

STATE OF MICHIGAN
COURT OF APPEALS

BURLINGAME COMPANY,

Plaintiff-Counter
Defendant-Appellee,

v

LEO CHENARD,

Defendant-Counter
Plaintiff-Appellant.

UNPUBLISHED
December 16, 2003

No. 241533
Kent Circuit Court
LC No. 00-000661-NZ

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

PER CURIAM.

Following a jury trial, a verdict was entered against defendant for defrauding plaintiff and converting its property. Defendant appeals as of right from the resulting judgment, arguing that the trial court erred in denying his motion to file a witness list after the due date and to extend discovery. We reverse and remand for a new trial. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's original attorney did little or no discovery and let deadlines lapse. He did not file a witness list on December 18, 2000, as required. New counsel was substituted by an order entered on January 8, 2001. During depositions on January 9, 2001, defendant's new counsel discovered that plaintiff had not been provided with defendant's witness list. He provided plaintiff with a witness list two days later, which listed three witnesses, including defendant. On March 2, after the parties' pending settlement failed, the trial court denied defendant's motion to extend the deadline for serving the witness list and to extend discovery, stating that it would not deviate from the scheduling order. The scheduling order barred witnesses not timely disclosed from testifying at trial. At trial, the court instructed the jury that defendant was not being permitted to present any witnesses because he failed to timely file a witness list. The court granted a directed verdict on defendant's counter-claim.

Plaintiff argues that the issue has not been preserved since the order denying the motion did not bar defendant from calling any witnesses at trial, and defendant did not attempt to do so. Nor did defendant make an offer of proof detailing the importance of the witnesses' testimony. However, the trial court repeatedly stated that defendant was not being permitted to call any witnesses given the failure to file a timely witness list. Requiring defendant to make an attempt would have been a useless exercise. See *Jernigan v General Motors Corp*, 180 Mich App 575,

584-585; 447 NW2d 822 (1989). This Court will disregard preservation requirements if review is necessary to a proper determination of the case. *Pittsburgh Tube Co v Tri-Bend, Inc*, 185 Mich App 581, 590; 463 NW2d 161 (1990).

Regardless of whether the two non-party witnesses could have been properly barred from testifying at trial, the trial court erred by precluding defendant from testifying. In *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628-629; 506 NW2d 614 (1993), this Court stated:

Witness lists are an element of discovery. *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 778; 404 NW2d 665 (1987). The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial. *Id.* The purpose of witness lists is to avoid "trial by surprise." *Id.*, 779.

We agree that legitimate reasons may exist permitting parties to testify at trial even if no witness list has been filed. First, the parties are the original adversaries and are generally known to each other from the outset. This should prevent the element of surprise occurring when unlisted witnesses are called to testify. . . . Second, disallowing the parties to testify when the witness list is stricken or prevented from being filed is the equivalent of a dismissal. Allowing a trial court to routinely dismiss an action whenever a witness list is stricken appears inconsistent with the various discretionary discovery sanction options available to it. See *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 627-629; 420 NW2d 835 (1987). . . .

In this case, although defense counsel was permitted to cross-examine plaintiff's witnesses, the trial court's order precluded defendant from proffering a defense, which was tantamount to entry of a default. Further, defendant's counter-complaint was dismissed as a result. Such sanctions cannot be based solely on the failure to timely file a witness list.

With respect to the two non-party witnesses, "the mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition of" a sanction barring them from testifying or dismissing the case. *Dean v Tucker* 182 Mich App 27; 451 NW2d 571 (1990). In *Dean*, the Court set forth various other factors that must be taken into consideration in deciding an appropriate sanction:

(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [182 Mich App 32-33. (Citations and footnotes omitted).]

The trial court abused its discretion by failing to consider these factors.

We vacate the trial court's judgment and remand for a new trial. On remand, the trial court shall permit defendant to testify, and shall weigh the factors outlined in *Dean, supra*, in determining whether the additional two witnesses shall be permitted to testify. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White