Cite as 2011 Ark. 473

# SUPREME COURT OF ARKANSAS

No. 11-430

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| ROSS SYSTEMS, INC.<br>APPELLANT<br><br>V.<br><br>ADVANCED ENVIRONMENTAL RECYCLING TECHNOLOGIES, INC.<br>APPELLEE | **Opinion Delivered** November 10, 2011<br><br>APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NO. CV09-3808-2]<br><br>HONORABLE KIM MARTIN SMITH, JUDGE<br><br>AFFIRMED. |

**JIM HANNAH, Chief Justice**

Ross Systems, Inc., appeals an order of the circuit court striking its answer as a sanction for discovery violations. Ross alleges that the circuit court abused its discretion because (1) a significant number of documents were produced, (2) some documents sought were not in its possession, (3) its conduct was unintentional, and (4) the sanction imposed was disproportionate to its discovery violation. We find no abuse of discretion and affirm. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(8) (2011).

In 2006, Ross contracted with Advanced Environmental Recycling Technologies, Inc., (AERT) to provide a new Enterprise Resource Planning System (ERP). ERP software is used to manage business functions, including sales, inventory, order management, manufacturing, finances, and other business functions. AERT manufactures composite building components, including decking and fencing. AERT asserts that the products provided by Ross failed to perform and that Ross failed to correct the problems. On

November 24, 2009, AERT filed suit against Ross alleging deceit, deceptive trade practices, and breach of contract. Ross counterclaimed for breach of contract.

The record reveals the following facts regarding the discovery dispute that resulted in the sanction. On March 29, 2010, AERT propounded a first set of discovery, including a request for admission of facts and genuineness of documents, a first set of interrogatories, and a first request for production of documents. Ross provided timely responses to this discovery; however, by a June 15, 2010 letter, AERT's counsel attempted to informally resolve concerns it had by informing Ross why AERT believed that the discovery responses were evasive or incomplete. In the letter, AERT informed Ross that if it failed to respond to the letter within seven days, AERT would file a motion to compel complete responses.[1] Ross did not respond to the letter. AERT filed a motion to compel supplemental discovery responses arguing that Ross had not responded to the June 15, 2010 letter and that the discovery responses were incomplete.

At an August 17, 2010 hearing on the motion to compel, Ross agreed to provide complete supplemental responses to the disputed discovery within twenty-one days. An order was entered on September 1, 2010, requiring Ross to provide supplemental responses by September 7. Ross timely provided supplemental discovery responses; however, AERT asserted that little new information and few documents were obtained from Ross's

[1] Arkansas Rule of Civil Procedure 37(a)(2) requires that before a motion to compel may be filed, the complaining party must have attempted to informally resolve the discovery dispute by conferring in good faith or attempting to confer in good faith with the opposing party.

supplemental responses. AERT filed a motion for sanctions based on an alleged failure to comply with the September 7, 2010 order to provide complete responses. A hearing on the motion for sanctions was held on January 13, 2011. At that hearing, the circuit court struck Ross's answer stating as follows:

> Number one, they were in violation of discovery when - - you know, they didn't do the discovery as the rules provide for. They haven't done the discovery after I've ordered them to do it. They produced some documents I guess last night, the day before this hearing. Obviously, they could have gotten those documents . . . You know, I just don't think that they are making any effort, and I am going to strike their Answer, and I will note your objection. I've issued an order and they have had four months to get it complied with before this hearing and they have not seen fit to do it, and I am going to strike their Answer.
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> . . . .
>
> You've admitted and not denied that there's some more documents out there, we just have not gotten them . . . but this company is just thumbing its nose at the court's order. It appears they are going to comply with my order when they are darn good and ready . . . I think this is egregious. He's had four months past the deadline to do it. He didn't even make the deadline to start with . . . they're just not going to comply until they are good and ready, so that's why I am implementing that sanction, over your objection.

Ross asserts that the circuit court abused its discretion in striking its answer. The imposition of discovery sanctions lies within the circuit court's discretion:

> Under Ark. R. Civ. P. 37(b)(2), if a party fails to obey an order to provide or permit discovery, the trial court may "make such orders in regard to the failure as are just," including an order "rendering a judgment by default against the disobedient party." *See* Ark. R. Civ. P. 37(b)(2)(C). The imposition of sanctions, including dismissal, for failure to provide discovery rests in the trial court's discretion; this court has repeatedly upheld the trial court's exercise of such discretion in fashioning severe sanctions for flagrant discovery violations. *Calandro v. Parkerson*, 333 Ark. 603, 970 S.W.2d 796 (1998). "There is no requirement under Rule 37, or any of our rules of civil procedure, that the trial court make a finding of willful or deliberate disregard under the circumstances before sanctions may be imposed for the failure to comply with the discovery requirements."

*S. College of Naturopathy v. State*, 360 Ark. 543, 558, 203 S.W.3d 111, 120 (2005) (citations

omitted). "A court commits an abuse of discretion when it improvidently exercises its discretion, for example, when discretion is exercised thoughtlessly and without due consideration." *Poff v. Brown*, 374 Ark. 453, 457, 288 S.W.3d 620, 623 (2008).

On appeal, Ross argues that the circuit court abused its discretion in striking the answer because Ross did produce a significant number of documents. It is true that Ross produced some documents; however, Ross failed to produce all the relevant documents it possessed and failed to provide complete discovery responses despite multiple opportunities to do so. As of the January 13, 2011 hearing, Ross still needed to undertake further searches for information and documents responsive to the discovery requests, and the circuit court concluded that Ross held documents that should have been produced. Clearly, Ross's responses to the interrogatories and the request for production were at best incomplete. Incomplete responses are treated as a failure to respond. *See* Ark. R. Civ. P. 37(a)(3).

Ross further alleges its conduct should be excused because some of the requested documents were not in its possession. Despite having had months to do so, Ross failed to determine what requested information and documents were not in its possession. Again, it is clear that the discovery responses were incomplete.

Ross also complains that the sanction is improper because Ross's noncompliance was unintentional. However, the facts revealed that Ross simply had not undertaken adequate steps to provide complete discovery responses, and the circuit court concluded that Ross's actions were volitional and egregious, and that Ross was "just thumbing its nose at the Court's Order." In any event, "willful or deliberate disregard" is not required before

discovery sanctions may be imposed. *S. College*, 360 Ark. at 558, 203 S.W.3d at 120.

Ross further argues that striking its answer was too severe a sanction because this is not a case where there has been a flagrant discovery violation. Severe sanctions may be imposed for flagrant discovery violations. *Id.* at 558, 203 S.W.3d at 120. The circuit court found Ross's conduct "egregious." One of the definitions of egregious is "flagrant." *See Black's Law Dictionary* 593 (9th ed. 2009). In *Viking Insurance Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992), the circuit court struck the appellant's answer for failure to comply with an order to produce its entire claim file and for a pattern of conduct obstructing discovery. Similarly, in the present case, Ross failed to comply with the circuit court's order and engaged in a pattern of conduct that obstructed discovery. The circuit court found that Ross would not comply until it was "good and ready."

The extraordinary remedy of striking pleadings should be used "sparingly and only when other measures fail because of the inherent danger of prejudice." *Harper v. Wheatley, Implement Co.*, 278 Ark. 27, 33, 643 S.W.2d 537, 539 (1987). Ross was given multiple opportunities to provide complete responses and did not do so. Further, over four months passed between September 7, 2010, and the hearing on January 13, 2011, and in all that time Ross failed to provide complete responses. It is clear that the circuit court tried other measures prior to striking Ross's answer. The circuit court concluded that Ross had not made "any effort." The circuit court's decision was not thoughtless or made without due consideration. The sanction was imposed only after the circuit court considered all of the circumstances surrounding Ross's conduct, including the failure to obey the court's order.

We find no abuse of discretion.

Affirmed.