

**JOSE RODRIQUEZ-
ZALDIVAR AND DYLCIO
RODRIGUEZ CRUZ**

*

NO. 2018-CA-0410

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COURT OF APPEAL

VERSUS

*

FOURTH CIRCUIT

**CHARLES LEGGETT AND
PROGRESSIVE CASUALTY
INSURANCE COMPANY**

*

STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-12246, DIVISION "C"
Honorable Sidney H. Cates, Judge

JUDGE SANDRA CABRINA JENKINS

(Court composed of Chief Judge James F. McKay, III,
and Judge Sandra Cabrina Jenkins, Judge Dale N. Atkins)

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REVERSED AND REMANDED

JANUARY 23, 2019

This appeal arises out of a discovery dispute in a personal injury action in which plaintiff/appellant Dylcio Rodriguez Cruz (“Cruz”) failed to appear for a court-ordered independent medical examination (“IME”), allegedly because Cruz had been involuntarily deported to Honduras and could not return to the United States. Cruz appeals the trial court’s March 13, 2018 judgment granting a Motion to Dismiss for Failure to Comply with Court Order filed by defendant/appellee Progressive Security Insurance Company (“Progressive”). For the reasons that follow, we reverse the trial court’s judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On December 29, 2015, Cruz and his son Jose Rodriguez-Zaldivar (collectively, “Plaintiffs”) filed suit against Progressive and its insured, Charles Leggett, for personal injuries allegedly sustained by Plaintiffs in an automobile accident on January 15, 2015. In September 2015, Dr. David Wyatt, an orthopedic surgeon, performed a right knee arthroscopy on Cruz. Dr. Wyatt opined that Cruz likely would require a total knee replacement surgery in the future. In Cruz’s

November 2016 deposition, he testified that he was not a U.S. citizen, and had been residing in the U.S. since 2005.

On March 20, 2017, Cruz filed a Motion in Limine, in which his attorney stated that Cruz had been detained by the U.S. Immigration and Customs Enforcement Agency (“ICE”), and deported to Honduras with no specific return date. Cruz’s attorney argued that Cruz’s deposition should be used at trial in lieu of live testimony because he now resided more than 100 miles from the place of trial under La. C.C.P. art. 1450(A)(3)(b). The trial court did not rule on the Motion in Limine.

On June 5, 2017, Progressive filed a Motion to Compel Independent Medical Examination (“Motion to Compel”). Progressive requested a court order directing Cruz to appear at an IME with Dr. David Aiken, a board-certified orthopedist, on October 25, 2017. In response, Cruz’s attorney filed a memorandum in opposition to the Motion to Compel, and also filed a Motion for Protective Order, seeking to protect Cruz from submitting to an IME in Louisiana because he had been deported to Honduras by the ICE against his will. Cruz’s attorney argued that Cruz would be violating federal criminal law if he returned to Louisiana for the IME. Cruz’s attorney offered to schedule an IME at a medical clinic located near Cruz in Honduras.

On August 25, 2017, the trial court granted Progressive’s Motion to Compel, and ordered Cruz to appear for a physical examination to be conducted by Dr. Aiken on October 25, 2017 in Metairie. When Cruz did not appear for the IME, or

advise Dr. Aiken that he would not be appearing, Progressive filed a Motion to Dismiss for Failure to Comply with Court Order. Progressive asked the court to dismiss Cruz's claims, with prejudice, under La. C.C.P. art. 1471, or in the alternative, strike Cruz's claim for his right knee injury. In his opposition to the Motion to Dismiss, Cruz's attorney stated that Cruz had been deported on February 21, 2017 and, under federal law, he could not return to the U.S. for at least ten years. Again, Cruz's attorney offered to produce Cruz for an IME in Honduras.

On March 13, 2018, the trial court signed a judgment granting Progressive's Motion to Dismiss, and dismissing Cruz's claims, with prejudice. Cruz timely appealed.¹

DISCUSSION

“A trial court has much discretion in imposing sanctions for failure to comply with a discovery order, and a choice of sanctions will not be reversed absence a clear showing that the trial court abused its discretion.” *Creppel v. Tidewater Marine Serv., Inc.*, 94-0984, pp. 4-5 (La. App. 4 Cir. 10/13/94), 644 So.2d 1071, 1074.

The dispositive issue in this case is whether the trial court abused its discretion under La. C.C.P. art. 1471 in dismissing Cruz's claims with prejudice

¹ Although Cruz filed a “Notice of Intent to File Devolutive Appeal,” instead of motion for appeal or petition for appeal (*see* La. C.C.P. art. 2121), the substance of the pleading makes it clear that Cruz intended to appeal the judgment of the trial court. “The fact that a pleading is captioned incorrectly is not sufficient grounds to dismiss the appeal.” *Rubin v. Non-Flood Prot. Asset Mgmt. Auth.*, 18-0500, pp. 4-5 (La. App. 4 Cir. 11/14/18), -- So.3d --, 2018 WL 5985470, *2.

for failure to comply with a discovery order. La. C.C.P. art. 1471 provides, in pertinent part:

A. If a party... fails to obey an order to provide or permit discovery... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or **dismissing the action** or proceeding or any part thereof, or rendering a judgment by default against the disobedient party... [Emphasis added.]

The sanction of dismissal is a draconian penalty that is reserved for extreme circumstances and only the most culpable conduct. *Hutchinson v. Westport Ins. Corp.*, 04-1592, p. 2 (La. 11/8/04), 886 So.2d 438, 440; *Cantuba v. Am. Bureau of Shipping*, 08-0497 (La. App. 4 Cir. 6/3/09), 31 So.3d 397, 412. “Dismissal is generally appropriate when the client, as well as the attorney, is at fault, and the record must evidence that the failure was due to willfulness, bad faith, or fault of the non-compliant party.” *Cantuba*, 08-0497, 31 So.3d at 413 (citing *Horton v. McCary*, 93-2315 (La. 4/11/94), 635 So.2d 199, 203).

Here, there is no evidence in the record showing that Cruz’s failure to appear was due to his willful misconduct, bad faith, or personal fault. Nor do we find that the failure to comply with the court-ordered discovery was due to willfulness, bad faith, or fault of Cruz’s attorney. Although the parties repeatedly state in their pleadings and briefs that Cruz did not appear for the IME because he was deported to Honduras, and could not return to the United States, there is no evidence in the record to support this contention. Arguments of counsel in briefs or memoranda are not evidence. *Daisy v. Plaquemines Parish Govt.*, 17-0076, p. 13 (La. App. 4 Cir. 8/30/17), 226 So.3d 560, 568.

In sum, in the absence of evidence to support a finding of willfulness, bad faith, or fault, we conclude that the trial court abused its discretion in imposing the “ultimate sanction of dismissal with prejudice” for Cruz’s failure to comply with the court’s discovery order. *See Cantuba*, 08-0497, 31 So.3d at 415. The March 13, 2018 judgment of the trial court is reversed, and this matter is remanded for further proceedings.

REVERSED AND REMANDED