STATE OF MICHIGAN

COURT OF APPEALS

KALKASKA ENVIRONMENTAL SERVICES, INC., Plaintiff-Counterdefendant-Appellee,	UNPUBLISHED November 28, 2000
v	No. 215763 Luce Circuit Court
THE BARRETT COMPANY, INC., Defendant-Counterplaintiff-Appellant.	LC No. 95-002314-CZ

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant The Barrett Company, Inc. appeals by right from an order dismissing its countercomplaint against plaintiff Kalkaska Environmental Services, Inc. We affirm.

This case arises from an environment clean-up contract between plaintiff and defendant. Because the clean-up project was performed under the Michigan Underground Storage Tank Fund Act (MUSTFA), the State of Michigan was to pay $100,953.88 to plaintiff for the goods and services that it provided to defendant. Plaintiff provided defendant with detailed billings, and defendant submitted the billings to the State of Michigan. The State of Michigan issued the warrant for $100,953.88 to the order of plaintiff and defendant; however, the warrant was sent directly to defendant. Defendant apparently presented the state warrant to a bank without plaintiff's endorsement and deposited the proceeds. As a result, plaintiff filed a lawsuit against defendant, arguing that plaintiff was entitled to the entire amount of the state warrant, and that defendant willfully converted the $100,953.88 warrant to defendant's own use.

Defendant filed a two-count countercomplaint, alleging breach of contract and fraud. In relevant part, defendant's first count alleged that plaintiff breached the contract by failing to clean defendant's property, and that plaintiff's unsuccessful cleaning attempt caused further contamination. Also, in relevant part, defendant's second count alleged that plaintiff defrauded defendant by misrepresenting plaintiff's ability and qualifications to perform the contract.

Plaintiff mailed a request for admissions to defendant regarding plaintiff's complaint, as well as interrogatories regarding defendant's countercomplaint. Defendant did not respond to the request for admissions until seven days past the twenty-eight-day due date. MCR 2.312(B)(1). On March 28, 1996, plaintiff moved for partial summary disposition based upon defendant's failure to timely answer the request for admissions. On June 14, 1996, plaintiff moved to compel defendant to answer plaintiff's interrogatories and to impose sanctions, and plaintiff noticed defendant that plaintiff's motions would be heard on July 9, 1996.

Defendant's attorney failed to appear at the July 9, 1996 hearing, and the trial court granted plaintiff's motion for partial summary disposition based upon the admissions that the trial court deemed admitted. The trial court also ordered defendant to specifically answer plaintiff's interrogatories regarding the counterclaim and to pay $1,500 in attorney fees. The trial court noted that if defendant failed to comply with the order to compel discovery and to pay the $1,500, the trial court would enter a default judgment against defendant's countercomplaint.

Defendant filed objections to the trial court's orders. Defendant's attorney argued that plaintiff's attorney led him to believe that the July 9, 1996 hearing on plaintiff's motion to compel discovery and impose sanctions was canceled because plaintiff's attorney had received defendant's answers to plaintiff's interrogatories that defendant mailed to plaintiff on June 17, 1996. Also, defendant's attorney argued that the trial court never heard plaintiff's motion for partial summary disposition, in contravention of the seven-day rule regarding entry of orders under MCR 2.602.

At a hearing on August 6, 1996, the trial court determined that defendant did receive notice of the July 9, 1996 hearing regarding both of plaintiff's motions; therefore, the trial court determined that it would enter orders granting plaintiff's motions effectuating its July 9, 1996 oral ruling. Accordingly, the trial court entered two orders on August 6, 1996: (1) an order granting plaintiff's motion for summary disposition and requiring defendant to pay plaintiff $100,953.88, plus interest and costs to be taxed, and (2) an order granting plaintiff's motion to compel defendant to provide complete answers to all of plaintiff's interrogatories within fourteen days of the order and to pay attorney fees in the amount of $1,500 within fourteen days of the order. Also, the order compelling discovery contained a clause that warned defendant that failure to comply with the order would result in the trial court entering a default judgment against defendant's counterclaim.

Defendant's first issue on appeal is that the trial court improperly granted partial summary disposition based upon the admissions that the trial court deemed admitted. We disagree. We review de novo the trial court's grant or denial of summary disposition to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We review a trial court's decision to deem admitted untimely answers to a request for admissions for an abuse of discretion. *Medbury v Walsh*, 190 Mich App 554, 556-557; 476 NW2d 470 (1991). As previously noted, "the admissions resulting from a failure to answer a request for admissions may form the basis for summary disposition." *Id.*, 556-557.

There is no merit to defendant's argument that a trial court must sua sponte allow a party to file untimely answers to a request for admissions where prejudice has not been demonstrated. Under MCR 2.312(B)(1), a party has twenty-eight days after service of a request for admissions to provide written answers or objections to the party requesting the admissions. If the party to whom the request is directed fails to timely answer the request for admissions, "[e]ach matter as to which a request is made is deemed admitted." MCR 2.312(B)(1). "A matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission. MCR 2.312(D)(1). For good cause the court may allow a party to amend or withdraw an admission. The court may condition amendment or withdrawal of the admission on terms that are just." However, in order for the trial court to grant a deviation from MCR 2.312(B)(1), a party must file a request with the court either before service or within a reasonable time thereafter. MCR 2.312(F). Defendant did not do so.

Defendant's reliance upon *Janczyk v Davis*, 125 Mich App 683, 692-693; 337 NW2d 272 (1983), emphasizes defendant's misunderstanding of MCR 2.312, as well as the *Janczyk* decision itself. As noted, under MCR 2.312(F), a party to whom the request for admissions is directed must first file a request with the trial court either before service or within a reasonable time thereafter before the trial court will deviate from MCR 2.312(B)(1). Further, the *Janczyk* decision only applies where the trial court has denied a party's request to file late answers to a request for admissions. *Janczyk*, *supra*, 692. Defendant in the present case failed to request additional time in which to respond to plaintiff's request for admissions; therefore, the *Janczyk* decision does not apply, and there is no need to discuss the three-pronged test for determining whether to allow defendant to file late answers.

Defendant also contends that the trial court abused its discretion when granting sanctions for defendant's failure to specifically answer plaintiff's interrogatories to defendant's counterclaim and when defaulting defendant's counterclaim. We disagree. We review a trial court's decision to grant a default judgment for discovery abuses for an abuse of discretion. *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994); *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396; 484 NW2d 718 (1992).

We first note that defendant has failed to provide any supporting authority for this issue. We have stated that this Court "will not search for authority to sustain or reject a party's position." *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 14; 527 NW2d 13 (1994); see also *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997) (explaining that "[a] party may not merely announce a position and leave it to us to discover and rationalize the basis for the claim. *Id*.). Therefore, defendant has abandoned this issue by failing to support its claim. *Isagholian*, *supra*, 14; see also *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

In any case, there is no merit to defendant's contention. Under MCR 2.309(C) and MCR 2.313(A)(2)(c), a party submitting interrogatories may move for an order compelling the opposing party to answer the interrogatories. If the motion is granted, the trial court is required to order sanctions against the party whose conduct necessitated the motion unless their opposition was justified. MCR 2.313(A)(5)(a). In the present case, the trial court ordered defendant to pay plaintiff $1,500 in attorney fees for having to compel defendant to answer

plaintiff's interrogatories regarding defendant's counterclaim. Significantly, the trial court noted on the record that $1,500 represented an appropriate sanction in light of the amount of work that plaintiff's attorney performed in obtaining the order to compel discovery. The trial court also suggested that it was aware of defendant's lack of progress in moving forward with its counterclaim.

The trial court's order also provided that a default judgment would be entered against defendant's counterclaim if defendant failed to pay the $1,500 and to answer plaintiff's interrogatories. MCR 2.313(B)(2)(c). Although a trial court is explicitly authorized by the court rule to enter an order of default against a party who fails to obey an order to provide discovery, *Thorne, supra*, 633, the trial court here never did so. The August 6, 1996 order granting plaintiff's motion to compel discovery and to impose sanctions merely provided that the trial court would enter a default judgment against defendant's counterclaim if defendant failed to pay the $1,500 and to answer plaintiff's interrogatories.

Defendant's third issue on appeal is that the trial court abused its discretion when dismissing its counterclaim for lack of progress and denying its motion for reconsideration. We disagree. We review a trial court's decision to dismiss a claim for lack of progress for an abuse of discretion. *Bolster v Monroe Co Bd of Rd Comm'rs*, 192 Mich App 394, 399-400; 482 NW2d 184 (1991). Further, we will not reverse a trial court's decision to deny a motion for reconsideration absent a showing that the trial court abused its discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997) (citing MCR 2.119(F)(3)); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989).

Under MCR 2.502, a trial court may dismiss a claim for lack of progress. Specifically, MCR 2.502(A)(1) provides that

> [t]he court may notify the parties in those actions in which no steps or proceedings appear to have been taken within 91 days that the action *will be* dismissed for lack of progress unless the parties show that progress is in fact being made or that the failure to prosecute is not due to the fault or lack or reasonable diligence of the party seeking affirmative relief (emphasis added).

In the present case, defendant has failed to demonstrate that it made progress with its counterclaim. In fact, defendant's brief appears to blame the trial court for any lack of progress with its counterclaim. Specifically, defendant argues that when it contacted the trial court on February 3, 1998 to inquire how the trial court wanted to proceed with the counterclaim, the trial court responded by dismissing defendant's counterclaim on February 6, 1998.

Notably, approximately one year and seven months passed from the time of the trial court's order compelling defendant to answer plaintiff's interrogatories regarding the counterclaim and imposing a $1,500 sanction for attorney fees, which is the last activity that involved defendant's counterclaim, and the telephone call that defendant made to the trial court inquiring about the status of its counterclaim. Even if we accept defendant's argument that its unsuccessful attempt to appeal to this Court constituted progress regarding its counterclaim, over six months of inactivity passed between the order of this Court denying defendant's delayed

application for leave to appeal and defendant's telephone call to the trial court inquiring about the status of its counterclaim. Because defendant failed to demonstrate that it took steps to make progress with its counterclaim within the past ninety-one days, the trial court properly exercised its discretion to dismiss the counterclaim. MCR 2.502.

Defendant also argues that the trial court abused its discretion under MCR 2.313(B)(2)(c), when dismissing its counterclaim for failing to comply with the order compelling discovery and imposing sanctions. Under MCR 2.313(B)(2)(c), a trial court may dismiss an action as a sanction for a party's failure to comply with a discovery order. Therefore, not only did the trial court have discretion to dismiss defendant's counterclaim for lack of progress, MCR 2.502, but the trial court also had the discretion to dismiss defendant's counterclaim as a discovery sanction. MCR 2.313(B)(2)(c). Defendant has not demonstrated that the trial court abused its discretion when applying either court rule.

We note that defendant's reliance upon *Thorne v Bell*, *supra*, does not advance its argument that the trial court abused its discretion by dismissing defendant's counterclaim as a discovery sanction under MCR 2.313(B)(2)(c). Defendant's failure to comply with the trial court's order compelling discovery and imposing sanctions demonstrates "a flagrant and wanton refusal to facilitate discovery." *Thorne*, *supra*, 633. Further, the record discloses a "history of recalcitrance or deliberate noncompliance with discovery orders." *Id*., 633-634. Defendant failed to attend the scheduled hearing regarding plaintiff's motion for partial summary disposition and motion to compel, and defendant failed to pay the sanctions ordered by the trial court. We find no abuse of discretion.

Finally, defendant argues that the trial court lacked jurisdiction to enter a default judgment. We disagree. Interpretation of court rules is a question of law subject to de novo review on appeal. *St George Greek Orthodox Church of Southgate v Laupmanis Associates, PC*, 204 Mich App 278, 282; 514 NW2d 516 (1994).

The crux of defendant's argument is that the trial court lacked jurisdiction to enter judgment on August 26, 1996 based upon the trial court's August 6, 1996 order granting partial summary disposition to plaintiff. Specifically, defendant argues that because defendant appealed the trial court's August 6, 1996 order to a previous panel of this Court within twenty-one days (i.e., the appeal was filed on August 21, 1996), jurisdiction vested in this Court when defendant filed its appeal on August 21, 1996, and the trial court lacked jurisdiction to enter a judgment on August 26, 1996. Defendant is incorrect. As this Court explained in its order dismissing defendant's claim of appeal, the order appealed was not a final order because it did not dispose of all the claims of all the parties as required by MCR 2.604 and MCR 7.202(8). Therefore this Court never took jurisdiction and the trial court did not err.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra