

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-000995-MR

NORWEST BANK MINNESOTA, N.A.

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO.2002-SC-000055-D

v. APPEAL FROM LARUEL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 99-CI-00704

DARRELL HURLEY and
LIDDELL VAUGHN

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; GUIDUGLI and McANULTY, JUDGES.
EMBERTON, CHIEF JUDGE. On September 9, 1999, Norwest Bank
Minnesota, N.A., filed a foreclosure action against Darrell
Hurley and, with a general denial, Hurley answered on October 5,
1999. On October 12, 1999, Hurley served interrogatories and
request for production of documents upon Norwest's counsel.
After Norwest failed to respond to the discovery requests,
Hurley moved the court for an order to compel discovery. Both

parties appeared at a hearing on January 14, 2000, and Norwest was ordered to produce the discovery requests within ten days. After Norwest failed to comply with the court's order, Hurley moved to dismiss the action with prejudice. Norwest did not appear at the scheduled hearing and, on March 20, 2000, the trial court granted Hurley's motion and awarded him \$750 in attorney's fees.

Norwest filed a notice of appeal on April 20, 2000. In addition to erroneously stating the date of the order appealed, Norwest's counsel failed to sign the check tendered as the filing fee. Because the check was not signed until May 9, 2000, this court held that the notice of appeal was untimely and dismissed the appeal. The Supreme Court granted discretionary review, and in a published opinion, reversed.¹ Holding that the appeal was timely filed, it remanded the case to this court for consideration on the merits.

The issues raised are whether the circuit court abused its discretion in dismissing the complaint with prejudice and whether the court was required to set forth written findings of fact. Finding no error, we affirm.

Under CR² 37.02 and CR 37.04, failure to timely respond to discovery requests can result in dismissal of an action. Our

¹ Norwest Bank Minnesota, N.A. v. Hurley, 103 S.W.3d 21 (2003).

² Kentucky Rules of Civil Procedure.

standard for review of a decision to impose sanctions is whether the circuit court abused its discretion.³ Among the factors to be considered in reviewing the imposition of sanctions for an abuse of discretion are:

(1) whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery, (2) whether the dismissed party was warned that failure to cooperate could lead to dismissal, and (3) whether less drastic sanctions were imposed or considered before dismissal was ordered.⁴

Hurley had an interest in resolving this dispute in a timely manner. Not only were additional charges and interest added to the time period in which Norwest delayed the discovery, but also the courts are aware of the stress and expense of a prolonged litigation. Certainly, Norwest, through counsel, was aware that the failure to comply with discovery requests could result in sanctions. Not only do the civil rules require timely compliance, but Norwest failed to timely follow the court's order. Finally, when faced with the motion to dismiss, there again was no response and Norwest failed to appear before the circuit court. At this point, the circuit court had little alternative but to dismiss the action. It had already attempted, through granting additional time and scheduling hearings, to give Norwest the opportunity to avoid dismissal.

³ Greathouse v. American Nat'l Bank and Trust, Ky. App., 796 S.W.2d 868 (1990).

⁴ Id. at 870.

Without any response by Norwest, it chose the only sanction remaining, dismissal.

The trial court did not make any specific written findings of fact; CR 52.04, however, requires that a judgment not be reversed or remanded because of the failure to make findings of fact unless such failure is brought to the attention of the circuit court by written request or motion. Norwest made no such request, and therefore, any error in the failure to make written findings is waived.

The judgment is affirmed.

ALL CONCUR.

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