

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1947

Cir. Ct. No. 2007CV2379

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WISCONSIN COMMUNITY BANK,

PLAINTIFF-RESPONDENT,

V.

**ALTA CONSTRUCTION, INC., JUPITER DRIVE TD, LLC, DUBLIN HOUSE, LLC,
SOUTHERN WISCONSIN STRUCTURAL CONCRETE, INC. AND BRIAN CASON,**

DEFENDANTS-APPELLANTS,

**SCULLION & SONS MASONRY, RICHARDSON INDUSTRIES, INC. AND
CATERPILLAR FINANCIAL SERVICES CORP.,**

DEFENDANTS,

BURSE SURVEYING AND ENGINEERING, INC.,

INTERVENOR.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Alta Construction, Jupiter Drive TD, Dublin House, Southern Wisconsin Structural Concrete and Brian Cason appeal from a judgment granting Wisconsin Community Bank's foreclosure and replevin claims against them following a trial to the court. They challenge pretrial orders which dismissed their affirmative defenses and counterclaims as a discovery sanction and permitted counsel to withdraw. We affirm for the reasons discussed below.

BACKGROUND

¶2 Cason is the principal officer of Alta Construction, Jupiter Drive TD, Dublin House, and Southern Wisconsin Structural Concrete, which are companies involved in various construction and real estate ventures. Wisconsin Community Bank filed suit against Cason and his companies (collectively Cason), alleging that they were in default on multiple loans. Cason filed a counterclaim, and then an amended counterclaim, raising various claims and affirmative defenses including misrepresentation, breach of contract, breach of good faith and breach of fiduciary duty.

¶3 The bank served a first set of interrogatories and requests for documents in November 2007, asking Cason to explain how any of the alleged misrepresentations by the bank had caused him to default, to identify what the reasons for nonpayment were, and to produce accounting records showing amounts owed and paid on the various loans. Despite multiple requests from counsel by letter, email and phone, Cason never provided the requested answers.

When the bank asked Cason at his deposition in January 2008 what damages he was claiming were caused by the bank, Cason responded that his advisors were still working on putting those numbers together. He named Tom Ebbers and John Matthews as his experts.

¶4 The bank served Cason with a second set of interrogatories in April 2008. Questions 8 and 9 of this set of interrogatories similarly asked Cason to identify certain expenditures he claimed to have made in reliance upon alleged misrepresentations. Cason provided some discovery in response to the second set of interrogatories, but did not answer the questions about his alleged damages. Eventually, the bank moved to compel discovery, and the court ordered Cason to provide responses to Questions 8 and 9 by May 21, 2008.

¶5 Cason provided a supplemental response which the bank still considered to be incomplete and insufficient. Cason suggested that the bank could obtain a more detailed accounting from his accounting expert, Ebbers, during his deposition. However, Cason did not schedule Ebbers or his other expert, Matthews, for a deposition until after the bank filed a motion to dismiss on May 23, 2008, based on the continued failure to provide discovery.

¶6 Meanwhile, Alta Construction filed a petition in bankruptcy on May 29, 2009. The parties sought clarification as to whether scheduled depositions could continue, and the court ruled the same day that depositions of Ebbers and Matthews could go forward. However, at Ebbers' deposition the following day, Cason again argued that discovery was stayed. The deposition was adjourned while the parties received an expedited ruling from the bankruptcy court that the stay applied only to the named debtor, and furthermore did not apply to any counterclaims being affirmatively pursued by Alta Construction. Nonetheless,

at the continued deposition later on May 30, 2008, Ebbers was again advised by counsel that he should not answer any questions relating to Alta Construction. In addition, Cason himself threatened Ebbers with litigation if he did not answer the way Cason wished.

¶7 On June 2, 2008, the bank filed an amended motion to dismiss Cason's counterclaims and affirmative defenses, or to compel discovery and require Cason to permit the deposition of Ebbers. At a hearing held on June 4, 2008, the court found that despite having identified Ebbers as his expert in December 2007, and having deferred questions about damages to him, Cason had not retained Ebbers as an expert for trial or asked Ebbers to do anything other than provide tax returns until the middle of May 2008, for a trial that had been rescheduled from March to June. The court further found that the supplemental answers to the interrogatories which Cason had provided in response to the court's order compelling discovery were "in no way even close to responsive," and provided nothing that would allow the bank to understand what damages were being claimed or prepare a defense to the counterclaim. The court also accepted the bank's assertions that both Cason and counsel had directed Ebbers not to answer key questions at his deposition, notwithstanding the plain orders of two courts that the bankruptcy stay did not apply. In addition, the court noted that various positions Cason had taken throughout the litigation lent "significant credence to the notion" that he was engaged in a process of delay.

¶8 The court concluded that Cason had violated discovery statutes as well as the court's orders, and that it was "within a quarter of an inch" of determining that Cason's conduct had been sufficiently egregious to warrant drastic sanctions such as dismissal or barring the defendants' experts from testifying. However, the court decided instead to impose a monetary sanction and

award the bank its costs and attorney fees relating to its efforts to compel discovery, and to give Cason one last chance to provide without further obstruction the long-sought answers regarding what damages he was claiming. It cautioned that any further noncompliance would in all likelihood result in the dismissal of the counterclaim.

¶9 On June 5, 2008, Lawton & Cates moved to withdraw as counsel for Cason and his companies, asserting a conflict of interest as well as a breakdown in their relationship with their client. In addition to detailing strained communications and Cason's failure to cooperate with respect to providing information about damages, counsel also noted that Cason had filed an affidavit in bankruptcy court blaming Lawton & Cates for his need to seek a stay of circuit court proceedings.

¶10 At the next hearing held on June 6, 2008, the bank reported that depositions of Ebbers and Cason had gone forward, but that Cason had refused to sign a supplemental response to Interrogatories 8 and 9 prepared by Ebbers. Cason explained that he refused to signed the document because he did not agree with its content. Cason acknowledged that he still hadn't provided complete or accurate answers to the second set of interrogatories, but maintained that was the result of failures by his expert witness and attorneys rather than his own fault. However, the court found that Cason himself was the only one who could have provided the detailed information necessary to answer the interrogatories, and that he had produced only generalities about lost profits. In addition, the court found that many of Cason's attempts to blame his attorneys were simply not credible. Rather, the court determined that the ongoing discovery violations were in large part attributable directly to Cason. The court concluded that the continued violations were egregious because Cason should have known from the time the

first set of interrogatories were posed and his deposition was taken that he needed to assemble information relating to his claims for damages, but had refused to cooperate with his own expert's efforts to obtain the necessary information. Accordingly, the court granted the motion to dismiss, but withdrew its prior imposition of a monetary sanction.

¶11 With respect to the withdrawal motion, Cason acknowledged that “[t]here most certainly [was] a very serious personality conflict” between himself and one of his lead attorneys; that they had several serious arguments over the past three months; that he was no longer willing to meet with his attorneys or respond to their emails; and that he hadn’t informed them that he was going to file bankruptcy due to “a total lack of communication and trust.” The circuit court permitted counsel to withdraw, nineteen days before the trial.

¶12 The matter proceeded to a trial before the court, at which Cason and his companies remained unrepresented. The court granted judgment in the bank’s favor. Cason and his companies appeal the dismissal of their counterclaim and affirmative defenses and counsel’s withdrawal.

STANDARD OF REVIEW

¶13 A circuit court has broad discretion to impose sanctions in response to a discovery violation. *Sentry Ins. v. Davis*, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553. A wide range of sanctions are available, up to and including the dismissal of an action or any part thereof. WIS. STAT. § 804.12(2)(a)3. (2007-08).¹ In order to warrant dismissal, however, there must be

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

a showing that the conduct was egregious and without any clear and justifiable excuse. *Sentry Ins.*, 247 Wis. 2d 501, ¶20. We will uphold the court's imposition of a discovery sanction so long as the record shows that the court applied the proper standard of law to the relevant facts using a demonstrated rational process to reach a reasonable conclusion. *Id.*, ¶19.

¶14 A motion by retained counsel to withdraw is also directed to the sound discretion of the circuit court. *State ex rel. Dressler v. Circuit Court for Racine County*, 163 Wis. 2d 622, 632, 472 N.W.2d 532 (Ct. App. 1991).

DISCUSSION

Discovery Sanction

¶15 Cason argues that the circuit court erroneously exercised its discretion in dismissing his counterclaim and affirmative defenses because: (1) his conduct was not egregious; (2) he had a justifiable excuse for failing to respond to certain discovery requests; and (3) the court failed to consider less harsh sanctions. We address each contention in turn.

¶16 First, we agree with the circuit court that Cason's conduct was, in fact, egregious. Cason told the bank in December 2007 that his experts were assembling the requested information on damages, but did not even ask his expert to do so until May 2008, after the initial March trial date had been rescheduled for June. He subsequently directed his expert to refuse to answer questions at a deposition in violation of orders from both the circuit court and bankruptcy court. And even after being given one last chance to provide the requested discovery just days before trial, Cason refused to verify his expert's interrogatory response regarding the damages he was seeking on his counterclaim and instead

acknowledged that the information provided by his expert was inaccurate and incomplete. The fact that Cason had finally provided some other long-sought discovery does not excuse the egregiousness of his continued failure to answer the remaining interrogatory questions. As the circuit court noted, the sought information on damages did not relate to some peripheral issue, but was central to the counterclaim. The bank could not possibly prepare a defense without knowing how Cason was alleging that he had been harmed.

¶17 Cason argues that he had a justifiable and good faith reason for refusing to verify the interrogatory responses prepared by his expert—namely, that he did not believe that they contained complete and accurate information. Cason conveniently ignores the court’s finding that the reason the expert’s responses were incomplete and inaccurate was that Cason himself had failed, over a period of months, to provide his expert with the information necessary to prepare the responses. There was no justifiable excuse for Cason’s failure to have gathered and provided information on alleged damages to his expert before the eve of trial, despite months of discovery attempts. Rather, Cason’s final failure was part of a clear pattern of dilatory and bad faith conduct throughout the litigation.

¶18 Finally, Cason’s contention that the circuit court failed to consider less harsh sanctions is entirely disingenuous considering that the court first imposed a lesser sanction, and warned Cason that any further obstruction would lead to dismissal. In sum, the court gave Cason multiple opportunities to provide the requested discovery, and reasonably determined that dismissal of the counterclaim was an appropriate sanction based on Cason’s egregious and unjustified failure to do so as the trial date approached.

Withdrawal of Counsel

¶19 The Rules of Professional Conduct for Attorneys set out a number of situations in which counsel shall or may terminate a client's representation. SCR 20:1.16 (2009).² One of the mandatory bases for withdrawal is when continued representation will result in a violation of the Rules of Professional Conduct. SCR 20:1.16(a)(1). In this case, Cason had made allegations which placed him in a position adverse to counsel with respect to the bankruptcy proceeding as well as the discovery violations. Therefore, there was a significant risk that counsel's continued representation would be materially limited by the firm's own interests, in violation of the conflict of interest rule set out in SCR 20:1.7(a)(2). The circuit court properly exercised its discretion when it determined that there were grounds for withdrawal and that Cason would have a reasonable opportunity to obtain successor counsel with nineteen days remaining before trial.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

² All references to the Supreme Court Rules are to the 2009 version unless otherwise noted.

