, appellees assert that appellants themselves must be considered at fault in failing to comply with discovery, as each neglected to contact their attorney or the trial court for more than two years.

It is well settled that a trial court has much discretion in selecting appropriate sanctions for failure to comply with discovery orders, and its decision will not be disturbed absent an abuse of that discretion. Smith v. State, Department of Transportation & Development, 03-1450 (La. App. 4 Cir. 4/28/04), 872 So. 2d 594, 602; Payne v. Green, 2000-1655 (La. App. 4 Cir. 8/30/00), 769 So.2d 650, 651. La. C.C.P. art. 1471, which provides the sanctions available against a party failing to comply with discovery orders, allows the trial court to sanction a disobedient party with dismissal or a default judgment.

Both dismissal and default are draconian penalties, which should be applied only in extreme circumstances. Allen v. Smith, 390 So.2d 1300 (La. 1980). Dismissal and default are generally reserved for those cases in which the client, as well as the attorney, is at fault. The record must support "a finding that the failure was due to ... willfulness, bad faith, or fault." Id., at 1302.

In the recent case of Hutchinson v. Westport Insurance Corp., 04-1592 (La. 11/8/04), 886 So. 2d 438, the Louisiana Supreme Court upheld the trial court's dismissal of an action due to the plaintiff's failure to answer discovery. The court recognized that dismissal is a sanction of last resort only to be imposed where the litigant has been afforded an opportunity to be heard. The court further stated that although dismissal is harsh, that action might be the proper remedy where the plaintiff's willful disobedience and fault are evident. In considering whether dismissal was the proper remedy, the court considered whether the plaintiff's tactics and delays acted to frustrate the judicial system. Specifically, the court stated: "Litigants cannot refuse to make a good faith effort to respond to discovery; if they do they run the risk of incurring sanctions, up to and including dismissal and default." Id. at 441.

In the present case, more than two years passed without appellants'

compliance of discovery requests. Furthermore, the record before us does not reflect that the answers have ever been submitted. The record does show, however, that appellants disregarded two discovery orders of the trial court and appellants' counsel failed to attend two scheduled court hearings. Appellants' counsel urges this court to excuse the lack of compliance because his clients were difficult to locate. Considering that the delays in this proceeding were due mainly to appellants' unwillingness to participate in their own legal action, we find no merit to this argument. Moreover, considering the standards set forth in Horton, and the pronouncements of Hutchinson, we find no abuse of discretion on the part of the trial court in imposing the sanction of dismissal.

CONCLUSION:

For the foregoing reasons, the Judgment of the trial court is affirmed.

**AFFIRMED**