STATE OF MICHIGAN

COURT OF APPEALS

VITEC, LLC,

Plaintiff-Appellant,

v

CHARLES A. YOUNG III, ANNA CALDERON, YDL-SYNERGY, LLC, LEWIS D. DENNEN and THEODORE B. LAWRENCE,

Defendants-Appellees,

and

ENGINEERING SOLUTIONS & SUPPORT, INC.,

Defendant.

UNPUBLISHED
February 10, 2004

No. 243732
Wayne Circuit Court
LC No. 02-203749-CZ

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order dismissing its case with prejudice against all defendants. We affirm the order as to defendant Lewis D. Dennen, but reverse as to defendants Charles A. Young III, Anna Calderon, YDL-Synergy, LLC, Theodore B. Lawrence and Engineering Solutions & Support, Inc.

I. FACTS

Plaintiff is a automotive parts supplier. Defendant, Charles A. Young III, was employed by plaintiff as Chief Financial Officer having access to and control over plaintiff's financial assets and accounts. Defendant, Anna Calderon, was employed by plaintiff as a purchasing manager. Calderon, who reported to Young, was responsible for sourcing and purchasing parts from tier-two automotive suppliers. While employed by plaintiff, Young formed defendant,

YDL-Synergy, LLC (YDL), with defendants Theodore B. Lawrence and Lewis D. Dennen.[1] Young also formed defendant, Engineering Solutions & Support, Inc. (ESS), with Lawrence during this time.

It is contested whether Young disclosed his ownership interests in YDL and ESS to plaintiff before entering into business transactions with those entities on plaintiff's behalf. Plaintiff began purchasing supplies from YDL. Plaintiff alleges that suppliers were coerced by Calderon to use YDL as a middle man and that these transactions led to at least $73,500 in additional unnecessary expenses. Plaintiff also alleges that Young funneled over $1,000,000 from plaintiff's bank accounts into ESS. These activities led to the imposition of criminal charges against Young, Calderon, Lawrence and Dennen. The criminal charges against Dennen were dismissed with prejudice on January 13, 2003.

Plaintiff filed its complaint on February 1, 2002, alleging that defendants Young and Calderon: made fraudulent misrepresentations to plaintiff regarding Young's ownership interest in YDL and ESS resulting in a loss of profits to plaintiff; breached their contracts by engaging in conduct that violated their non-compete agreements; and, breached their fiduciary duty by engaging in improper and illegal transactions with YDL and ESS. Plaintiff alleged that defendants Young, Calderon, Dennen and Lawrence tortiously interfered with plaintiff's business expectations by funneling supplies from a third party, through YDL at plaintiff's expense. Plaintiff alleged that all defendants conspired to commit all wrongful conduct alleged *supra* causing harm to plaintiff. Plaintiff further alleged that all defendants committed common law conversion by converting plaintiff's money to their own use, and statutory conversion by wrongfully taking and exerting control over plaintiff's money when Young and Calderon transferred plaintiff's funds into YDL and ESS accounts. Plaintiff alleged that all defendants were unjustly enriched by their actions and asked the court to order an equitable accounting to determine the amount of money lost, the creation of a constructive trust for those funds wrongfully transferred and an injunction to prevent the loss of those funds.

Defendants Young, Calderon, ESS and YDL denied all allegations in the complaint and asserted as affirmative defenses failure to state a claim upon which relief can be granted, good faith, and statute of limitations. Defendant Dennen responded that plaintiff failed to state a claim upon which relief can be granted and to mitigate damages, plaintiff's claims were barred by law, estoppel, ratification and waiver, and statute of frauds. Defendant Dennen further asserted that plaintiff's officers were cloaked in apparent or actual authority to conduct transactions with YDL, that Dennen was not liable in his personal capacity because he acted on behalf of YDL, and that he acted under the good faith belief that YDL was formed as a legitimate minority business under the direction, guidance, and full knowledge of plaintiff.

On March 25, 2002, defendant Dennen filed a notice that depositions would be taken of plaintiff's keeper of the records and employees on April 17-19, 2002. Dennen contended that the suit against him was frivolous and defamatory and that he wanted discovery as soon as possible

[1] Defendants Lawrence and Dennen were not employees of plaintiff.

in order to file for summary disposition. On April 5, 2002, Dennen filed a motion to compel plaintiff's agents to appear for depositions and for production of the documents after plaintiff informed Dennen that its agents would not attend depositions on the dates set. Plaintiff responded that Dennen had not been cooperative in arranging mutually agreeable dates for the depositions and had not supplied all requested documents or answered interrogatories which had been served on all defendants on March 7, 2002. Judge William Callahan instructed plaintiff and Dennen to arrange deposition dates before the May 2, 2002 status conference. Dennen tried to arrange these dates by telephone and fax letter to plaintiff. Plaintiff failed to respond to Dennen's correspondence

On April 26, 2002, plaintiff filed a motion to compel the depositions of the corporate representatives of YDL and ESS, including Dennen. Plaintiff contended that defendants Lawrence, Calderon and Young had expressed concern about being deposed prior to the preliminary examination, but that defendants were to be deposed in their corporate capacity, and therefore, could not assert their personal right against self-incrimination.[2] Plaintiff contended that if defendants were not required to be deposed, then neither should plaintiff's agents. However, plaintiff never filed notice of Dennen's deposition. Plaintiff also filed a motion to compel defendants Dennen and Young to answer interrogatories contending that each had returned their responses late without requesting an extension and asserted invalid objections. Young and Dennen responded to most of the questions by asserting their Fifth Amendment privilege against self-incrimination.

At the same time, Dennen filed a motion requesting sanctions for discovery violations contending that plaintiff was nonresponsive to attempts to arrange deposition dates. Dennen once again argued that plaintiff's claims against him were frivolous and defamatory and that he intended to move for summary disposition as soon as possible. Dennen responded to plaintiff's motion to compel responses to interrogatories by contending that his answers in this civil suit could incriminate him in the pending criminal case, giving him the right to assert the Fifth Amendment. He further argued that plaintiff was aware of the pending criminal charges when it filed suit and that it should dismiss the case until the criminal matter was concluded. Dennen again filed notice that he intended to depose plaintiff's agents on May 13 and 23, 2002.

Judge Callahan conducted a pretrial status conference on May 2, 2002. At that conference, Judge Callahan recommended that plaintiff dismiss its case without prejudice as defendants intended to assert their Fifth Amendment rights while the criminal matter was pending. Although plaintiff's counsel stated that he would discuss this recommendation with his client, plaintiff did not voluntarily dismiss its case without prejudice at that time.

The civil case was reassigned to Judge John H. Gillis, Jr. A hearing was held on the various motions filed by plaintiff and Dennen on May 24, 2002. The court ordered both plaintiff and Dennen to provide requested documents within 30 days. The court also ordered that depositions occur within 30 days. Plaintiff was to allow its agents to be deposed prior to taking

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[2] Trial counsel for Calderon and Young indicated that if his clients were deposed in their individual capacity, they would assert their Fifth Amendment right against self-incrimination.

the depositions of individual defendants. Defendants Young and Calderon objected to the court's order, as Judge Callahan had ordered that defendants could not be compelled to testify in violation of their Fifth Amendment right against self-incrimination.[3]

Dennen once again filed notice that he intended to depose plaintiff's agents on June 25-27, 2002. Following another hearing on June 14, 2002, the court ordered plaintiff to produce documents by June 28, 2002 and to produce agents for depositions on various dates in the month of July. The corporate defendants were ordered on June 21, 2002 to produce individual defendants in their corporate capacity to be deposed.

On July 23, 2002, Dennen filed a motion to show cause as plaintiff's counsel had left a telephone message on July 19, 2002, indicating that he was canceling all depositions for plaintiff's agents based on the fact that another defendant filed a motion to stay the civil proceeding. Three days later, no motion to stay had been filed and plaintiff's agents failed to appear for their depositions. Dennen requested an emergency ex-parte hearing to order plaintiff's agents to appear at depositions scheduled later that same week. The court ordered plaintiff to show cause why it failed to obey the court's order to provide discovery and why it should not be held in contempt and ordered to pay costs to Dennen.

On July 24, 2002, defendants Young, Calderon, ESS and YDL filed a motion to stay the civil proceeding. Defendants contended that the basis of the claims in the civil proceeding was also the basis of criminal charges brought against the individual defendants and that the civil matter should be stayed until the conclusion of the criminal matter. Judge Gillis denied this motion. That same day, the court heard Dennen's emergency motion. Plaintiff appeared and argued that Dennen's preliminary examination in the criminal matter had been postponed until September and he only wanted discovery to assist in his criminal case. Plaintiff informed the court that all other defendants had agreed to stay the proceeding until the conclusion of the criminal matter. Plaintiff proposed that the civil case be dismissed without prejudice against defendant Dennen alone as the other defendants had agreed to the stay. Judge Gillis also stated that he would not dismiss the case without prejudice. After a discussion of dates when plaintiff's agents could be deposed, plaintiff again objected on the ground that other defendants were going to claim their Fifth Amendment privilege and the case would be stayed. Dennen's counsel objected to dismissing the lawsuit without prejudice. Plaintiff was ordered to produce its agents for deposition before August 2, 2002.

On July 26, 2002, Dennen filed another emergency motion after plaintiff's agents failed to appear for their depositions on July 25, 2002, as ordered by the court. Dennen wanted to hold the depositions on July 31, 2002, or have the case dismissed with prejudice under MCR 2.504(B)(1) for plaintiff's intentional failure to comply with the court's order.[4] Plaintiff

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[3] Judge Callahan was informed by the parties that the civil and criminal cases were based on the same facts and events. Judge Callahan stated, "But you can't have depositions in a criminal case."

[4] MCR 2.504(B)(1) governs the effect of involuntary dismissal and provides: "If the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action
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responded that Dennen had unilaterally scheduled all depositions without regard for plaintiff's schedule and Dennen was not blameless as he had failed to produce requested documents forcing plaintiff to file a motion to compel production. Plaintiff argued that it had acted in good faith as the other defendants informed it that the motion to stay would be filed on July 19, 2002. Plaintiff presented the court with a proposed order for voluntary dismissal on July 25, 2002, of which Dennen was notified. Plaintiff argued that it had always tried to cooperate in arranging mutually agreeable deposition dates and its agents had never just failed to appear.

At the hearing on July 29, 2002, the court dismissed plaintiff's claims against all defendants with prejudice. The court found that plaintiff had "repeatedly disobeyed this Court's order to appear last Thursday" and dismissed the case with prejudice.

II. DISCOVERY SANCTIONS

On appeal, plaintiff contends that the trial court abused its discretion by dismissing its case with prejudice as a discovery sanction without considering all of the necessary factors and alternative sanctions on the record.

A. Standard of Review

This Court reviews the imposition of discovery sanctions for an abuse of discretion. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 697; 662 NW2d 804 (2003); *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). There is an abuse of discretion when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion and bias." *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

B. Analysis

The Michigan Court Rules explicitly authorize a court to dismiss a proceeding as a possible sanction against a party for failing to obey a discovery order. MCR 2.313(B)(2)(c); *Bass*, *supra*, 238 Mich App 26. Dismissal is a drastic sanction and should only be imposed in extraordinary circumstances. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000); *Bass*, *supra*, 238 Mich App 26; *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). The record should reflect that the trial court carefully considered the factors involved and alternative sanctions in determining what sanction was just and proper under the circumstances. *Bass*, *supra*, 238 Mich App 26; *Vicencio*, *supra*, 211 Mich App 506-507. The factors that the court should consider are:

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

(…continued)

or a claim against that defendant.

> exists a history of the other 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*, 238 Mich App 26-27; see also *Vicencio, supra*, 211 Mich App 507; *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

We conclude that the trial court did not abuse its discretion by dismissing plaintiff's case against defendant Dennen with prejudice. The record in this case shows that plaintiff willfully and wantonly disobeyed numerous court orders compelling discovery over a three month period. See *Bass, supra*, 238 Mich App 27-35 (holding that the trial court did not abuse its discretion by dismissing the plaintiff's case with prejudice for willfully violating discovery orders over a 15 month period). Plaintiff's belief in the correctness of its position that the trial court was required to order a stay in the civil proceeding pending the conclusion of the criminal trial does not negate plaintiff's duty to obey the trial court's discovery orders or render the violation accidental. See *Kirby v Michigan High School Athletic Assoc*, 459 Mich 23, 40; 585 NW2d 290 (1998) ("A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date."). Plaintiff's history of noncompliance was prejudicial to Dennen, who did not engage in deliberate delay by asserting his Fifth Amendment right against self-incrimination. Furthermore, plaintiff made no timely attempt to cure its noncompliance because it submitted a proposed order for voluntary dismissal without prejudice after the trial court warned that it would dismiss plaintiff's case with prejudice if plaintiff violated another court order. A less drastic sanction would not have better served justice regarding defendant Dennen. Therefore, the trial court did not abuse its discretion by dismissing plaintiff's case against Dennen with prejudice.

Plaintiff was ordered on April 12, 2002 to reach mutually agreeable dates for depositions before the status conference. Before the May 2, 2002 status conference, Judge Callahan recommended to plaintiff that it dismiss the case without prejudice as defendants. Plaintiff opted not to dismiss its case without prejudice and insisted that it was entitled to depose defendants in their corporate capacity to discover nonprivileged testimony. Plaintiff was again ordered to submit to depositions and produce requested documents on May 24 and June 14, 2002. On July 24, 2002, plaintiff was ordered to submit to depositions within the week. Judge Gillis warned plaintiff that voluntary dismissal without prejudice was no longer an option and that if plaintiff did not appear for its depositions, its claims against all defendants would be dismissed with prejudice. Plaintiff's case was not dismissed with prejudice until plaintiff entered a proposed order of voluntary dismissal instead of attending the court ordered depositions. Plaintiff contended below that defendants would assert their Fifth Amendment right against self-incrimination at their depositions forcing the court to stay the civil proceedings and that plaintiff should not have to be deposed. However, Dennen spent over $30,000 to defend himself in the civil case and had to file numerous motions to compel discovery. Dennen believed plaintiff's claims against him were frivolous and defamatory and plaintiff's refusal to comply with discovery prevented Dennen from moving for summary disposition. Plaintiff caused the delay in discovery by refusing to voluntarily dismiss the case without prejudice and filed this suit while the criminal charges were pending even though there was no statute of limitations problem. As such, we hold that the trial court did not abuse its discretion by dismissing plaintiff's case against

defendant Dennen with prejudice as the record reflects that this sanction was just and proper under the circumstances.

We also find that the trial court did consider lesser sanctions. Judge Callahan recommended that plaintiff dismiss its case without prejudice, which plaintiff failed to do. Judge Gillis warned plaintiff that its next violation would result in dismissal with prejudice as to all defendants. In *Traxler v Ford Motor Co*, 227 Mich App 276; 576 NW2d 398 (1998), this Court upheld the trial court's grant of a default judgment against the defendant where the trial court recognized its duty to consider lesser sanctions and "simply concluded" that a lesser sanction would not better serve justice. *Id.*, 286-287.

However, we find that the trial court abused its discretion by dismissing plaintiff's claims against defendants Young, Calderon, Lawrence, YDL and ESS with prejudice. These defendants were not prejudiced by plaintiff's violations of the discovery orders. Defendant Lawrence and plaintiff had already agreed to postpone discovery until after the preliminary examination in the criminal case. Defendants Young, Calderon, YDL and ESS had not attempted to depose plaintiff or to compel discovery. These defendants moved to stay the civil proceeding five days before the case was dismissed. We find that, as none of the other defendants were attempting to prepare a defense by taking discovery from plaintiff, plaintiff's failure to comply in discovery with defendant Dennen was not prejudicial to their defenses. A lesser sanction would have better served justice in relation to these defendants. Therefore, it was an abuse of discretion for the trial court to dismiss plaintiff's claims as to these defendants.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Bill Schuette