

# Commonwealth Of Kentucky

## Court Of Appeals

No. 1997-CA-002353-MR

JAMES P. SMITH

APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JAMES E. HIGGINS, JR., JUDGE  
ACTION NO. 92-CI-000631

CALIGO, LTD

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE, DYCHE AND KNOX, JUDGES

KNOX, JUDGE. This is an appeal from the judgment of the Christian Circuit Court dismissing appellant's cause of action against Caligo, Ltd. (Caligo), alleging violation of the Kentucky Civil Rights Act and defamation, under the authority of CR 37.02.

Appellant, James P. Smith (Smith), filed his original complaint on August 18, 1992, alleging wrongful termination in violation of the Kentucky Civil Rights Act, as codified by KRS 344.010 et seq.; for recovery of damages attendant to such violation; and, for recovery of damages resulting from Caligo's alleged defamation by libel and slander. Appellee, Caligo, duly filed its answer on September 9, 1992, and propounded

interrogatories and requests for production of documents on September 16, 1992. Smith provided a partial response to these requests on December 29, 1992.

On August 24, 1994, the trial court filed a CR 77.02(2) notice of dismissal for lack of prosecution. Although only counsel for Caligo appeared at the set hearing date, the trial judge, for reasons unknown, did not dismiss the action. On March 28, 1996, Caligo propounded a supplemental set of requests for production of Smith's tax returns for the years 1988 through 1995, and a copy of any federal complaint filed arising out of his termination at Caligo. No response was made to these supplemental requests.

Due to the inadequacy of the initial discovery requests and absence of any response to the supplemental requests, Caligo filed a motion to compel Smith to answer interrogatories, produce documents and appear for his deposition.<sup>1</sup> A hearing was held April 16, 1997 on Caligo's motion and Smith's own motion to set for trial. At said hearing both trial and pre-trial dates were set, and further, the court entered an order compelling Smith to: (1) furnish Caligo with copies of Smith's tax returns for the years 1988 through 1995, and copies of any civil rights action he has caused to be filed; (2) fully and completely answer identified numerical interrogatories specifically addressing

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<sup>1</sup> Following the trial court's decision not to dismiss for lack of prosecution, Caligo made several efforts to set deposition dates for Smith, but he refused to make himself available.

Smith's defamation and wrongful termination claims, further directing the answers to be of such a nature to advise Caligo of the exact nature of each justiciable allegation set forth in his complaint; and, (3) appear and give his deposition.

Over the course of the following four (4) months, Smith failed or refused to provide the court ordered discovery, but did appear for his deposition. At the pre-trial hearing, August 15, 1997, after having reviewed the propriety of the propounded but unanswered interrogatories, the trial court dismissed Smith's complaint, concluding there was an inexcusable failure to provide the requested income tax returns and answer the interrogatories directly related to the allegation of defamation. Specifically, the relevant portion of the court's order stated:

1. The Plaintiff's Complaint is hereby dismissed as a sanction, pursuant to CR 37.02, for the willful failure, without a valid excuse or justification, of the Plaintiff to provide Court Ordered discovery to the Defendant.

The issue in this appeal is whether the trial court abused its discretion in dismissing appellant's complaint. Smith concedes that Caligo had a legitimate complaint regarding Smith's failure to produce his tax return, admitting this omission prevented him from proving damages for discrimination. However, Smith contends the trial court erred in dismissing the entire action, specifically, the allegation of defamation. We disagree.

CR 37.02(2)(c) provides, inter alia:

If a party or an officer, director or managing agent of a party or a person

designated. . . fails to obey an order to provide or permit discovery, including an order made under Rule 37.01. . . , the court in which the action is pending may make [sic] such orders in regard to the failure as are just, and among others the following:

. . . .

An order. . . dismissing the action or proceeding or any part thereof. . . .

As discussed, supra, the trial court entered its order of April 16, 1997 directing Smith to produce his income tax returns. The record reflects that Smith's own counsel suggested that entry of such an order may motivate Smith's compliance, indicating he had encountered difficulty obtaining his client's cooperation. Nonetheless, Smith, without excuse, failed to comply with this direct court order.

The United States Supreme Court has on several occasions interpreted Fed.R.Civ.P. 37 on which our own Kentucky CR 37.02 is based. While indicating that the imposition of the severest sanctions available under Rule 37 must be "tempered by the careful exercise of judicial discretion to assure that its imposition is merited."; it has also stated[:] "Effective discovery is exceedingly vital[;]" and the severest sanctions should be imposed where the evidence indicates a willful failure to comply with the discovery procedure.

Nowicke v. Central Bank & Trust Co., Ky.App., 551 S.W.2d 809, 810 (1977) (citation omitted) (alterations made to reflect original quotations).

Furthermore, review of the pre-trial video reveals the trial court's careful consideration of the specific interrogatories in which the same order had mandated Smith's response. Apparently, and understandably, the court deemed this

information imperative to enable Caligo to ascertain the merit, much less the strength and weaknesses, of Smith's defamation claim. Appellant offered no explanation or excuse for lack of compliance. Furthermore, we are cognizant that the trial court had already given Smith a second bite at the apple by not dismissing the action, for no obvious reason, in August 1994. As such, under the authority granted by either CR 37.02(2) or CR 37.04, it is our opinion the trial court appropriately exercised its discretion in determining the case should be dismissed in its entirety.

We are cognizant that, as the record amply reflects, and as noted by Caligo, counsel for appellant has arduously advocated his client's cause of action, acting in a professional and dignified manner. It is regrettable that Smith's personal failure to communicate and cooperate with counsel resulted in the court's imposition of such severe a sanction. However, "[i]f the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied." In re Professional Hockey Antitrust Litig., 63 F.R.D. 641, 656 (E.D. Pa. 1974).

The order of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth W. Humphries  
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BRIEF FOR APPELLEE:

William S. Haynes  
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