STATE OF MICHIGAN

COURT OF APPEALS

KENNETH MITAN and TECORP ENTERTAINMENT, Plaintiffs-Appellants, v NEW WORLD TELEVISION, INC., NEW WORLD DETROIT, INC. d/b/a WJBK-TV CHANNEL 2, RICH FISHER, BILL BONDS, HUEL PERKINS, MIKE REDFORD, MICHAEL VORIS and MORT MEISNER, Defendants-Appellees.	UNPUBLISHED December 4, 2003 No. 225530 Wayne Circuit Court LC No. 97-710748-NZ ON REMAND

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court[1] for consideration of the issues not reached in our earlier decision, *Mitan v New World Television, Inc*, unpublished per curiam opinion of the Court of Appeals, issued November 12, 2002 (Docket No. 225530) (Neff, J., concurring in part and dissenting in part; White, P.J., concurring in part and dissenting in part).[2]

[1] *Mitan v New World Television, Inc*, Order of the Michigan Supreme Court (Docket No. 122829, issued September 18, 2003).

[2] In lieu of granting leave to appeal, the Supreme Court reversed the judgment of this Court (Neff, J., dissenting), which reversed the circuit court's orders appointing a special master for discovery and adopting the master's orders and findings, and remanded the case for further proceedings. The Supreme Court concluded that it was improper for this Court to reverse the circuit court's judgment because plaintiffs requested the appointment of a special master to make recommendations on discovery issues, and they failed to raise issues regarding the appropriateness of that procedure in the circuit court.

We now address the remaining issues and affirm the grant of summary disposition in favor of defendants.[3]

I

The relevant facts were set forth in our previous decision:

> This case arises from several "Hall of Shame" segments defendant WJBK-TV2 broadcasted that reported unfavorably on plaintiffs' business practices with regard to Lucky's Billiards and Brew (Lucky's), a bar in Dearborn Heights.[4] The broadcasts occurred on April 10, 1996, May 8, 1996 and August 2, 1996. The April 10, 1996 segment concerned plaintiff Mitan's bouncing of paychecks to Lucky's employees. The broadcast also reported that Mitan was delinquent on property taxes and payments to the person from whom Lucky's was purchased, and that Lucky's management sent employees to purchase liquor at retail stores when the bar ran out of liquor, which violated state liquor laws. The May 8, 1996 segment concerned additional allegations that Mitan wrote bad checks, including the failure to pay for pool tables delivered to Lucky's, which resulted in litigation. The August 2, 1996 segment concerned the court-ordered repossession of the pool tables, and charged that Lucky's used the tables free of charge for eight months. [*Mitan, supra*, slip op at pp 1-2.]

II

Plaintiffs raise numerous claims of error with regard to discovery. We find no error for the reasons stated in Judge Neff's separate opinion, which we adopt to resolve the issues not reached in the majority opinion of our earlier decision.

1

> Plaintiffs claim error with respect to various discovery sanctions. This Court reviews a trial court's imposition of discovery sanctions for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Whether a trial court has the authority to impose particular sanctions is a question of law subject to review de novo. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 637; 607 NW2d 100 (1999).

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[3] In our earlier decision, a divided panel of this Court (White, P.J., dissenting) affirmed the circuit court's denial of plaintiffs' motion to disqualify counsel. Defendants did not seek leave to appeal that aspect of our decision.

[4] Plaintiffs' complaint states that plaintiff Tecorp is a limited partnership doing business as Lucky's Billiards and Brew. Kenneth Mitan had a financial interest in Tecorp. Defendants are companies associated with, and employees of, WJBK-TV Channel 2.

MCR 2.313(B)(2) provides that a court may "order such sanctions as are just." Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery. *Bass, supra* at 26. If a trial court imposes sanctions, the record should reflect that the court gave careful consideration to the factors involved and considered all its options in determining a just and proper sanction. *Id.* Factors to be considered in determining an appropriate sanction are: (1) whether the violation was willful or accidental; (2) the party's history of refusal to comply with discovery requests; (3) prejudice to the other party; (4) actual notice to a party of the witness and the length of time to trial; (5) whether the party has a history of engaging in deliberate delay; (6) the degree of the party's compliance with other provisions of the order; (7) an attempt by the party to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. *Id.* at 26-27, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

a

Plaintiffs first argue that the court abused its discretion in dismissing Tecorp's claims on the basis that plaintiffs failed to produce Keith Mitan, Kenneth Mitan's brother, for a deposition. I find no abuse of discretion given plaintiffs' languor in responding to the order to produce Keith Mitan for deposition and plaintiffs' history of circumventing other discovery requests.

The special master issued his first discovery order in this matter on March 17, 1999. Over the course of the next seven months, the master presided over numerous discovery disputes, held several lengthy hearings, and ultimately sanctioned plaintiffs for their repeated noncompliance with his discovery orders. On September 28, 1999, the master ordered the deposition of Keith Mitan to take place on October 1, 1999, and ordered that should Tecorp fail to produce Keith Mitan for deposition, Tecorp's complaint would be stricken and a judgment of no cause of action entered against it. On October 1, 1999, the special master found that although Keith Mitan appeared at the time and place set for the deposition, he refused to comply with the previous order requiring his deposition.

Plaintiffs' arguments that they had no control over Keith Mitan because he was merely a "former employee" of Tecorp are hardly credible. The evidence established that Keith Mitan handled the day to day business operations of Tecorp and was a key witness with regard to plaintiffs' claimed damages. Keith Mitan himself argued various reasons for his failure to appear for the deposition.

MCR 2.313(D)(1) provides that just sanctions may be imposed where a party or an officer, director or a managing agent of a party fails to appear for depositions following proper notice. MCR 2.313(D)(1); *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 653; 649 NW2d 23 (2002). MCR 2.313(B)(2)(c) authorizes a court to enter an order dismissing an action or rendering a judgment by default against the disobedient party. *Rogers, supra*; *Bass, supra* at 26.

The special master considered the nature and effect of plaintiffs' noncompliance with the discovery orders in determining the appropriate sanction. Given the close relationship between Keith and Kenneth Mitan and their plethora of conflicting excuses for their refusal to facilitate discovery as ordered, their actions reflect a deliberate circumvention of legitimate discovery sought by defendants. There was no abuse of discretion in the determination that the sanction of dismissal best served the interests of justice. *Id.* at 26, 35.

I reject plaintiffs' argument that MCR 2.313(D)(1) was not a basis for sanction because the court failed to consider evidence regarding notice to the witness before adopting the special master's discovery orders. This issue was not addressed before the trial court, and plaintiffs fail to fully argue the merits of this issue on appeal. "Insufficiently briefed issues are deemed abandoned on appeal." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001). "A party may not leave it to this Court to search for authority to support its position." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 495-496; 593 NW2d 180 (1999).

b

Plaintiffs argue that the court abused its discretion in precluding Mitan from asserting any claims for damages derivative of Tecorp on the basis of the dismissal for failing to produce Keith Mitan for deposition. I find no abuse of discretion.

Mitan stated in discovery responses that Keith Mitan was the person with knowledge of Tecorp's damages. However, Mitan's cooperation with regard to the deposition was merely superficial, i.e., filing a motion to compel Keith Mitan's appearance, but nonetheless refusing to subpoena him. The sanction was just and appropriate. *Bass, supra* at 26.

Plaintiffs further argue that the sanction was not tailored to address the wrongful conduct of the party being sanctioned and that the court improperly sanctioned Mitan individually for Tecorp's alleged misconduct. The pertinent discovery request required plaintiffs to produce documents concerning a lawsuit between Tecorp Entertainment and Heartbreakers, the landlord at Lucky's bar and the liquor license holder. The request was directed to Mitan as well as Tecorp.

Given the close nexus between Mitan and Tecorp, and the fact that Keith Mitan represented Tecorp in the Heartbreakers litigation and shared offices with Kenneth Mitan, the failure to respond to this discovery request is properly attributed to Mitan as well as Tecorp. It was defendants' contention that discovery concerning the Heartbreakers litigation would show the real reason Lucky's was evicted from its building and went out of business, and that it was unrelated to defendants' broadcasts. Because Mitan failed to respond to the discovery request, he was properly precluded from asserting any damages based

on a claim that defendants' broadcasts drove Tecorp out of business. This sanction was just and appropriate. *Id.*

c

Plaintiffs argue that because Theresa Mitan was a former employee of Tecorp, as with Keith Mitan, it was an abuse of discretion to sanction plaintiffs for her failure to appear for deposition. Further, such sanction was akin to dismissing significant portions of plaintiffs' claims and was overly severe.

In sanctioning plaintiffs, the special master reasoned that, as with Keith Mitan, the close nexus between Mitan and his mother Theresa, and indications that she still did work for Tecorp or Mitan's other businesses, warranted an adverse finding. Further, plaintiffs had not shown good faith in expediting discovery and had shown no good reason for failing to produce Theresa Mitan for deposition.

The same reasoning applies here as above with the claim as to Keith Mitan. The sanction was appropriate and just because, as the special master noted, it defies logic for Theresa Mitan to take the position that she would have cooperated to help her son, with whom she lived and had business associations, if only she had been subpoenaed.

The discovery was critical to defending against plaintiffs' defamation claim based on defendants' reports of check bouncing practices. In his September 30, 1999 deposition, Mitan testified that his mother helps out with his businesses sometimes. It was Mitan's position that although his businesses had frequently bounced checks, it was not intentional or for the reasons reported by defendants. It was mostly because his mother, who was primarily responsible for the checking accounts, had thirty to forty-five checking accounts to handle at the same time for his businesses and she was unable to handle them properly. Under these factual circumstances, and given plaintiffs' history of thwarting discovery, the sanction of an adverse finding was just and appropriate. *Id.* at 26-27.

d

Plaintiffs argue that they were unfairly severely sanctioned for failing to produce litigation documents for lawsuits in which they had been involved despite their efforts to secure these records from their various forty-nine attorneys. The sanction of an adverse finding that plaintiffs engage in litigation to avoid their payment obligations was not an abuse of discretion. The bulk of plaintiffs' response effort was devoted to showing that the request was an overwhelmingly burdensome impossibility.

The special master stated that this discovery request related to defendants' desire to show plaintiffs' business practice of purchasing businesses, and then engaging in litigation to avoid their payment obligations. He acknowledged that the request was overbroad, but he expected plaintiffs to make a good faith effort to respond in a timely fashion, which did not occur. As with other discovery requests, plaintiffs' responses were merely superficial despite the special master's repeated efforts and orders to effect a minimal response. The record supports the special master's reasoning and findings.

Plaintiffs' assertion that the court failed to consider any less Draconian sanctions is in error because the special master gave ample consideration to possible sanctions, and to counsel's suggestions, at the September 16, 1999 hearing prior to imposing the sanction.

The sanction was just and appropriate. *Id.* MCR 2.313(B)(2) provides that if a party fails to obey a discovery order, the matter addressed by the order or designated facts may be taken as established, the disobedient party may be precluded from asserting designated claims or defenses, or introducing designated matters into evidence. MCR 2.313(B)(2)(a), (b). Because plaintiffs thwarted key discovery on the issue of Mitan's business practices involving litigation, the adverse finding of fact and the preclusion of evidence at trial was not an abuse of discretion.

e

Plaintiffs argue that the sanctions of a finding that Mitan suffered no economic damages and was precluded from introducing evidence of economic damages was an abuse of discretion. They contend that the sanction was unfair because the records sought were not within plaintiffs' possession, custody or control so as to be subject to production under MCR 2.310(B).

The pertinent document request sought Mitan's tax returns from 1994 through 1999. It was undisputed that the state police in Marquette had seized Mitan's computers and his financial records. However, plaintiffs indisputably had an alternative source for copies of the returns. As the special master noted, even if the returns were seized and could not be obtained from the state police, plaintiffs could have obtained copies from the Internal Revenue Service, and they offered no valid reason for failing to do so. The sanctions were imposed only after the special master determined that plaintiffs refused to otherwise cooperate in obtaining the requested financial records.

Given plaintiffs' repeated delays and failure to abide by their own discovery commitments and the special master's orders, the sanction was not an abuse of discretion. Plaintiffs were aware that a sanction would be imposed for their failure to produce the returns by September 30, 1999, and they ultimately set forth no valid justification for their noncompliance.

The sanctions were just and appropriate in that plaintiffs' claimed damages were for lost income and defendants' efforts to discover information vital to a proper defense were frustrated by plaintiffs, the noncompliance was not inadvertent, and a lesser sanction would be inadequate because the time for discovery had expired. *Bass, supra* at 26-27; *Welch v J Walter Thompson USA, Inc,* 187 Mich App 49, 52-54; 466 NW2d 319 (1991).

f

Finally, plaintiffs challenge the sanctions precluding them from offering the testimony of any non-party witness concerning damages. Plaintiffs complain that this sanction was unjustly harsh and an abuse of discretion given that the documents at issue had been seized by the state police and were not within plaintiffs' possession, custody or control. I find no abuse of discretion given plaintiffs' delays in responding to discovery, the lengthy proceedings addressing this matter, and plaintiffs' lack of good faith effort to comply with repeated discovery orders of the special master.

Contrary to plaintiffs' assertions, the willfulness of their failure to respond to discovery requests concerning damages, and the prejudice to defendants, was fully considered before the imposition of this sanction. Plaintiffs' failure to respond to damages discovery cannot be attributed to the seizure of records by the state police, which the special master found was merely a "fortuitous circumstance" amid plaintiffs' continued discovery delays and refusal to otherwise respond.

The record shows that the special master's sanction was not an abuse of discretion. Reversal of the sanction and the dismissal are unwarranted given the finding that plaintiffs' failure to respond to discovery requests was willful, tantamount to knowing concealment, and not merely accidental or involuntary. *Bass, supra* at 26, 34-35; *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451-454; 540 NW2d 696 (1995).

2

Plaintiffs argue that the trial court erred in granting summary disposition in favor of defendants. This Court reviews de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.* The party opposing the motion then has the burden of showing by evidentiary proofs that a genuine issue of material fact exists. *Id*. at 455.

Plaintiffs first argue that summary disposition of Mitan's defamation claims should be reversed because there were genuine issues of material fact whether Mitan violated Michigan liquor laws by purchasing liquor from retail stores for resale as reported by defendants.

The elements of a defamation claim are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 726; 613 NW2d 378 (2000); *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). Summary disposition of Mitan's defamation claim was proper because plaintiffs have failed to establish a genuine dispute that the alleged defamatory statement was false, which is fatal to their claim.

Defendants submitted the affidavit of a former Lucky's employee, Ron Bruno, who averred that while he "was employed at Lucky's, bar management would send employees to retail shops to purchase beer or liquor if the bar was running short."

Plaintiffs filed Mitan's affidavit, stating essentially that the accusations concerning the liquor purchases were false. Mitan's affidavit does not create a genuine material dispute. First, Mitan, in the same affidavit stated that he was not involved in the day to day business of Tecorp, which operated Lucky's, so his statement carries little weight absent any evidence of his personal knowledge of the bar's day to day operations. Second, Mitan's mere statement that the report was false is insufficient to avoid summary disposition. Plaintiffs are incorrect that the standard for summary disposition is whether a record "might be developed" on which reasonable minds could differ and whether "the nonmoving party's claim is impossible to support." *Smith, supra* at 455, n 2.

When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). Plaintiffs' reliance on Mitan's affidavit, which they admit is the same denial contained in their pleadings, is insufficient to survive a motion for summary disposition. An affidavit submitted in support of or in opposition to a motion must 1) be made on personal knowledge, 2) state with particularity facts admissible as evidence, and 3) show affirmatively that the affiant, if sworn as a witness, could testify competently to the facts stated in the affidavit. MCR 2.119(B)(1), *Regents of the University of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 728; 650 NW2d 129 (2002).

Because the trial court properly granted summary disposition of plaintiffs' underlying defamation claim, this Court need not address plaintiffs' final argument concerning reinstatement of their related claims. Plaintiffs' remaining claims were properly dismissed. [*Mitan, supra*, (Neff, J., concurring in part and dissenting in part), slip op at pp 3-8.]

Affirmed.

/s/ Janet T. Neff
/s/ Kathleen Jansen