

STATE OF MICHIGAN
COURT OF APPEALS

LAW OFFICES OF ANTHONY WAYNE KAHN,
a/k/a ANTHONY WAYNE KAHN,

UNPUBLISHED
July 9, 2002

Plaintiff-Appellee,

v

CELLULAR PLUS SYSTEMS, INC.,

No. 230029
Oakland Circuit Court
LC No. 99-018316-CK

Defendant-Appellant.

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

MEMORANDUM.

Defendant appeals as of right from a default judgment entered against it. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court entered the judgment pursuant to MCR 2.313(B)(2)(c) after defendant had allegedly failed to comply with a second order compelling discovery. Such a harsh sanction is “generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary.” *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Before imposing such a sanction, the court should consider the following factors: (1) whether the party has a history of failing to provide discovery, (2) whether the existing discovery order was violated, (3) the amount of time between the violation and the motion for a default judgment, (4) the prejudice to the defendant, and (5) whether other sanctions might be more appropriate. *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994). “The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.” *Bass, supra*. The trial court’s imposition of discovery sanctions is reviewed for an abuse of discretion. *Id.*

The second discovery order provided for automatic entry of a default judgment as a sanction for noncompliance. That, in itself, did not constitute an abuse of discretion, given defendant’s admitted inexcusable failure to comply with the prior discovery order. Defendant complied with the second order, providing the answers to interrogatories and payment of costs within the time allowed. Plaintiff contended that defendant violated the order by providing insufficient answers to some of the interrogatories, but it is not up to a party to determine the sufficiency of the opposing party’s answers. Rather, if a party believes the answers are incomplete or evasive, the proper procedure is to bring the matter before the court for

determination via a motion to compel answers under MCR 2.309(C) and MCR 2.313(A). 2 Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2309.11, p 336; § 2313.4, p 403. Therefore, the trial court abused its discretion by entering a default judgment without first making a finding that defendant had in fact willfully violated its order.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff