

STATE OF MICHIGAN
COURT OF APPEALS

KNIGHT ENTERPRISES, INC.,

Plaintiff-Appellant,

v

RPF OIL COMPANY,

Defendant-Appellee.

UNPUBLISHED

November 16, 2010

No. 293892

Wayne Circuit Court

LC No. 08-121646-CZ

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order dismissing its complaint with prejudice for failure to comply with a discovery order. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

A trial court's decision to impose discovery sanctions is reviewed for an abuse of discretion. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

If a party fails to comply with a request for discovery, the requesting party may move for an order compelling discovery. MCR 2.313(A). If the party from whom discovery is sought fails to comply with the order, the court "may order such sanctions as are just," including dismissal of the action. MCR 2.313(B)(2)(c). If a party fails to appear for a deposition after proper notice, the court "may order such sanctions as are just," including dismissal of the action. MCR 2.313(D)(1).

Dismissal is a harsh sanction that 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), overruled in part on other grounds *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008). Before imposing such a sanction, the court should consider various factors, including: (1) whether the party has a history of failing to provide discovery, (2) whether the party has a history of refusing to comply with other court orders, (3) whether the party has a history of deliberately delaying the proceedings, (4) whether the violation was willful or accidental, (5) whether the opposing party has been prejudiced, and (6) whether a lesser sanction would better serve the interests of justice. *Id.* at 26-27. "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.” *Id.* at 26.

In this case, because plaintiff failed to provide discovery and the discovery cut-off date was approaching, defendant filed a motion to compel. Plaintiff agreed to provide the requested discovery materials and to produce its principal, Carroll Knight, for a deposition within 21 days or by May 13, 2009. The trial court’s order provided that failure to comply with either directive would result in dismissal. It was on that basis that the trial court dismissed plaintiff’s complaint. However, the record shows that plaintiff did not violate the discovery order. Plaintiff emailed the requested transcript to defendant on May 13, 2009, and defendant waived compliance with the order regarding Knight’s deposition by agreeing to conduct the deposition on May 15. Plaintiff subsequently violated the parties’ agreement to conduct the deposition on May 15 when it announced that Knight was not able to appear on that date. The discovery order did not address this situation and the parties had not stipulated to any sanction as part of their agreement. Therefore, the trial court abused its discretion in ordering dismissal in accordance with the discovery order. Instead, it should have determined an appropriate sanction for violation of the parties’ discovery agreement after considering the relevant factors set forth in *Bass*. Accordingly, we reverse the trial court’s order of dismissal and remand for reconsideration in light of *Bass*.

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

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher