STATE OF MICHIGAN

COURT OF APPEALS

DAVID WILLIAMS, Plaintiff-Appellant,	UNPUBLISHED February 10, 2004
v	No. 225693 Wayne Circuit Court
ARBOR HOME, INC., Defendant-Appellee.	LC No. 99-913425-NO ON REMAND

Before: Whitbeck, C.J, and O'Connell and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing his case as a result of discovery violations.[1] We affirm.

On May 10, 1996, plaintiff suffered a fall while a resident in a supervised residential care facility owned by defendant. The fall allegedly resulted from a defective elevator. Plaintiff filed a complaint on April 30, 1999, alleging that defendant wrongfully evicted him and violated various statutory and common law duties with regard to the condition of the elevator.

In September 1999, defendant filed a motion to compel discovery, alleging that plaintiff had failed to answer interrogatories served in June 1999. Plaintiff stipulated to the entry of an order requiring plaintiff to answer the interrogatories within twenty-eight days from September 10, 1999.

[1] In an earlier opinion, this Court dismissed plaintiff's appeal for lack of jurisdiction. See *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002). Plaintiff then appealed to the Supreme Court, which remanded the case to this Court, concluding that plaintiff was indeed entitled to an appeal as of right with regard to his case against Arbor Home. See *Williams v Arbor Home, Inc*, 469 Mich 893; 669 NW2d 814 (2003). The Supreme Court's order granted no appeal with respect to an earlier named defendant, Michigan Elevator Company. Accordingly, this opinion deals only with plaintiff's claims against Arbor Home.

Plaintiff failed to answer the interrogatories and failed to appear for a deposition on October 7, 1999. Therefore, on November 3, 1999, defendant filed a motion to dismiss under MCR 2.313 for failure to provide discovery. The motion hearing occurred on November 12, 1999. At the hearing, plaintiff's counsel explained that he was trying to locate plaintiff and was using an investigator in doing so. The court stated, "I [am] going to give you 30 days to find this person. I'll dismiss without prejudice. If you find him, you could always re-file it." Plaintiff's counsel responded, "That's fair."

After the hearing, on November 22, 1999, defendant filed a proposed order. The order stated, in part, "that unless the Plaintiff attorney produce[s] the Plaintiff for discovery deposition within 30 days of November 12, 1999, . . . this matter will be dismissed." The court signed the order, and it was entered on December 1, 1999.

On December 1, 1999, defendant filed another proposed order, which stated:

> On December 1, 1999, this court entered its Order to produce the Plaintiff for discovery deposition by December 12, 1999, or this matter would be dismissed. The Plaintiff has failed to appear for discovery deposition as ordered by the Court. NOW THEREFORE IT IS ORDERED that the above-captioned matter be and hereby is dismissed *with prejudice* and without costs. [Emphasis added.][2]

The court signed the order on December 21, 1999, and it was entered on that date.

Subsequently, an additional defendant, Michigan Elevator Company (MEC),[3] moved for summary disposition, essentially arguing that (1) it had not been added properly as a defendant and (2) the dismissal of the case should apply to it as well as to defendant Arbor Homes. The hearing on MEC's motion occurred on January 14, 2000. During the hearing, plaintiff's counsel asked the court for relief from the December 21, 1999, order dismissing the action, arguing that (1) he located plaintiff approximately a week after the thirty-day period had expired; (2) he had not received the proposed order of dismissal under the seven-day rule (see MCR 2.602); (3) he had not received the final copy of the order; (4) he did not learn of the dismissal of the case until answering MEC's motion for summary disposition; and (5) his law practice had recently changed locations and there had been problems with the forwarding of mail. He argued that no prejudice had resulted from the delay in discovery. The court rejected counsel's request for relief, stating, "[a]s far as I'm concerned, this case is dismissed as to everyone." However, the court additionally stated, "I don't want another order entered until Plaintiff has an opportunity to

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[2] Defendant, in its appellate brief, repeatedly states that the December 12, 1999, order is silent regarding whether the dismissal was with or without prejudice. However, defendant's own appendix, attached to its appellate brief, clearly demonstrates that the dismissal was with prejudice. We remind defendant to ensure the accuracy of the representations it makes to this Court.

[3] See note 1, *supra.*

present a motion for the relief of that order," apparently referring to the December 21, 1999, order.

On January 18, 2000, plaintiff filed a motion for relief from the December 1, 1999, and December 21, 1999, orders. Plaintiff argued, inter alia, that (1) the orders had been entered irregularly because plaintiff had not received notice of them and (2) allowing the orders to stand was contrary to the interests of justice because plaintiff had since been located. The court ruled as follows at the January 28, 2000, motion hearing:

> The problem is, Counsel, is that 30-day time period was the last straw. This accident happened more than, at least, four years ago at this point. You know these are harsh remedies, and I really struggled with this. And I have to look at the prejudice to the defendant at this point.
>
> And it is the opinion of this court that you as an attorney certainly did nothing wrong. You can't help . . . [it] if your client disappears on you. But he did disappear. He didn't pursue his cause of action. I think it would be extremely prejudicial to the defendant to reinstate this and to grant the plaintiff any relief from the order. So, it is denied.

On February 11, 2000, an order was entered that denied plaintiff's motion for relief from judgment and dismissed plaintiff's complaint, with prejudice.

On appeal, plaintiff argues that the trial court improperly dismissed the case. We review for an abuse of discretion a trial court's decision to dismiss a case for discovery violations. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Similarly, we review for an abuse of discretion a trial court's decision to deny a motion for relief from judgment. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

In *Bass, supra* at 26, the Court stated:

> The Michigan Court Rules at MCR 2.313(B)(2)(c) explicitly authorize a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery. The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it. [Citations omitted.]

The *Bass* Court cited the following factors to be considered in determining the appropriate sanction for a discovery violation:

> "(1) [W]hether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose

> witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice." [*Bass, supra* at 26-27, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

We cannot agree that the trial court's dismissal of the case violated the precepts discussed in *Bass*. Indeed, plaintiff initially failed to answer interrogatories served in June 1999. His counsel then *stipulated* to the entry of an order requiring him to answer the interrogatories within twenty-eight days from September 10, 1999. Despite this stipulation, plaintiff failed to answer the interrogatories and then failed to appear for a deposition on October 7, 1999. Despite the numerous discovery violations that had already occurred, the court, exercising its discretion, allowed counsel "30 days to find [plaintiff]." Again, plaintiff's counsel *agreed* with the timeline proposed by the court. Nevertheless, plaintiff did not meet the timeline. Indeed, plaintiff's counsel admitted that plaintiff in fact was not located until approximately a week after the thirty-day period had expired.

The facts demonstrated a repeated and continuing failure to provide discovery. Plaintiff violated two direct orders relating to discovery – orders with which plaintiff's counsel had agreed. Cf. *MacArthur Patton Christian Ass'n v Farm Bureau Ins Grp*, 403 Mich 474, 477; 270 NW2d 101 (1978). Additionally, it cannot seriously be argued that plaintiff's complete and extended failure to maintain contact with his attorney or to inform his attorney about his whereabouts was accidental, given that litigation was pending. Moreover, contrary to plaintiff's argument on appeal, plaintiff's failure to provide discovery did in fact prejudice defendant in that defendant repeatedly was given no chance to begin exploring the factual background of this accident that occurred in 1996. Time delays further exacerbated any problems with memory that might have already existed. At any rate, even assuming that there would have been no prejudice to defendant in allowing the case to proceed, the repeated discovery violations, the non-accidental nature of the violations, and the failure to comply with explicit court orders *in themselves* justified the court's decision to dismiss the case. We simply cannot find an abuse of discretion with regard to the trial court's decision.

Furthermore, the record demonstrates that the trial court carefully considered the circumstances of the case before dismissing it. The court gave plaintiff numerous "chances" to comply with discovery. At the January 28, 2000, hearing, the court stated that it understood the harshness of dismissal and that it had "really struggled with this." It emphasized that the plaintiff had "disappear[ed]," and it emphasized the prejudice to defendant. It is obvious that the court "gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Bass, supra* at 27. Reversal is unwarranted.

Plaintiff additionally argues that the dismissal must be reversed because he received no notice of the December 1, 2000, and December 21, 2000, orders. This argument is entirely specious. Indeed, the trial court rectified any problems concerning this alleged lack of notice by granting plaintiff a hearing with respect to the orders. Plaintiff "had his day in court," so to

speak, at the January 28, 2000, hearing. While the court's December 21, 1999, order did contradict its November 12, 1999, ruling in that it dismissed the case *with prejudice*, the court, during the January 28, 2000, hearing, sufficiently justified its decision to increase the earlier proposed sanction by dismissing the case with prejudice.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Patrick M. Meter