

STATE OF MICHIGAN
COURT OF APPEALS

RONALD W. GRANT,

Plaintiff/counterdefendant-
Appellant,

v

RAYMONA K. VIANO,

Defendant/counterplaintiff-
Appellee.

UNPUBLISHED
September 20, 2011

No. 298215
Macomb Circuit Court
LC No. 2009-003492-CH

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a bench trial, plaintiff/counterdefendant, Ronald W. Grant (plaintiff), appeals as of right from a judgment in favor of defendant/counterplaintiff, Raymona K. Viano (defendant). We reverse and remand for proceedings consistent with this opinion.

Plaintiff and defendant were involved in a romantic relationship. Although the couple did not marry, defendant asserted that they conducted themselves as a married couple by commingling assets and executing wills that made the other the primary beneficiary. The relationship soured. Plaintiff asserted that he suffered a stroke. As a result of his health condition, plaintiff contended that he executed a power of attorney and quitclaim deeds to two properties to allow defendant to handle his affairs. He alleged that defendant did not care for his interests, but instead converted monies for her own personal use. Plaintiff filed a complaint alleging fraud and misrepresentation and unjust enrichment.

On the contrary, defendant asserted that plaintiff suffered financial losses as a result of the economy. Defendant alleged that plaintiff's frustration led to an increasing alcohol problem and abuse directed at her. In fact, plaintiff was convicted of domestic violence against defendant. Defendant filed a countercomplaint, essentially seeking to divide the couple's assets, recover any monies converted by plaintiff, and damages for the assault and battery upon her.

In January 2010, plaintiff filed a motion to compel complete answers to interrogatories and requests for production. Shortly thereafter, defendant filed a similar motion. On February 3, 2010, an order provided that both parties were to complete the outstanding discovery materials by February 15, 2010. On February 25, 2010, plaintiff's counsel withdrew from his

representation. On February 26, 2010, defendant filed a motion to hold plaintiff in contempt of court for failing to comply with discovery, for entry of a default judgment, and for sanctions.

On March 8, 2010, plaintiff obtained new counsel who filed a motion to adjourn the bench trial scheduled for March 16, 2010. The motion was heard on March 15, 2010. Plaintiff's counsel asserted that the case should be adjourned because there had been no prior adjournments, there was outstanding discovery, and he had a conflict with the trial date because of a federal case in Flint. Defense counsel opposed the motion and also noted that the trial court had taken the motion for contempt, default judgment, and sanctions under advisement, but had not yet ruled on the motion.

Without providing an adequate record, the trial court ruled that the motion to adjourn trial was denied and granted defendant's motion for "default" (sic) of plaintiff's claims for discovery violations. Trial was scheduled to begin the next day in the afternoon after Plaintiff's counsel appeared in federal court. At trial, the court refused to allow plaintiff to testify as an additional discovery sanction. The court also refused to adjourn the trial to allow for the submission of deposition testimony by the attorney who prepared the quitclaim deeds. Ultimately, the trial court ruled that the parties jointly held real properties, bank accounts, and investment accounts. A receiver was appointed to sell the property and divide the subject accounts. The costs of the receiver were to be borne solely by plaintiff. Additionally, defendant was awarded \$3,500 for the claim of assault and battery. Plaintiff appeals as of right.

Plaintiff alleges¹ that the trial court erred by entering a default against plaintiff as a discovery sanction. We agree. The trial court's entry of a default for failure to comply with a discovery order is reviewed for an abuse of discretion. See *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.* The trial court's factual findings underlying a discovery ruling are reviewed under the clearly erroneous standard. *Traxler v Ford Motor Co*, 227 Mich App 276, 284-285; 576 NW2d 398 (1998).

Although it is within the trial court's authority to dismiss an action for failing to comply with a court order, the circumstances of each case must be examined to determine if such a drastic sanction is appropriate. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). "[T]he record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it." *Id.* "The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental and involuntary." *Mink v Master*, 204 Mich App 242, 244; 514 NW2d 235 (1994). The court must also evaluate other options before concluding that a drastic sanction is warranted. *Id.* The trial court's dismissal of a plaintiff's complaint is inconsistent with the various discretionary discovery sanction options available to it, and the trial court's "failure to evaluate these options on the record before concluding that dismissal of the

¹ Because this issue requires reversal, we will address plaintiff's issues in a different order than presented.

complaint was warranted constituted error.” *Thorne v Bell*, 206 Mich App 625, 635; 522 NW2d 711 (1994).

Among the factors that should be considered in determining the appropriate sanction are: (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. [*Dean*, 182 Mich App at 32-33 (footnotes omitted).]

In *Dean*, 182 Mich App at 29, the parties appeared prepared for the date of trial, July 17, 1987. Although the parties were trial ready, the court was unable to hear the matter and adjourned the trial until November 16, 1987. The trial court held a pretrial on July 17, 1987, and issued an order noting that discovery was complete, and the parties were to file their witness lists by August 6, 1987. The plaintiff filed her witness list on August 27, 1987, with a motion to extend the time to file the list, explaining that counsel inadvertently calendared the deadline as August 28, 1987. The trial court denied the motion to extend the deadline for filing witness lists, barred plaintiff from presenting witnesses, and granted defendants’ motion for summary disposition in the malpractice action. *Id.*

This Court held that the trial court erred in dismissing the action for failure to timely file the witness list. First, the Court cited to the trial court’s lack of explanation for dismissing the action:

[T]he trial court gave few reasons to justify its decision, merely stating that to grant the request would be unfair and that it would reopen discovery as to all of the witnesses. The court did not explain what unfairness would result from granting plaintiff’s request for an extension to file the witness list nor are we aware of any reason why granting the request would necessitate a reopening of discovery since discovery had already been completed prior to the pretrial conference which resulted in the order requiring plaintiff to file the witness list. [*Id.* at 33.]

This Court held that there was no reason to justify the imposition of the harsh sanction. *Id.* at 33-34. The failure to timely file the witness list was inadvertent rather than willful. The defendants admitted that they were aware of the expert witness through discovery, and the witness had previously been deposed. There was no indication that the plaintiff deliberately delayed the litigation; in fact, the case would have been tried on July 17, 1987, but was adjourned because of the court’s own scheduling conflicts. *Id.* at 34. This Court also cited to the fact that the defendants made vague generalizations regarding reliance, but failed to demonstrate any prejudice. Finally, it was noted that the plaintiff detected her mistake and proceeded to promptly correct her mistake. Accordingly, this Court held that the trial court’s decision to deny the

motion to extend time, to sanction by striking the expert witness, and the grant of summary disposition was an abuse of discretion under the circumstances of the case. *Id.* at 34-35.

In *Thorne*, 206 Mich App at 630-635, the defendants filed a motion for summary disposition one day before the close of discovery, asserting that the plaintiffs failed to reveal their exhibits, lay and expert witnesses, and a summary of the witnesses' proposed testimony which prejudiced the defendants ability to engage in discovery and rebut the plaintiffs' claims. The trial court agreed, granting the most extreme sanction of dismissal of the complaint and the dismissal of the answer to the defendants' counterclaim. This Court held that the violation of a discovery order regarding filing dates did not justify the dismissal where the record did not disclose a history of recalcitrance or deliberate noncompliance. *Id.* at 633. Additionally, a defendant similarly did not comply with the timely filing of witness and exhibit lists, but the trial court denied the plaintiffs' motion to dismiss despite the fact that the court gave the same reason for dismissing the plaintiffs' complaint and answer to the counterclaim. *Id.* at 635.

In the present case, the trial court granted the default by stating, "I will grant defendant's request to default plaintiff's claims for discovery violations." Although the trial court actually dismissed plaintiff's complaint as a sanction, this decision constituted an abuse of discretion. *Saffian*, 477 Mich at 12. The entry of a default is the most drastic sanction, and the trial court must examine factors, including other, lesser means of obtaining compliance before resorting to such a drastic remedy. *Mink*, 204 Mich App at 244; *Dean*, 182 Mich App at 32. Additionally, the failure to examine the factors and the options *on the record* constitutes error. *Thorne*, 206 Mich App at 635. In the present case, the parties filed motions alleging that the other had not fulfilled discovery requests or sufficiently answered discovery. The end result was a consent order where the parties agreed to provide answers by a date certain. Thereafter, defendant filed a motion for contempt, asserting that plaintiff had not complied. There is no indication in the record that the trial court actually determined if plaintiff had complied. Additionally, the trial court did not examine whether other discretionary remedies, such as costs and attorney fees, would obtain compliance or examine any of the other factors. Accordingly, the trial court's decision is reversed.

Plaintiff also alleges that the trial court erred by ruling that plaintiff was not allowed to testify at the bench trial as a discovery sanction.² We agree. In *Meyer v Walker Land Reclamation, Inc*, 103 Mich App 526, 528-530; 302 NW2d 906 (1981), the plaintiff filed suit against a corporation to recover the amount outstanding on a loan. The plaintiff refused to answer questions in his deposition regarding what happened to corporate funds. The defense moved for a motion to compel answers or entry of a default. Initially, the trial court denied the motion, but later granted the request. The plaintiff was ordered by the court to answer questions that he had refused to answer. At a subsequent deposition, the plaintiff once again refused to answer the questions. The defendant filed another motion, and the court ordered dismissal of the

² Plaintiff phrased this issue as a ruling excluding evidence from trial. However, this ruling is related to the first issue because the trial court imposed the ruling also as a discovery sanction. Accordingly, because of its relationship to the first issue, we will address it.

plaintiff's complaint and entry of default on the defendant's counterclaim. Damages were determined from the evidence solely presented by the defendant. *Id.*

On appeal, the plaintiff challenged the entry of the default judgment, the dismissal of his complaint, and the trial court's denial of the plaintiff's right to participate in the hearing to establish the defendant's damages. This Court upheld the entry of the default. *Id.* at 538-539. However, this Court reversed the trial court's decision that precluded the plaintiff from participating in the damages hearing, *id.* at 539-541, stating:

[W]e begin with the recognition that a default admits the right to recover but not the amount of damages. Thus, the court must still assess damages and, ideally, such assessment should award the successful party only what is due, and no more. It is axiomatic that the best way to achieve this result is by permitting the defaulted party to participate in the damages hearing. The provision in [the court rules] for notice to the defaulted party would seem directed at securing such participation.

If notice was only intended to insure an observer's presence, rather than that of a participant, each damages hearing would result in an appeal because that would be the only means by which a defaulted party could voice his objections to the proceedings. As we are not sufficiently persuaded that the administration of justice requires such a procedure, we will not endorse it now. In this conclusion, we are supported by numerous cases from other jurisdictions. ...

In the instant case, plaintiff and his attorney were denied the right to participate in any way at the damages hearing. This was error. Accordingly, we reverse the order assessing damages and remand for a new hearing at which plaintiff shall be permitted to cross-examine defendant's witnesses, *present his proofs*, and argue the issue to the finder of fact. Plaintiff shall not be permitted to introduce proofs in derogation of his liability[.] [*Id.* at 540-541 (emphasis added; citations omitted).]

In *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 77; 618 NW2d 66 (2000), this Court upheld the trial court's decision to exclude the defendant himself and other witnesses from testifying at trial, following the entry of a default judgment as a discovery sanction. However, in that case, the plaintiff failed to file a witness list and did not disclose until the morning of trial that the defendant wanted to testify and to call an expert witness regarding damages. The trial court noted that although the defendant would not be a surprise to the plaintiff, the substance of the defendant's testimony was unknown to the plaintiff because the defendant repeatedly refused to have his deposition taken. Additionally, the plaintiff had no opportunity to conduct discovery of the expert witness. Under the circumstances, the trial court explained its rationale on the record, citing the complete failure to conduct discovery by the defendant, and the lack of good cause shown. Accordingly, this Court concluded that the trial court's decision did not constitute an abuse of discretion. *Id.* at 90-91.

In the present case, plaintiff wished to testify, but the trial court excluded the testimony as a discovery sanction. However, the trial court reached this decision without making any record or conducting an analysis of the discovery sanction factors. Again, the general rule is that the entry of a default does not prevent a party from testifying regarding damages. *Dollar Rent-A-Car Systems v Nodel Construction*, 172 Mich App 738, 743; 432 NW2d 423 (1988); *Meyer*, 103 Mich App at 540-541. The trial court did not conduct an analysis of the degree of discovery that plaintiff had participated in and whether plaintiff was attempting to bypass the trial court's earlier ruling and would seek to admit evidence that he failed to provide in discovery. Unlike the circumstances in *Kalamazoo Oil*, 242 Mich App at 90, there is no record of a complete failure to participate in discovery. Although defendant makes conclusory statements that plaintiff failed to comply, defendant did not delineate the discovery questions posed, the answer received, and the deficiency. Similarly, the trial court did not examine the discovery sent to plaintiff and the information received in response. Accordingly, there are no factual findings to review. *Traxler*, 227 Mich App at 284-285. Rather, the trial court merely concluded that default was appropriate, and plaintiff's testimony was excluded. Accordingly, the trial court abused its discretion by preventing plaintiff from testifying at the trial as a discovery sanction. *Saffian*, 477 Mich at 12. In light of our holding, we need not address plaintiff's remaining issues on appeal.³ Therefore, we reverse the trial court's discovery sanction rulings, vacate the trial court's judgment, and remand for proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause

³ We note that the parties raise various factual issues that were not resolved below. Defendant contends that plaintiff delayed the proceedings, used the proceedings to destroy defendant, and did not participate with the facilitator or his own counsel. These statements are mere allegations and were not factual findings rendered by the trial court. Defendant also contends that plaintiff inappropriately expanded the record on appeal by citing to the suspension from the practice of law by plaintiff's original trial counsel. Although this information may not be in the lower court file, attorney discipline board proceedings are a matter of public record, and judicial notice of the suspension may be recognized at any stage of a proceeding whether requested or not. See *Winekoff v Pospisil*, 384 Mich 260, 268; 181 NW2d 897 (1970); MRE 201(b), (c), and (e). In any event, it is irrelevant to issues discussed in this opinion.