

STATE OF MICHIGAN
COURT OF APPEALS

MARIANO MOCERI, JR.,

Plaintiff-Appellant,

v

PAMELA MOCERI,

Defendant-Appellee.

UNPUBLISHED

November 25, 2008

No. 277920

Macomb Circuit Court

LC No. 05-000999-DO

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order adopting the final arbitration award entered pursuant to the Domestic Relations Arbitration Act, MCL 600.5702. On appeal, plaintiff asserts the trial court erred in exercising jurisdiction over a discovery dispute and abused its discretion in finding plaintiff in contempt and dismissing his claim that defendant was partly responsible for credit card debt accrued during their marriage. We conclude the trial court retained jurisdiction over the discovery dispute, but the record does not support the trial court's finding that plaintiff willfully failed to comply with its order. Consequently, the trial court abused its discretion by precluding plaintiff from presenting his proofs regarding the credit card debts. We vacate the lower court's order and remand for further proceedings consistent with this opinion.

Plaintiff first asserts the trial court erred in concluding that it had jurisdiction to enforce subpoenas issued while the parties were proceeding with arbitration. We disagree. This Court reviews a claim that a trial court lacked jurisdiction over a matter de novo. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

The trial court's determination that it had jurisdiction over the dispute in question is supported by the Judgment of Divorce and by both statute and court rules. In the Judgment of Divorce, a section entitled "Enforcement of Judgment" provides that "[i]t is further ordered that in the event any of the terms contained in this agreement are not complied with by either party, and the other party must seek enforcement by the court, then the party not in compliance shall be liable for costs, sanctions and attorney fees." While there is no reference in the judgment to discovery, subpoenas or the transfer and exchange of documents, this Court concludes that the trial court retained jurisdiction to decide such disputes. The section of the judgment entitled "Division of Marital Debt" provides that "[e]ach party shall be responsible for all debts associated with their business and each party shall indemnify and hold the other party harmless

with regard to said debts.” While this section does not explicitly state that the parties must exchange documentation proving the marital nature of debt, that is clearly the implication. Consequently, because the judgment required the parties to account for their respective business debts, plaintiff’s alleged failure to comply with the subpoenas pertaining to his records of business expenses would violate it. Because the trial court retained the right to enforce the terms of the agreement, it properly exercised jurisdiction over the dispute.

Additionally, both the statute and the court rules support the trial court’s actions. Defense counsel signed the subpoenas while parts of the case were in arbitration. The arbitrator was appointed in June 2006, and the subpoenas were issued in August 2006. According to MCR 2.506(B)(1), a subpoena that is signed by any attorney of record “has the force and effect of an order signed by the judge of that court.” As provided by MCR 3.602(F)(1), “MCR 2.506 applies to arbitration hearings.” Therefore, where parties appear before an arbitrator, a subpoena signed by one party’s attorney carries the force of an order signed by the arbitrator or a presiding court of law. MCL 600.5079, a provision of the Domestic Relations Arbitration Act, provides “[t]he circuit court shall enforce an arbitrator’s award or other order issued under this chapter in the same manner as an order issued by the circuit court.” Because the subpoenas were the equivalent of an order of the arbitrator, the trial court was therefore empowered to enforce them as if they were its own.¹

Plaintiff next contends the trial court clearly erred in determining that he failed to comply with the court’s order to comply with the subpoenas and abused its discretion in dismissing his claim regarding the credit card debt. In a contempt proceeding, this Court reviews a trial court’s findings of fact for clear error and its ultimate determination of contempt for an abuse of discretion. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). An abuse of discretion occurs when the lower court’s holding falls outside the range of principled and reasonable outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). We conclude that the trial court clearly erred in its fact finding and abused its discretion by holding plaintiff in contempt. Moreover, even if plaintiff technically violated an order, the court abused its discretion by dismissing plaintiff’s claims in respect to the credit card debts without first considering less drastic sanctions.

On March 28, 2006, the parties signed a consent judgment of divorce. The judgment provided that if the parties were unable to reach agreement regarding the division of certain real estate, the distribution of their marital property, or the division of the marital debt, the matter would be arbitrated pursuant to the Domestic Relations Arbitration Act, MCL 600.5702. Subsequently, attorney John Lascoe was appointed arbitrator to decide these disputed issues. This appeal arises from plaintiff’s assertion that defendant should be partially responsible for approximately \$80,000 in credit card debt; defendant contended these debts were plaintiff’s business expenses and his sole responsibility.

¹ In addition, because it was plaintiff and his business entities that initially invoked the trial court’s jurisdiction to quash the subpoenas in question, plaintiff has waived any claim that the trial court improperly interfered with the arbitration proceedings.

Although plaintiff bore the burden of proof before the arbitrator to establish the credit card obligations were marital rather than business debts, *defendant* served two expansive discovery subpoenas for records on plaintiff. The first, issued on August 17, 2006, required plaintiff to produce all his personal and his business entities' bank statements from the year 2000 forward, all check registries, and front and back copies of all returned checks for each account of his personal and business accounts. The subpoena required the documents be produced to the office of defendant's counsel by August 31, 2006.

Defendant's counsel issued a second subpoena on August 24, 2006, that required plaintiff to produce financial documents in his own name and in the name of his two companies by September 8, 2006. Specifically, this subpoena sought production of (A) all tax returns from 1999 until the date of the subpoena; (B) records from 1999 to present of "any and all documentation supporting any expenses taken on behalf" of plaintiff's companies, including "detailed documentation as to what those expenses consist of, and how they were developed" by the companies; and (C) records from the same time period of "any and all business records outlining expenses that were taken in the form of credit card payments for" plaintiff in his name and that of the two companies. This subpoena was also returnable to the office of defendant's counsel.

On August 28, 2006, James Bishai, counsel for plaintiff's businesses, filed objections in the trial court to the above subpoenas and to similar subpoenas issued to numerous banks. Counsel asserted the subpoenas were overly broad, vexatious, unduly burdensome, and a "fishing expedition."

On September 8, 2006, plaintiff filed a motion with the trial court seeking to quash defendant's August 17, 2006 subpoena. Plaintiff asserted that the subpoena sought information that was not relevant to the matters pending before the arbitrator, was unreasonable and oppressive, and was intended only to harass plaintiff. Plaintiff requested relief from the subpoena, or in the alternative, an order for reimbursement of the actual costs of compliance and a protective order regarding disclosure of the documents.

Bishai also filed a similar motion to quash on September 13, 2006 on behalf of plaintiff's business, asserting that the subpoenas sought information that was irrelevant, that the subpoenas were merely intended to harass, and were tantamount to a fishing expedition.

Plaintiff's motions to quash were first heard by a circuit court referee on September 18, 2006, whose report recommended "the subpoenas shall be complied with" and that the "materials shall be returned to the plaintiff at the close of this litigation." The referee's report also recommended a protective order precluding disclosure of the materials beyond the parties, their attorneys, the arbitrator, and the court. Counsel for plaintiff's businesses filed objections to the referee's report that included the arguments noted above. In addition, counsel noted the arbitrator was only interested in the credit card records for card usage one or two years before the complaint for divorce was filed. Further, because plaintiff bore the burden of proof regarding his claim that the credit card debt was marital rather than business expenses, he offered to produce for the court's inspection copies of the documents he intended to produce to meet his burden so the court could determine whether defendant's subpoenas were overly expansive.

The trial court heard the matter on October 10, 2006. Bishai argued that defendant's subpoenas were an overly burdensome fishing expedition that sought information that was not related to plaintiff's credit card claims. The court noted that nothing indicated that either of the parties had "acted inappropriately with regard to financial or personal information" and denied the motion to quash, upholding the referee's recommendations in their entirety. The trial court's written order filed the next day adopted the referee's recommendations "in full" and ordered that the "documents requested in the subpoenas shall be produced to defendant's counsel . . . on or before October 20, 2006."

On October 18, 2006 plaintiff's counsel notified defendant's counsel by facsimile letter that plaintiff was assembling the subpoenaed documents and asked whether defense counsel had already received some of the requested information from subpoenas issued to five banks. On October 19, 2006, defendant's counsel faxed her response: "I am NOT modifying my subpoena requests in any way. As you should be well aware after having two Court hearings on the issue, all of the items requested in my subpoenas to your client and his companies are to be produced by tomorrow."

On October 19, 2006, Bishai faxed the following letter to defendant's attorney:

In accordance with the Order dated October 10, 2006, my client will be delivering documents that he was able to find in accordance with the issued subpoenas, to your office tomorrow, October 20, 2006 at 1:30 p.m.

Please be advised, that since there is also a protective order in place for these specific documents, they will be delivered by truck to the most convenient delivery bay in your building. Please make arrangements to accept the documents, especially designating a safe area for them to be placed. There will be 40 to 50 boxes (estimated), so please make the appropriate arrangements. Further, in accordance with the protective order, the boxes of documents will be videotaped during the delivery and transfer into you [sic] temporary possession, in order to protect the proper identification of all the boxes and documents when returned to Mocerri Produce, Inc.'s possession.

On the morning of October 20, defense counsel spoke to Bishai by cell phone, advising him that she objected to plaintiff's coming to her office and that she would not accept the tendered original documents. Defense counsel also spoke by phone with plaintiff's divorce counsel and told him the same thing. Bishai and plaintiff attempted to deliver the 40 boxes of subpoenaed documents to plaintiff's office at about 4:00 p.m. on October 20, 2006, but no one was present at defense counsel's office to accept the documents.

At some point on October 20, 2006, the two divorce lawyers corresponded by facsimile. In defense counsel's letter to plaintiff's attorney, she stated she would not be in the office that day because of vehicle problems. She also stated she would not accept original documents in satisfaction of the subpoenas she issued, would not deal directly with plaintiff or his family, and expected the subpoenaed documents to be organized. Further, she accused plaintiff's counsel of "game playing" and stated that she would have to file an emergency motion. She also added that as she had explained before, "your client can always withdraw his request to have my client contribute towards his credit card debts and expenses."

In his facsimile of October 20, 2006, plaintiff's counsel explained that 39 of the 40 boxes that Bishai and plaintiff had attempted to deliver to defense counsel's office were the original business records demanded in paragraphs B & C of defendant's August 24, 2006 subpoena. Counsel noted that each carton contained documentation for one month's business with the documents for each business day in separate envelopes; the 39 boxes contained approximately 48,000 documents. The letter indicated that while defense counsel wanted all the records photocopied and delivered to her by the October 23, 2006, she rejected plaintiff's counsel's offer to view the records at his office to mark the specific records for which copies were desired. Counsel also advised that business records from before August 2003 had been destroyed in a fire. One box Bishai was unable to deliver apparently contained copies of the business tax records.

The trial court held a hearing on November 6, 2006 regarding defendant's motion to find plaintiff in contempt for not compliance with the court's October 10, 2006 order. Defendant's counsel stated that she was out of her office on October 20 because of car problems and that her assistant notified her of Bishai's fax, which prompted her telephone calls to plaintiff's counsel. She admitted she told plaintiff's counsel she did not want plaintiff delivering original documents to her office; she also had her assistant close the office at 1:30 p.m. because the assistant did not feel comfortable with the situation. Plaintiff's counsel also acknowledged she learned from other lawyers in her building that Bishai appeared at her office at about 4:15 that afternoon with copies of the tax returns. Plaintiff's counsel explained that she did not want to accept the original documents and later face a claim that documents were lost.

Plaintiff's counsel stated the boxes plaintiff attempted to deliver contained the business records from August 2003 to October 2006, organized by month and day; he did not know until the records were being assembled that records from before August 2003 had been destroyed in a fire. Counsel stated that he provided evidence to defense counsel regarding the fire. The boxes of records were taken to the office of plaintiff's counsel after the attempted delivery to defense counsel, where they were made available for defense counsel's review; the parties could not agree regarding expenses to photocopy the records. The records were boxed as plaintiff kept them in the normal course of business.

The trial court indicated its belief that only bank statements and tax records had been subpoenaed and was offended that Bishai intended to videotape delivery of the boxed records. The court also could not find fault in defense counsel's insisting that plaintiff not come to her office in "today's day and age" of "violence out there." Later, the court determined plaintiff's counsel's actions were not unreasonable because plaintiff had demonstrated his inability "to maintain [sic] his anger." The court faulted plaintiff's counsel for not previously having raised the issues of the fire-destroyed records and copying costs. The court determined that plaintiff did not make reasonable efforts to comply with "not only the technical but the spirit" of the court's prior order. Consequently, the court ruled it would sanction plaintiff by precluding him from proceeding with his claim before the arbitrator to establish the credit card balances were marital debts for which defendant should be partially responsible. The court the same day entered an order to that effect, including that plaintiff pay defense counsel \$750 as an attorney fee.

Plaintiff filed a timely motion for reconsideration of the court's order, which the court denied by opinion and order, dated December 15, 2006. Incredibly, the court not only acknowledged plaintiff had attempted to deliver the subpoenaed documents but chastised

plaintiff for attempting to provide the originals of all documents that defense counsel had insisted be produced, rather than only those that were relevant. The Court wrote:

The subpoenaed documents were finally produced, but instead of complying with the subpoena by supplying those documents that have any relevance to the subject matter, plaintiff attempted to deliver 40 to 50 boxes (approximately 40,000 documents) of original documents to defendant's office for defendant's examination just days before the scheduled arbitration. Defendant refused to accept and be responsible for 40-50 boxes of original material and requested copies of only relevant documents.

Despite, plaintiff's counsel's repeatedly attempting to narrow the scope of defendant's discovery subpoena to documents relevant to plaintiff's credit card claim—which both defense counsel and the court rebuffed—the court viewed plaintiff's compliance as a “tactic,” writing:

Plaintiff's tactic of submitting voluminous documents material along with immaterial documents, regardless of whether they were properly organized, was quite obviously an attempt to obstreperously hinder the process instead of facilitating a smooth and uncomplicated resolution. Defendant had no choice but to appeal to the Court for enforcement of the subpoenas.

Remarkably, the Court found plaintiff's actions unreasonable because plaintiff did not do the very thing that plaintiff's counsel initially sought the court to allow: to narrow the subpoena to documents relevant to plaintiff's claims. The court opined:

Plaintiff contends that he complied with the subpoenas and a finding by this Court of contempt is unsupported. However, the record demonstrates that plaintiffs “compliance” was unreasonable and unacceptable and a finding of contempt is supported and will not be vacated. Clearly, the burden of sifting through 40,000 documents to find those relevant to the issues is on plaintiff's shoulders, not defendants, especially since it was plaintiff who raised the issue in the first place. The suggestion that defendant review the documents in plaintiffs counsel's office is irrational and unwarranted.

We conclude that the trial court clearly erred in finding that plaintiff willfully failed to comply with the court's order to obey defendant's subpoenas. It follows that the court abused its discretion by imposing the sanction of dismissing plaintiff's claim regarding the credit card debt. The undisputed record evidence establishes that on October 10, 2006, plaintiff and his counsel attempted to deliver to defense counsel's office 40 boxes of subpoenaed records. While defense counsel's actions may have been excusable, doing so does not alter the fact that plaintiff tried to comply with the subpoenas but was prevented from doing so by defense counsel's actions. There is no evidence in the record that plaintiff's counsel was pursuing a “tactic” of inundating defense counsel with irrelevant documents. Rather, defense counsel insisted on full compliance with the subpoenas. The record establishes that plaintiff was attempting to comply with defense counsel's insistence that she receive “any and all documentation supporting any expenses taken on behalf” of plaintiff's companies, including “detailed documentation as to what those expenses consist of, and how they were developed.” Although plaintiff sought to narrow discovery to relevant matters, this effort was rejected. Contrary, to the trial court's reasoning, plaintiff had no

burden—and no authority—to unilaterally limit his compliance with the subpoena when the trial court previously denied his request for relief in that regard and defendant’s counsel was insisting on full compliance. So, plaintiff did not act unreasonably in attempting to fully comply with the subpoenas. Likewise, after the impasse developed, plaintiff’s counsel did not act unreasonably by holding the records available for defense counsel’s inspection at his office and offering to copy any defendant wanted at defendant’s expense.

Moreover, the trial court made no finding that plaintiff’s claim that records from before August 2003 had been destroyed in a fire was untrue. Indeed, our review of the record discloses no evidence to support that plaintiff’s contention was false. And, even if not producing the business records were a technical failure to comply with the subpoena, we would nonetheless conclude that the trial court abused its discretion in dismissing plaintiff’s claim that defendant was responsible for portions of the credit card debt. Where a party fails to comply with a properly issued subpoena, the trial court is empowered by MCR 2.313(B)(2)(c) to dismiss a portion of a claim or enter a default judgment. But the dismissal of a claim is the most severe of sanctions, and the court must carefully consider all circumstances and potential sanctions before dismissing a claim. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on other grounds *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 81 Mich 618, 628; 752 NW2d 37 (2008). 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. *Id.* Here, plaintiff does not appear to have a history of disregarding the court’s orders, and he appears to have attempted to comply with the court’s order to satisfy defendant’s subpoenas. Although the trial court correctly concluded that the discovery impasse created time constraints for adequately preparing for the arbitration hearing, plaintiff was not solely responsible for the situation. Most troubling, the trial court did not consider alternative remedies to dismissal of plaintiff’s claim. The trial court did not inquire whether the arbitration hearing could be delayed while plaintiff copied the relevant documents for defendant, nor did it allow plaintiff to propose alternative solutions. As a result, we must conclude that the trial court’s imposition of sanctions was outside the range of principled outcomes.

We vacate the trial court’s November 6, 2006 order imposing sanctions and awarding attorney fees, and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot