

STATE OF MICHIGAN
COURT OF APPEALS

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.,

UNPUBLISHED
March 13, 2012

Plaintiff-Appellant,

v

KERRY STEEL, INC.,

No. 300872
Oakland Circuit Court
LC No. 2009-104260-CK

Defendant-Appellee.

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that dismissed plaintiff's complaint with prejudice. For the reasons set forth below, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

The trial court dismissed plaintiff's case on the ground that plaintiff failed to comply with the court's order to file a joint trial binder with defendant. Pursuant to MCR 2.504(B)(1), "If a party fails to comply with [court] rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims." This Court reviews for an abuse of discretion a trial court's dismissal of a case for failure to comply with a court order. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.*

"Dismissal is a drastic step that should be taken cautiously," *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995), and "should be reserved for the most egregious violations of the court rules," *Schell v Baker Furniture Co*, 232 Mich App 470, 477; 591 NW2d 349 (1998). "Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Vicencio*, 211 Mich App at 506-507. A trial court's failure to evaluate other options on the record is an abuse of discretion. *Id.* at 507. The non-exhaustive list of factors a trial court is required to consider on the record when dismissing a case, includes:

- (1) whether the violation was willful or accidental;
- (2) the party's history of refusing to comply with previous court orders;
- (3) the prejudice to the opposing party;
- (4) whether there exists a history of deliberate delay;
- (5) the degree of

compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio*, 211 Mich App at 507.]

Here, before it dismissed plaintiff's case, the trial judge acknowledged that plaintiff's counsel acted in good faith and emphasized that there was no professional misconduct by counsel. The only reason the judge cited for dismissing the case with prejudice was that "plaintiff's client has not shown cause" for the failure to comply with the court's order to file a joint trial binder. The trial judge did not consider any court rule or case law and, importantly, the court did not consider the *Vicencio* factors and did not "carefully evaluate all available options on the record" before it imposed the drastic sanction of dismissal. *Vicencio*, 211 Mich App at 506-507.

The record reflects that the parties disagreed about various discovery issues and that plaintiff or its counsel may have caused some prior discovery delays. However, plaintiff's counsel explained to the court that he was attempting to settle the case. He also stated that this delayed his work on trial material related to at least one settling party. Further, while defendant independently submitted a trial binder to the court, the record does not establish that either side cooperated to make a "joint" binder as required by the order.

The record does not establish whether the noncompliance with discovery orders was wilful or deliberate, and whether defendant was prejudiced by the failure to submit the binder in this instance. The court did not evaluate on the record whether plaintiff's request for an adjournment to complete the joint binder was a reasonable option or whether lesser sanctions would have sufficed, such as not allowing plaintiff to introduce certain evidence, taking certain facts as established, or ordering plaintiff to pay defendant reasonable expenses for the delay.

Again, without the trial court's consideration of the *Vicencio* factors and the available alternative remedies, dismissal of the case with prejudice for this discovery violation was especially harsh, and constituted an abuse of discretion. Accordingly, we vacate the trial court's order of dismissal and remand for the trial court to conduct further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly