

STATE OF MICHIGAN
COURT OF APPEALS

FIRST STEP REHAB, INC.,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 18, 2016

No. 328108
Wayne Circuit Court
LC No. 13-016194-NF

Before: GADOLA, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the March 24, 2015 order granting defendant's motion to dismiss for plaintiff's failure to comply with defendant's discovery requests and the trial court's September 2, 2014 discovery order. We reverse and remand for further proceedings consistent with this opinion.

On appeal, plaintiff argues that the trial court's decision to sanction plaintiff by dismissing its claim was an abuse of discretion because lesser sanctions would have been more appropriate under the circumstances. We agree to the extent that the trial court erred when it failed to evaluate all available options on the record before imposing the sanction of dismissal.

Generally, we review a trial court's decision to dismiss a case based on a party's failure to comply with its rules or orders for an abuse of discretion. *Grimm v Dept of Treasury*, 291 Mich App 140, 149; 810 NW2d 65 (2010). Additionally, we review "a trial court's imposition of discovery sanctions for an abuse of discretion." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 659; 819 NW2d 28 (2011). "An abuse of discretion occurs when the decision is outside the range of principled outcomes." *Id.* at 659-660 (citation omitted). Therefore, a trial court may abuse its discretion if it commits an error of law. *Donkers v Kovach*, 277 Mich App 366, 368-369; 745 NW2d 154 (2007) (quotation marks and citation omitted). Moreover, "[t]he interpretation and application of a court rule involves a question of law that this Court reviews de novo." See *Hardrick*, 294 Mich App at 660 (citation omitted).

"Trial courts possess the inherent authority to sanction litigants and their counsel, including the right to dismiss an action." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Specifically, MCR 2.504(B)(1) provides a trial court discretion to enter an order dismissing a party's action or claims if the party fails to comply with the court rules or a

court order. Additionally, MCR 2.313(B)(2)(c) expressly grants a trial court the authority to dismiss a party's action where a party has failed to comply with the trial court's discovery order. See also *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000) (stating that a trial court may enter an order dismissing a proceeding against a party who fails to comply with a discovery order).

However, "[d]ismissal is a drastic step that should be taken cautiously." *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). Generally, dismissal is disfavored because our legal system prefers the disposition of litigation on the merits. *Id.* at 507. Thus, *before* imposing a sanction dismissing a party's claim, the trial court must "carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Id.* at 506. Specifically, the trial court must consider the following factors before imposing a sanction of dismissal:

(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Woods v SLB Property Management, LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008), citing *Vicencio*, 211 Mich App at 507.]

In defendant's motion to dismiss, it argued that plaintiff had been served with the following discovery requests: (1) first interrogatories, (2) first request for the production of documents, (3) expert witness interrogatories, and (4) lay witness interrogatories. In its motion, defendant asserted that dismissal of plaintiff's claim with prejudice was appropriate because plaintiff failed to respond to defendant's discovery requests, failed to comply with the trial court's September 2, 2014 discovery order, and failed to provide "a consistent demand" after the trial court ordered the parties facilitate the case on October 7, 2014. Moreover, defendant argued that it was prejudiced "in its preparation for trial" by plaintiff's refusal to participate in the discovery process and violation of the court's September 2, 2014 order.

Plaintiff neither filed a response to the motion nor appeared at the hearing. In its brief on appeal, plaintiff asserts that the failure to appear at the hearing as well as the failure to file any response to the motion was inadvertent. At the March 20, 2015 hearing on defendant's motion to dismiss, the trial court noted repeated efforts to reach plaintiff's counsel and its review of the unopposed motion papers. The court further noted, that it was granting defendant's motion to dismiss "for the reasons put forth in [defendant's] brief and as [defendant] put on the record, and we've gone over and above notice to get [plaintiff] here for their [sic] side of the story." The court thus adopted the then uncontroverted facts in defendant's motion and the assertions of defense counsel on the record. The relevant facts in that motion were the existence of the discovery order, its date, multiple efforts to retrieve the discovery materials, other incidents of non-compliance with other court orders, and plaintiff's intentional failure to deliver the materials. On the record defense counsel noted that the materials had not been produced in response to the motion to dismiss, either. The only prejudice addressed in the papers and on the record was that of impeding the defendant's ability to prepare for trial. Defendant recited the *Woods* factors in its brief supporting the motion and concluded that dismissal was the correct

remedy for the discovery violations at issue, but did not indicate why the interests of justice were best served by dismissal as opposed to other sanctions.

Plaintiff's attorney appeared in the courtroom after the hearing and the court set a date for a hearing on a motion for reconsideration. At that hearing, while plaintiff's trial counsel made several arguments in opposition to the relief requested, at no time did he assert that the failure to file responses to the discovery order was unintentional. Instead, he argued that the failure to supply the materials did not prejudice defendant because defendant already had the materials. Thus from this record we can conclude that the failure to comply was willful and repeated. Defendant argues here, as it did in the trial court, that the willful failure occasioned prejudice to the defendant. Specifically, defendant asserts that it had been unable to prepare for trial or comply with the court's pre-trial order for a jury trial set for March 30. Plaintiff did not at any time orally or otherwise rebut the fact that the failure to provide the materials requested impeded in some degree defendant's preparation for trial. Thus the court, by its reliance on the un rebutted assertions in the original motion, was justified in finding that there was some prejudice.

However, there is no record of the trial court's consideration of whether a lesser sanction would better serve the interests of justice. Although the trial court evaluated the case in more depth at the hearing on plaintiff's motion for reconsideration, the trial court still failed to evaluate lesser sanction options. This failure constitutes an abuse of discretion. *Vicencio*, 211 Mich app at 506-507.

Accordingly, we reverse and remand to the trial court for the requisite consideration, on the record, of the *Woods* factors set forth above. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens