STATE OF MICHIGAN

COURT OF APPEALS

VORTEX, INC.,

Plaintiff-Appellant,

v

SENG DOCK & TRUCKING, INC.,

Defendant-Appellee,

and

EDWARD SENG,

Defendant.

UNPUBLISHED
December 21, 2010

No. 294438
Manistee Circuit Court
LC No. 08-013179-PD

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing its complaint and granting defendants possession of a piece of equipment referred to as a "pelletizer." We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a company located in New York, owned the pelletizer when this case began. According to the record, plaintiff had "loaned" the pelletizer to a New York company called C & V Logistics, L.L.C. C & V leased land in Michigan from defendants for the purpose of converting solid waste into pelletized, solid fuel. However, after C & V piled the solid waste onto the leased land, the Michigan Department of Environmental Quality found the waste contaminated and stopped the operation. Defendant Seng Dock & Trucking (Seng), as the landowner, was required to pay the expense of cleaning up the waste. Seng sued C & V, which had not only left the waste but also some equipment, including the pelletizer, of which Seng took possession. The court in that case (the same judge as in the present case) granted Seng the right to possess the equipment.

In 2008, plaintiff sued defendants for claim and delivery, seeking to take possession of the pelletizer, which it claimed had a value of $95,000. Defendants had refused to simply hand over the equipment, asserting a right to some sort of payment in exchange for storing and maintaining the pelletizer for two years. Plaintiff moved for possession, but the trial court

denied the motion, reasoning that ordering defendants not to damage or dispose of the pelletizer was sufficient to protect the property pending judgment. On the day of the motion hearing, the parties agreed to a scheduling order, setting forth dates for witness lists (February 1, 2009), discovery conclusion (March 1, 2009), dispositive motion deadline (April 1, 2009), exhibit lists (May 1, 2009), settlement conference (July 27, 2009), final settlement conference (August 31, 2009), and trial (September 23, 2009). That order entered November 14, 2008.

Defendants filed a witness list on February 4, 2009. On February 26, 2009, plaintiff's attorneys moved to withdraw from representation, citing a breakdown in the attorney-client relationship. Service was made on defense counsel, plaintiff's president, and a law firm in New York. The court granted the motion after a hearing in which it noted, "The Plaintiff isn't going to be able to proceed with this action. Plaintiff is a corporation." Withdrawing counsel agreed, and stated he expected defense counsel to pursue dismissal if that were the case. The order granting withdrawal also provided that the scheduling order remained in effect.

Indeed, plaintiff did not retain substitute counsel, even though defendants continued with litigation, filing requests for admission on March 4 and an exhibit list on May 1. On July 27, 2009, defense counsel appeared for a scheduled settlement conference and, when plaintiff did not appear, the court entered the order dismissing the complaint and granting defendants possession of the pelletizer. The order states the claims were dismissed "for Plaintiff's failure to appear at the Settlement Conference as required by this Court's Scheduling Order and Notice to appear in addition to the reasons stated on the record." The order further states that the pelletizing equipment "is considered abandoned." The hearing transcript does not identify any other reasons for dismissal.

On August 13, 2009, plaintiff, represented by local counsel, filed a "motion to set aside default," including an affidavit from plaintiff's president stating that he had no actual knowledge of the settlement conference and blaming plaintiff's former counsel for the lack of knowledge about scheduling. According to the affidavit, plaintiff had been negotiating a settlement in good faith with defendant, and dismissal of the complaint was too harsh a sanction where plaintiff could prove it owned the equipment. At the motion hearing, plaintiff's counsel, citing MCR 2.401(G), argued that, "[i]t would be manifest injustice to have someone else end up being the owner" just because of missing a settlement conference.

The court found plaintiff culpably negligent in failing to attend the settlement conference, noting that plaintiff had notice of the existence of the scheduling order due to the motion and order regarding withdrawal of counsel. The court also found no manifest injustice, citing the fact that defendants were required to pay for cleanup of the site and that the equipment "sat there" until "finally something motivated plaintiff to file this lawsuit."

On appeal, plaintiff argues that allowing defendants to retain the equipment when plaintiff had no actual knowledge of the settlement conference would result in manifest injustice. Plaintiff asserts that the trial court should have considered a lesser sanction, and should have allowed plaintiff to present its president and the bill of sale that proved plaintiff was the proper owner of the equipment.

We review for an abuse of discretion a trial court's decision to dismiss a claim for failure to participate. *Schell v Baker Furniture Co*, 232 Mich App 470, 474; 591 NW2d 349 (1998), aff'd 461 Mich 502 (2000). An abuse of discretion occurs when the decision falls outside the principled range of outcomes. *Radeljak v Daimler-Chrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

The relevant court rule, MCR 2.401(G), sets forth the provisions for sanctioning a party that fails to attend a settlement conference:

> (1) Failure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B).
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> (2) The court shall excuse a failure to attend a conference or to participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that
>
> (a) entry of an order of default or dismissal would cause manifest injustice; or
>
> (b) the failure was not due to the culpable negligence of the party or the party's attorney.
>
> The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).

MCR 2.504(B)(1) also grants the trial court authority to dismiss a case for violation of the court rules or a court order.

There can be little doubt that the trial court's finding of culpable negligence is well within the principled range of outcomes. Plaintiff was well aware that it had no representation. A corporation may appear in a court proceeding only if represented by an attorney. *Peters Prod, Inc v Desnick Broadcasting Co*, 171 Mich App 283, 287; 429 NW2d 654 (1988). Had it been a defendant, and perhaps a bit muddled by the process, its failure to act might be more understandable. But this is the plaintiff, who chose to file suit, and then left defendants to incur legal expenses complying with the trial schedule while it sat and did nothing. Plaintiff had a history of ignoring the court's deadlines, failing to file a witness list, interrogatories, or an exhibit list. The trial court did not abuse its discretion when it found that plaintiff was culpably negligent in failing to attend the conference.

The trial court's finding of manifest injustice is not quite so black-and-white. There is no evidence that plaintiff had anything to do with the mess left on defendants' land. Nor is there any indication that either party was aware of plaintiff's connection with the suit between defendants and C & V at the time that earlier litigation occurred. It appears that both parties are coming up short because of the actions of C & V, and the trial court could have taken proofs and fashioned a more even-handed remedy. However, that is the purpose of conducting a settlement conference, which plaintiff failed to attend. This is not a case where the party is getting stuck

because it trusted its attorneys; plaintiff chose to remain unrepresented at the same time representation was required for it to pursue its claims. The fact that plaintiff made so little effort to recover its equipment does not support a conclusion that this outcome was beyond the principled range of outcomes.

Moreover, there is no manifest injustice in dismissing the suit because, despite plaintiff's president's affidavit that plaintiff had purchased the equipment, nothing plaintiff presents refutes defendants' assertion that the equipment was abandoned. Plaintiff waited years to claim ownership, and this lack of diligence carried over into the way it conducted its suit. Plaintiff has only its own inaction to blame for its suit being dismissed.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto