DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AREK FRESSADI, an unmarried man, Plaintiff/Appellant, v. TOWN OF CAVE CREEK, an Arizona municipality; JOCELYN L. KREMER, a single woman; MICHAEL GOLTEC, a married man; and REAL ESTATE EQUITY LENDING, INC., an Arizona corporation, Defendants/Appellees.	1 CA-CV 11-0051 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-050924

The Honorable Robert A. Budoff, Judge

AFFIRMED

Arek Fressadi — Tucson
Plaintiff/Appellant, *in propria persona*

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K E S S L E R, Judge

¶1 Plaintiff/Appellant Arek Fressadi appeals the superior court's dismissal of his complaint pursuant to Rules 16(f) and 37(b)(2)(C) of the Arizona Rules of Civil Procedure ("Rules"). For the following reasons, we affirm the dismissal of Fressadi's complaint.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In February 2009, Fressadi filed a five-count complaint against Defendants/Appellees Jocelyn Kremer, Michael Goltec, Real Estate Equity Lending, Inc. ("REEL"), and the Town of Cave Creek ("the Town").[1] Kremer, Goltec, and REEL own properties adjacent to property owned by Fressadi, and Fressadi claimed that certain construction on their lots violated town ordinances. He sought an order requiring the Town to enforce the ordinances, and he alleged claims of nuisance, negligence, trespass, and sought an injunction against the other Defendants.

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[1] Goltec has not appeared in this appeal. In the exercise of our discretion, we do not consider his absence to be a confession of error in the superior court. *Evertsen v. Indus. Comm'n*, 117 Ariz. 378, 383, 573 P.2d 69, 74 (App. 1977), *approved and adopted by the supreme court*, 117 Ariz. 342, 572 P.2d 804 (1977).

¶3 The parties telephonically appeared at a comprehensive pretrial status conference in December 2009.[2] At the beginning of the conference, Fressadi's counsel was permitted to withdraw. When counsel disconnected, so did Fressadi. Upon realizing this, the court recessed the hearing and reconvened with Fressadi present.[3] During the conference, the court inquired about the feasibility of settlement, and set several deadlines for discovery, disclosure, and dispositive motions. The court also ordered the parties to appear in person at the next pretrial conference to schedule a trial date. The minute entry reflects in bold text:

> IT IS FURTHER ORDERED setting a status conference on November 16, 2010, at 8:30 a.m. before this Court. All parties and counsel shall appear in person for the status conference. The purpose of the conference will be to schedule a trial date if the case is not yet resolved by that time.

¶4 Several months later, Fressadi filed a motion wherein among other things, he sought to correct the December 2009 minute entry, add another defendant, and requested that the

[2] Although the conference was not recorded, it was memorialized in a minute entry.

[3] Upon reconvening Goltec was no longer present.

court reconsider ordering a mandatory settlement conference.[4] In the same motion, Fressadi also sought sanctions against the Defendants, arguing that they were non-compliant with the "good faith provision of Rule 16(f)," seeking to prohibit them from introducing evidence of variance permits, and requesting a default judgment against them "pursuant to Rule 37(b)(2)(B) and (C)." He argued that his case was "primarily a request of Mandamus for the Town to enforce its zoning ordinances" and that the Defendants "were not interested in settlement because if variances conveniently remove all the zoning ordinance violations; there is no need for a settlement conference."

¶5 The court denied Fressadi's request to correct the record and for sanctions, but ordered a mandatory settlement conference.[5] In the same minute entry, the court reaffirmed the pretrial conference order requiring the parties to appear in person on November 16, 2010, at 8:30 a.m. to set a trial date.[6]

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[4] The December 2009 minute entry states that Goltec and the Town made statements that convinced the court a settlement conference would not be successful. Fressadi's motion stated that he was not on the telephone when the comments were made and claimed that they "lacked candor."

[5] The court also allowed Fressadi to file an amended complaint to add another party. Fressadi's amended complaint was later stricken because it contained matters beyond the scope of the court's ruling and beyond the scope of his original complaint.

[6] In October 2010, the court granted Kremer's motion for partial summary judgment.

¶6 Fressadi failed to appear at the November 16 conference. After waiting fifteen minutes, the court began the conference. The court noted that Fressadi did not appear and that he did not contact the court to say he could not be present. The court also noted that the December 11, 2009 order instructed all parties to appear in person at the November conference.

¶7 The court examined Rule 16(f), and inquired whether the Defendants were seeking sanctions. The Defendants moved to strike Fressadi's complaint and for dismissal under Rules 16(f) and 37(b)(2)(C).[7] The court invited the Defendants to support their requests by stating why the sanction of dismissal, as opposed to other sanctions, was warranted. The court acknowledged that: "Dismissal . . . is, of course, the most onerous of all of the potential sanctions. And I believe that the comments to the rule say that that particular sanction should only be imposed under the most egregious of circumstances."

¶8 The Defendants detailed their individual circumstances. According to Kremer, Fressadi's litigation conduct was egregious, and showed that he was trying to extract a settlement from her. She explained that Fressadi was also

[7] Goltec did not appear at the hearing.

suing her in another lawsuit regarding a sewer line that served her property. One month prior, Fressadi allegedly severed the sewer line, causing Kremer to have to stay in a hotel for weeks until the line could be reconnected. Kremer also asserted that Fressadi removed forty tons of dirt from the base of a retaining wall for an elevated driveway that runs through her property and serves the other Defendants, and the wall collapsed. In addition, Kremer asserted that Fressadi failed to disclose expert witnesses or opinions, and noted that his disclosures were "about a thousand pages of the same material every time."[8] Kremer claimed that Fressadi was simply trying to make her expend money by paying her attorney for the time it took to review non-responsive documents.

¶9 The Town stated that it was also involved in other lawsuits initiated by Fressadi.[9] It said it recently filed a dispositive motion in another action, and planned to file one in the instant matter. The Town asserted that Fressadi's only claim against it was to enforce its ordinances, but that it was

[8] Kremer mentioned her successful motion for partial summary judgment and noted that she recently filed another such motion. She maintained that if her second motion was successful, Fressadi would be left with only a trespass claim against her and that he had not disclosed damages.

[9] In its response to Fressadi's motion for sanctions, the Town asserted that Fressadi initiated three other lawsuits against the Town and various other defendants and was trying to add the Town to a fourth lawsuit that was four years old.

doing so. The Town claimed that Fressadi did not have any legal recourse against any of the Defendants and asserted that Fressadi's claims were also time-barred. Additionally, the Town stated that a different lawsuit involved Fressadi's sewer line, but that Fressadi wanted the Town to pay for installation of his sewer line in this case. It argued that Fressadi's conduct showed that he was filing lawsuits for no purpose other than to extract settlement money from the Defendants.

¶10 REEL stated that it became an owner of its property at a trustee sale and had since been sued by Fressadi in four separate lawsuits. According to REEL, Fressadi's claims were meritless because he claimed that REEL exceeded the "allowable lot disturbance" despite the fact that REEL obtained a variance permit. REEL asserted that Fressadi appealed the issuance of the variance permit and lost, but had since filed another appeal to prolong the process. To that end, REEL claimed that during a deposition, it discovered that Fressadi made disparaging remarks about its property to a potential buyer. REEL argued Fressadi's actions showed he was trying to prolong the process and prevent REEL from getting a certificate of occupancy and selling the house. REEL also discussed the effect of the destroyed sewer

connection and the collapsed driveway serving its property.[10] REEL asserted that Fressadi was simply exerting financial pressure on it by forcing it to defend multiple actions and incur attorneys' fees. REEL opined that because Fressadi represented himself, he did not have the same pressure.

¶11 The superior court ruled:

> Upon motion of respective appearing counsel, and the Court finding that plaintiff has not appeared at today's proceeding, and in accordance with the provisions of Rule 16(f) and 37(b)(2)(C) of the Rules of Civil Procedure, it is ordered dismissing the plaintiff's Complaint in this action in full with prejudice.

The court further stated:

> As previously noted, this matter was properly noticed in the presence of Mr. Fressadi. It was scheduled to begin at 8:30. The Court waited until . . . 8:45 to begin. It is 9:02 and Mr. Fressadi has still failed to appear or contact the Court. This mere failure to participate alone warrants sanctions in accordance with the rule. Additionally, respective counsel have set forth other reasons on the record that support substantively their motion to dismiss being granted. The Court finds there is no just reason for delay and entry of this judgment of dismissal pursuant to Rule 54(b), judgment will so be entered.

¶12 Thereafter, Fressadi did not file anything with the court seeking to explain or defend his absence. Instead, he

[10] Before argument on the motion for sanctions, REEL informed the court that it hired a structural engineer and needed additional time to assess further disclosure material.

timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2011).[11]

ISSUES ON APPEAL AND STANDARD OF REVIEW

¶13 Although unclear, we construe Fressadi's argument on appeal to be that the superior court abused its discretion by: (1) failing to hold an evidentiary hearing or make express findings regarding whether Fressadi was at fault for his failure to comply with the court's scheduling order; and (2) failing to determine whether lesser sanctions were appropriate.

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[11] In March 2011, we stayed this appeal because of the automatic stay issued in Fressadi's bankruptcy proceedings. We ordered Fressadi to file a written notice regarding the status of that stay by August 1, 2011, but he did not do so. Instead, he filed a notice that he was removing his appeal from this Court to the bankruptcy court. We issued an order informing him that this Court does not remove cases to the United States Bankruptcy Court, but rather stays the proceedings as was done in March 2011.

In July 2011, Fressadi filed his opening brief. Also in July 2011, the bankruptcy court dismissed Fressadi's bankruptcy case. In August 2011, the bankruptcy court continued a stay until September 2, 2011 to allow Fresadi to obtain a stay from the federal appellate court. On September 16, 2011, Kremer filed an answering brief and we terminated the stay of this appeal. We also permitted Kremer to supplement the record on appeal with the transcript from the pretrial conference Fressadi failed to attend. On October 17, 2011, Fressadi filed a motion for reconsideration and among other things asked us to take judicial notice of certain public records and his amended complaint in another matter. We denied the other requests in his motion. The Bankruptcy Appellate Panel dismissed his appeal in December 2011. We now deny Fressadi's motion to take judicial notice of documents regarding property ownership and his amended complaint in another matter because they are immaterial to our decision in this case.

¶14 We will uphold a sanction dismissing an action unless the record reflects an abuse of discretion. *See Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 153, ¶ 40, 211 P.3d 16, 31 (App. 2009) (stating standard of review in a non-discovery violation case); *see also Lenze v. Synthes, Ltd.*, 160 Ariz. 302, 305, 772 P.2d 1155, 1158 (App. 1989) (stating standard of review in a discovery violation case). "A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or 'the record fails to provide substantial evidence to support the trial court's finding.'" *Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007) (quoting *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982)).

DISCUSSION

I. Dismissal under Rule 16(f).

¶15 When a party "fails to obey" a superior court's scheduling order or other pretrial order, or fails to appear at a scheduled conference, Rule 16(f) requires that the superior court "shall, except upon a showing of good cause, make such orders . . . as are just." Ariz. R. Civ. P. 16(f); *see id.* at comm. cmt. ("The sanctions are mandatory upon the finding by the court that Rule 16 has been breached."). Rule 16(f) was

designed to give the court discretion to consider the full array of sanctions provided by the civil rules and specifically authorizes the court to impose sanctions as prescribed by Rule 37(b)(2)(C) including dismissing an action. Ariz. R. Civ. P. 16(f) cmt. (noting that "[t]his rule expands sanctions available . . . for non-compliance . . . [and] [i]t makes available . . . any and all of the sanctions available under the rules").

¶16 Although our precedent governing dismissal as a sanction under Rule 37 does not squarely govern the circumstances here, it provides some guidance. *See Green*, 221 Ariz. at 153-54, ¶¶ 41-45, 211 P.3d at 31-32 (acknowledging that there "is little Arizona law outside the discovery context that affords guidance on what factors a trial court must consider," applying federal and state law governing dismissal as a sanction for discovery violations to review due process considerations, and compiling non-exclusive list of factors for a court to consider before dismissing an action for disobeying other court orders); *see also Neufeld v. Neufeld*, 172 F.R.D. 115, 118 (S.D.N.Y. 1997) (recognizing that the standards applied when imposing dismissal under Rule 37 of the Federal Rules of Civil Procedure are appropriate to use when dismissing a case under Rule 16(f) of the Federal Rules of Civil Procedure because "Rule 16(f) incorporates portions of Rule 37").

¶17 When a court dismisses a case or enters default judgment as a sanction for discovery violations, we have recognized that the court's discretion is more limited than when imposing lesser sanctions and is "circumscribed by due process considerations." *Lenze*, 160 Ariz. at 305, 772 P.2d at 1158. Nonetheless, a "discretionary exercise of power within those limits is entitled to deference on appeal." *Id.*

¶18 Here it is undisputed that Fressadi violated a valid scheduling order and that he did not inform the court about his inability to comply with the order. There is no record evidence that Fressadi attempted to demonstrate "good cause" for failing to appear at the conference. Thus, sanctions were mandatory under Rule 16(f).

¶19 In his opening brief, Fressadi does not dispute that three of five generally recognized factors normally supporting dismissal as a sanction have been met or are not in dispute: the court's need to manage its docket, the public's interest in resolving litigation on a timely basis, and prejudice to a party

from delays in resolving litigation.[12] However, citing federal and Arizona cases addressing dismissal for discovery violations, Fressadi suggests that the court failed to hold a hearing to determine that he was at fault and failed to consider and make findings that lesser sanctions were insufficient before dismissing his case. We disagree.

II. A hearing to determine Fressadi's fault for non-compliance with the court's order was unnecessary under these circumstances.

¶20 Dismissal as a sanction is inappropriate when a party does not have the ability to comply with an order, and thus, did not willfully fail to comply. *Societe Internationale Pour Participations Industrielles Et Commerciales S.A. v. Rogers*, 357 U.S. 197, 212 (1958) (determining that dismissal is not authorized when the "failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of

[12] The majority of Fressadi's brief discusses a five-factor test utilized by the Ninth Circuit to determine the propriety of a dismissal for failure to comply with a court order. Under that test a district court must weigh: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987) (citation and internal quotations marks omitted). Arizona courts have never explicitly adopted this test, although these factors and others have been deemed relevant to a court's inquiry before imposing dismissal as a sanction. *See generally Green*, 221 Ariz. at 153-54, ¶¶ 41-45, 211 P.3d at 31-32 (synthesizing state and federal law to compile a non-exclusive list of factors to consider before dismissing an action for a failure to comply with court orders).

petitioner"). For example, in *AG Rancho Equipment Co. v. Massey-Ferguson, Inc.*, our supreme court found it necessary to remand for a hearing to determine whether AG Rancho willfully failed to answer an interrogatory prior to the entry of default judgment. 123 Ariz. 122, 124, 598 P.2d 100, 102 (1979). A hearing was necessary because there was evidence that: counsel for the parties entered into an agreement for an "open extension of time" to answer interrogatories; AG Rancho's attorney was later terminated; AG Rancho met with opposing counsel to inform him it was seeking new representation; a motion to compel was never sought before the sanctions motion was filed; AG Rancho did not receive notice of the motion for sanctions; and before obtaining new counsel AG Rancho received a copy of the court's minute entry dismissing its answer and counter-claim. *Id*. at 122-23, 598 P.2d at 100-01. Therefore, the record was unclear that AG Rancho willfully failed to comply and a hearing was required to make that determination.

¶21 A hearing may also be necessary when it is unclear *who* is at fault—the party itself or counsel. *See Birds Int'l Corp. v. Arizona Maint. Co.*, 135 Ariz. 545, 547-48, 662 P.2d 1052, 1054-55 (App. 1983) (remanding for an evidentiary hearing when record was unclear about plaintiff's knowledge about a discovery order and whether violation was plaintiff's fault); *Lenze*, 160 Ariz. at 306, 772 P.2d at 1159 (finding a hearing necessary

because the "record . . . does not reveal whether any facts were raised before the trial court to indicate whether the failure to comply" was the fault of the party as opposed to counsel); *Robinson v. Higuera*, 157 Ariz. 622, 625, 760 P.2d 622, 625 (App. 1988) ("When questions arise as to a party's bad faith or willful misconduct in violating a discovery order," fundamental fairness requires an evidentiary hearing).

¶22 However, "due process does not require that a hearing be held in every case prior to imposition of . . . sanctions of dismissal" and where "willfulness or bad faith or fault of the party is clear from the record a hearing may not be necessary." *Robinson*, 157 Ariz. at 624, 760 P.2d at 624; *see also Hammoudeh v. Jada*, 222 Ariz. 570, 572, ¶ 7, 218 P.3d 1027, 1029 (App. 2009) ("such a hearing is not required when the facts are apparent from the record").

¶23 Assuming without deciding that a court must find a willful violation of an order before dismissing under Rule 16(f), the record before the superior court was sufficient for it to determine that Fressadi was at fault for a willful failure to obey court orders. The record clearly demonstrates that: (1) Fressadi had notice of the court's order as evidenced by the December 2009 and May 2010 minute entries; and (2) Fressadi represented himself and so his non-compliance with court orders was his alone. The record also supports the conclusion that

Fressadi was aware of the potential for dismissal as a sanction for failing to appear under Rule 16(f). He filed a motion based on Rules 16(f) and 37(b)(2)(C) against the Defendants that led to the court's May 2010 minute entry reaffirming the conference Fressadi failed to attend. Unlike cases in which there is a question about whether the party himself was at fault for a failure to comply, the circumstances and facts here are not open to competing interpretations and did not necessitate further fact-finding.

¶24 In addition, although the court's order dismissing the case did not explicitly state that Fressadi himself "willfully violated" the scheduling order, on this record, we can conclude that the court did consider and determine Fressadi's fault by finding that: Fressadi received proper notice of the hearing, Fressadi did not say he was unable to attend the hearing, and the court waited a reasonable time to begin the hearing. That the court did not use the words "fault" or "willfully violated" does not diminish the court's apparent consideration of the issue on this undisputed record. Based on the circumstances and facts before the court, there was no other conclusion except that Fressadi was at fault for his willful non-compliance with the scheduling order.

¶25 This conclusion is not in conflict with our recent decision in *Seidman v. Seidman*, 222 Ariz. 408, 412, ¶ 24, 215

P.3d 382, 386 (App. 2009). In *Seidman*, a discovery violation case, we stated in dicta that even if the record demonstrated that the party, not the party's attorney, was solely at fault, the court is still "required to make an express finding that the violation was willful as a predicate to the entry of a dispositive sanction." In contrast, here it was Fressadi's burden under Rule 16(f) to come forward with evidence of good cause for his failure to attend the pretrial conference if such evidence existed. *See generally J-R Constr. Co. v. Paddock Pool Constr. Co.*, 128 Ariz. 343, 346, 625 P.2d 932, 935 (App. 1981) (determining that party may file a Rule 59 motion for new trial after a dismissal under Rule 37(b)). Because the record before the superior court and this Court supports the conclusion that Fressadi was at fault for the violation, the imposition of dismissal was not an abuse of discretion.

III. The court did not abuse its discretion by failing to consider lesser sanctions before dismissing Fressadi's case.

¶26 Fressadi also argues that the court erred by failing to consider lesser sanctions. Assuming such a consideration is a requisite to dismissal under Rule 16(f), on this record, we disagree. In *Nesmith v. Superior Court*, we vacated an order dismissing one of plaintiff's claims and remanded for a hearing, in part, because we were not able to "tell from this record whether the judge thoroughly considered other, less severe,

sanctions before resorting to the most extreme." 164 Ariz. 70, 72, 790 P.2d 768, 770 (App. 1990). We were unwilling to indulge a presumption that the ruling was supported by the evidence because we believed the superior court misapprehended the law in the first place, which was compounded by the lack of an express finding and our inability to discern from the transcript that the court considered alternative sanctions. *Id.*

¶27 Here, however, the court's statements at the November 16 conference indicate that it acknowledged the severity of the sanction of dismissal and the requirements of Rules 16(f) and 37(b)(2)(C), and considered lesser sanctions by specifically inviting the Defendants to state on-the-record why dismissal as opposed to other sanctions was warranted. Among other things, the Defendants explained that Fressadi sued them in multiple lawsuits regarding the same properties and he was causing continuing damage to the properties, which unnecessarily created further expense and the need for an extension of time to make additional disclosures. The Defendants also stated that Fressadi's case was meritless and that he was trying to force them into settlements by engaging in behavior that caused them unnecessary expense and did not advance the litigation. Fressadi made no attempt to dispute the truth of the Defendants' assertions by way of a motion for new trial or motion for relief from judgment under Rules 59 and 60 of the Arizona Rules of

Civil Procedure. *J-R Constr. Co.,* 128 Ariz. at 346, 625 P.2d at 935 (determining that party may file a Rule 59 motion for new trial after a dismissal under Rule 37(b)). The record indicates that the court was aware that it did not have to impose dismissal, and only chose to do so after it considered the substantive reasons articulated by the Defendants as to why the sanction was appropriate.

¶28 As such, this case is distinguishable from other Arizona precedent governing discovery violation cases in which disputed issues contributed to the need for a hearing or specific findings regarding lesser sanctions. Thus, in *Montgomery Ward & Co. v. Superior Court*, we granted special action relief from an order striking the defendants' answer and finding them liable in a tire defect case. 176 Ariz. 619, 620, 863 P.2d 911, 912 (App. 1993). We noted that there was a dispute regarding whether the defendants fully disclosed records about other models of tires as required by Rule 26.1 of the Arizona Rules of Civil Procedure. *Id.* In granting relief, we stated that the defendants had sought clarification of an earlier order requiring disclosure and the court imposed the ultimate sanction merely days after it had clarified its earlier order, expecting the appellate court to make the necessary findings. *Id.* at 621-22, 863 P.2d at 913-14. In *Wayne Cook Enterprises, Inc. v. Fain Properties Ltd. Partnership*, the court

dismissed a complaint after the plaintiff's new counsel disclosed a document five weeks before trial which its prior counsel had not disclosed. 196 Ariz. 146, 147, ¶¶ 2, 4, 993 P.2d 1110, 1111 (App. 1999). The parties disputed whether the document was crucial to the action and there were factual disputes whether the plaintiff actually possessed the document. *Id.* at ¶¶ 3-4, 993 P.2d at 1111. We reversed in part for an evidentiary hearing and findings about the adequacy of lesser sanctions. *Id.* at 149, ¶ 14, 993 P.2d at 1113.

¶29 In contrast, here the superior court heard from the Defendants about why lesser sanctions should not be applied for Fressadi's failure to appear. Although Fressadi was not at that hearing, he did not file a motion for new trial or for reconsideration to dispute those arguments. Nor did he ever ask the court to make specific findings about lesser sanctions. Thus, the only record before the superior court was the undisputed defense arguments about why a lesser sanction would be insufficient.

¶30 Given this record, we cannot say the court abused its discretion by failing to consider and make detailed findings why lesser sanctions were not sufficient.

CONCLUSION

¶31 The uncontested record in this case demonstrates that the court did not abuse its discretion because it considered

Fressadi's personal and willful disregard of court orders and lesser sanctions before imposing dismissal. We affirm.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
DIANE M. JOHNSEN, Presiding Judge

/S/
JON W. THOMPSON, Judge