

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY E. SNOW,

Plaintiff-Appellant,

v

C. THOMAS TOPPIN and C. THOMAS TOPPIN
& ASSOCIATES, P.C.,

Defendants-Appellees.

UNPUBLISHED

February 1, 2000

No. 210743

Oakland Circuit Court

LC No. 97-540746 CK

Before: Zahra, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's dismissal of his complaint for violating a discovery order. We affirm.

I. STATEMENT OF FACTS

Plaintiff, a former employee of defendants, alleged in this action that defendants improperly refused to pay a commission plaintiff earned. Ultimately, the trial court dismissed the action because plaintiff breached a stipulated order to comply with defendants' discovery request. Plaintiff maintains that the trial court's dismissal of his action was an abuse of discretion because his failure to provide discovery was not deliberate, but rather an inadvertent error. Plaintiff also maintains that the trial court should not have heard defendants' motion to dismiss on the ground that the motion was improperly served. We disagree with both arguments and affirm.

II. ANALYSIS

A

Plaintiff claims that the trial court abused its discretion by dismissing the action as a sanction for violating a discovery order. We disagree.

We review a trial court's discovery orders for abuse of discretion. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). We find an abuse of discretion where "an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the trial court's ruling." *In re Condemnation of Private Property for Hwy Purposes (Dep't of Transportation v Randolph)*, 228 Mich App 91, 94; 576 NW2d 719 (1998).

The court rules authorize a trial court to enter an order dismissing a proceeding by default against a party who fails to obey an order to provide discovery. *Thorne v Bell*, 206 Mich App 625, 632; 522 NW2d 711 (1994). However, such a severe sanction is generally appropriate only where there has been a flagrant and wanton refusal to facilitate discovery, and not where the failure to comply was accidental or involuntary. *Traxler, supra* 286. Before imposing such a sanction, the trial court should consider

whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to defendant, and whether wilfulness has been shown. [*Thorne, supra* at 632-633.]

The trial court should also evaluate other options before concluding that a drastic sanction is warranted, and the failure to properly evaluate the matter on the record constitutes error. *Id.* at 635.

Although dismissal is a severe sanction, we cannot say it constituted an abuse of discretion here. Plaintiff did not show any reasonable effort to comply with defendants' interrogatories and request for production of documents. When plaintiff's non-action prompted defendants to move to compel discovery, plaintiff personally stipulated to an order requiring him to comply by November 1—an order he later violated. Plaintiff's explanation for his failure to comply with the November 1 stipulated order—that he lost his calendar, forgot to inform his new counsel of the stipulated order, and forgot about the November 1 deadline—does not establish excusable neglect. Moreover, plaintiff willfully failed to appear at the hearing on defendants' motion for dismissal. Plaintiff, an attorney representing himself, fully understood the importance of discovery orders and his obligation to apprise his new counsel of the outstanding order. At best, plaintiff's dilatoriness constitutes *inexcusable* neglect. Consequently, the trial court did not abuse its discretion in dismissing plaintiff's action.

B

Plaintiff claims that the trial court should not have ruled on defendants' motion to dismiss because the motion was not timely or properly served upon plaintiff's counsel. We disagree.

MCR 2.119(C)(1) provides that a motion must be served at least nine days prior to the date set for the hearing on the motion if served by mail, and at least seven days prior to the date set for the hearing on the motion if served by "delivery" as defined in MCR 2.107(C)(1). Generally, defective service of process will not warrant dismissal of the pleading unless the service failed to notify the opposing party of the action within the time prescribed for service. See *In re Gordon Estate*, 222

Mich App 148, 157; 564 NW2d 497 (1997). Further, construction of the court rules should avoid the consequences of error that does not affect the substantial rights of the parties. MCR 1.105.

Here, defendants served the motion by mail only seven days prior to the hearing date. However, plaintiff's counsel acknowledged that he received, via facsimile, a copy of the motion and notice of hearing seven days prior to the date set for the hearing. While this service is not "delivery" as defined by MCR 2.107(C), we conclude that plaintiff was sufficiently notified of the motion and hearing within the time prescribed for "delivery" under the court rules, and we fail to see how a substantial right of plaintiff has been adversely affected by defendants' manner of service. Consequently, the trial court did not err in ruling on the motion.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Hilda R. Gage