NO. COA01-1078
NO. COA01-1080

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2002

LARRY EDMOND STAMM,
Plaintiff

v.

Iredell County
No. 2000 CVS 176

CLIFFORD E. SALOMON, TERI J. SALOMON, and SALOMON OF IREDELL COUNTY, INC.,
Defendants

Appeal by defendants from an order entered 10 March 2001 by Judge Sanford L. Steelman, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 13 August 2002.

No. COA01-1078 and No. COA01-1080 present common questions of law and all three defendants are appealing from the same order. Therefore, on its own initiative, this Court consolidated these cases for hearing pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure. Consequently, we address both appeals in this opinion.

Homesley, Jones, Gaines, Homesley & Dudley, PLLC, by Clifton W. Homesley and Kevin C. Donaldson, for plaintiff-appellee.

Robert K. Trobich for defendant-appellant Salomon of Iredell County, Inc.

Clifford E. Salomon and Teri J. Salomon, defendant-appellants, pro se.

HUNTER, Judge.

Clifford E. Salomon, Teri J. Salomon, and Salomon of Iredell County, Inc. ("defendants") appeal from an order striking their answers and counterclaims and entering a default judgment against each defendant as sanctions for noncompliance with a prior court's order compelling the parties to respond to discovery. We conclude the trial court did not abuse its discretion in imposing these severe sanctions and accordingly affirm.

The procedural history of this case is briefly summarized as follows. Larry Edmond Stamm ("plaintiff"), filed a complaint on 26 January 2000 alleging causes of action for fraudulent conveyance, punitive damages, and attorney's fees against defendants. Defendants filed answers and counterclaims to which plaintiff filed replies. Plaintiff served his first set of interrogatories and request for production of documents on all defendants on 23 June 2000. Defendants' responses to these interrogatories and request for production of documents were served upon plaintiff in August of 2000. Subsequently, on 5 September 2000, plaintiff filed a motion to compel, a motion for sanctions, and a motion for attorney's fees pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. Judge Michael E. Beale issued an order on 4 December 2000, compelling defendants to answer certain interrogatories and produce particular documents by 31 January 2001, as well as ordering each defendant to pay $500.00 by 31 December 2000 for plaintiff's attorney's fees incurred in handling the motion to compel. In this order, the court also relieved defendants of their obligation to answer some of plaintiff's interrogatories and requests for

production of documents because they were overly broad and unduly burdensome. Additionally, as a sanction, defendants were ordered to pay for the costs of reproduction and delivery of the requested discovery.

On 26 January 2001, defendants, Clifford E. and Teri J. Salomon, served plaintiff with discovery responses pursuant to the 4 December 2000 order and sent a $1,000.00 check for the attorney's fees, which was past due. Defendant Salomon of Iredell County, Inc., served its discovery responses pursuant to the court's order in February of 2001, which was after the 31 January 2001 deadline. From the record, there is no indication that defendant Salomon of Iredell County, Inc. ever paid its $500.00 in attorney's fees in compliance with the 4 December 2000 order.

On or about 16 February 2001, plaintiff filed separate motions for sanctions and attorney's fees against all three defendants for noncompliance with Judge Beale's order compelling them to respond to discovery. After a hearing on the motions, the presiding judge, Judge Sanford L. Steelman, Jr., entered an order striking the answers and counterclaims of all defendants, and entering a default judgment against each defendant as sanctions for discovery violations. Defendants appeal.

I.

Defendants initially argue the trial court erred in striking their answers and counterclaims and entering default judgments against them for discovery violations, since according to defendants, they complied to the fullest extent possible with the

trial court's prior order compelling them to respond to plaintiff's discovery requests.

At the outset, Rule 37(b)(2) of the North Carolina Rules of Civil Procedure provides that "[i]f a party . . . fails to obey an order to provide or permit discovery . . ." a trial court is permitted to enter a default judgment against the disobedient party, strike out pleadings or parts of pleadings, and require the disobedient party to pay reasonable expenses, including attorney's fees caused by the disobedient party's failure. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2001). "Sanctions under Rule 37 are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion." *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995). In order for this Court to reverse a trial court for abuse of discretion, there must be "a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Further, in referring to Rule 37 sanctions, this Court has stated: "Sanctions directed to the case's outcome, including default judgments and dismissals, although reviewed according to the abuse of discretion standard, are to be evaluated in light of the leading policy concern surrounding discovery rules, which is to encourage trial on the merits." *Lincoln v. Grinstead*, 94 N.C. App. 122, 124-25, 379 S.E.2d 671, 672 (1989). Before striking a party's answer and rendering a judgment by default, the trial court must consider less severe sanctions. *Cheek v. Poole*, 121 N.C. App. 370,

465 S.E.2d 561 (1996); *Goss v. Battle*, 111 N.C. App. 173, 432 S.E.2d 156 (1993). Additionally, if a party is unable to answer discovery requests due to circumstances beyond its control, it is exempt from Rule 37 sanctions. *Laing v. Loan Co.*, 46 N.C. App. 67, 264 S.E.2d 381 (1980).

In the case *sub judice*, the trial judge found the following with regard to defendants, Clifford E. and Teri J. Salomon:

> 11. The defendants, Clifford E. Salomon and Teri J. Salomon, failed to provide documents requested in requests for production 4, 5, 6, 7, 8 & 9 as ordered by Judge Beale. With respect to request 4, the individual defendants stated that they did not have these records, because they had thrown them out. This response was made despite clear and unequivocal language in Judge Beale's order that they were [sic] provide these documents to the plaintiffs. The individual defendants did produce a fax of a letter from their bank, dated February 28, 2001, stating that it would cost $2,500 to get copies of these records. No evidence was produced whatsoever that the individual defendants attempted to obtain these records prior to February 28, 2001, which was a full two months after the deadline imposed by Judge Beale's order. Counsel for the individual defendants advised the court that it was unlikely that the individual defendants would be able to produce the documents in response to request for production 4. With respect to request 5, it is clear that the individual defendants made several loans in Iredell County, yet failed to produce the documents as required by Judge Beale's order. Nothing was produced by the individual defendants in response to requests for production 6-9. The failure of the individual defendants to comply with the terms of Judge Beale's order was without justification or excuse. The imposition of sanctions against the individual defendants is appropriate in this matter.

The trial court made an additional finding of fact concerning defendant Salomon of Iredell County, Inc. which reads:

> 12. The corporate defendant, Salomon of Iredell County, Inc., failed to answer interrogatories 5, 9 and 10 as ordered by Judge Beale. With respect to interrogatory 5, the corporate defendant was required to "list all bank accounts . . ." Instead of doing this, the corporate defendant purported to answer by attaching bank statements. This was an insufficient response. With respect to interrogatory 9, the corporate defendant failed to produce the corporate records and stated that the records were lost in a move to Ohio. The corporate defendant answered that it "may" attempt to construct the corporate records, but apparently made no attempt to do so, and made no prediction as to when or if this might ever be done. This was an insufficient response. With respect to interrogatory 10, the corporate defendant referred to its answer to interrogatory 9, to the bylaws, and to information already provided to counsel. Judge Beale previously found that the original responses were insufficient. The corporate defendant clearly has no regard for this Court or its orders to answer the discovery in such an evasive and contemptuous manner. The failure of the corporate defendant to comply with the terms of Judge Beale's order was without justification or excuse. The imposition of sanctions against the corporate defendant is appropriate in this matter.

After thoroughly reviewing the record, we conclude that, with one minor exception, the trial court's findings of fact number eleven and twelve are supported by the evidence. In finding of fact eleven, Judge Steelman noted that there was no evidence that defendants Clifford E. and Teri J. Salomon attempted to obtain particular bank records prior to 28 February 2001, two full months after the deadline imposed by Judge Beale's order. We acknowledge that 28 February 2001 was only one month after Judge Beale's set

deadline (31 January 2001) for defendants to produce the documents. However, this slight inaccuracy has no impact on our analysis.

In its order the trial court noted that it considered all of the lesser sanctions available to it under the provisions of Rule 37, as is required, but that it nevertheless determined that the severe sanctions imposed were necessary and appropriate. We conclude that defendant has failed to show that the court's "ruling was so arbitrary that it could not have been the result of a reasoned decision." *Hursey*, 121 N.C. App. at 177, 464 S.E.2d at 505. Thus, there was no showing of an abuse of discretion. It appears from the record that none of defendants fully complied with Judge Beale's order compelling them to answer discovery and therefore, it was within the trial court's discretion to strike their answers and counterclaims and enter a default judgment against them pursuant to Rule 37.

II.

Defendants next contend the trial court improperly considered discovery matters in another proceeding not before the court. Defendants recite the following dialogue which occurred during the hearing and assert that it provides proof that the trial court may have allowed its decision to be swayed by proceedings in another matter:

> THE COURT: Is this an outgrowth of the same case that I entered a rather stiff discovery order in?
>
> MR. HOMESLEY: Yes, your Honor.
>
> THE COURT: A while back?

> MR. HOMESLEY: The original case is the one you entered a discovery order in, in the original case; and in fact, in that case --
>
> THE COURT: I was behind Judge Beale's order in that case, wasn't I?
>
> MR. HOMESLEY: It may have been. That's right.
>
> THE COURT: All right.
>
> MR. LAMBETH: Not the case we're involved in.
>
> THE COURT: No, this was the original case. I just remember there was [sic] some severe problems getting discovery in that case that required some rather onerous sanctions to be imposed to getting discovery done.
>
> MR. LAMBETH: My clients were not involved in that case at all.
>
> THE COURT: I understand. But you're representing the Salomon of Iredell County, too, aren't you?
>
> MR. HAMEL: No, your Honor. I am Bill Hamel and I haven't had an opportunity to be heard.
>
> THE COURT: Okay. That's fine.

We note that there is no evidence in the trial court's order nor in the hearing transcript that the court considered a previous proceeding in reaching its decision to impose sanctions on defendants for discovery violations. The dialogue recited by defendants merely shows that the trial judge mentioned a previous case at one point during the hearing. We conclude there is no proof that the discovery matters in another case had any impact on the trial court's order. Therefore, this assignment of error is overruled.

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

Report per Rule 30(e).