**[Cite as *Watkins v. Holderman*, 2012-Ohio-1707.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Dwight Watkins et al., | : | |
| Plaintiffs-Appellants, | : | |
| | | No. 11AP-491 |
| v. | : | (C.P.C. No. 10CVA07-10505) |
| Vernon N. Holderman et al., | : | (REGULAR CALENDAR) |
| Defendants-Appellees. | : | |

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D E C I S I O N

Rendered on April 17, 2012

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*Natalie J. Bahan*, for appellants.

*Metz, Bailey and McLoughlin*, and *Kyle J. Stroh*, for appellee Vernon N. Holderman.

*Jeffery K. Lucas*, for appellees Jeffrey K. Lucas, The J.A. McGregor Company, and McGregor Company.

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APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

**{¶ 1}** Plaintiffs-appellants, Dwight Watkins, Beverly Watkins, and Marysville Air Charter, Inc. ("appellants"), appeal from the judgment of the Franklin County Court of Common Pleas granting appellees' motion for sanctions and dismissing appellants' complaint, with prejudice, pursuant to Civ.R. 37(B)(2)(c). For the following reasons, we affirm.

**{¶ 2}** On July 19, 2010, appellants filed a complaint against defendants-appellees, Vernon N. Holderman, Jeffrey K. Lucas, McGregor Company, The McGregor Group, Inc., The J.A. McGregor Company, and Gail Holderman, alleging: (1) conversion, (2) unjust

enrichment, (3) civil conspiracy, (4) embezzlement, (5) fraud, (6) breach of fiduciary duty, (7) legal malpractice, and (8) accounting malpractice. (*See generally* Complaint.)

**{¶ 3}** On August 12, 2010, J.A. McGregor Company filed its answer to appellants' complaint. In addition, on November 16, 2010, appellees Jeffrey K. Lucas and McGregor Company filed their answers to appellants' complaint. Further, on January 25, 2011, appellee Vernon N. Holderman filed his answer to appellants' complaint.

**{¶ 4}** On August 12, 2010, appellee Jeffrey K. Lucas filed a notice that he had served upon Dwight Watkins his first set of requests for admission. Additionally, on February 3, 2011, Jeffrey K. Lucas, J.A. McGregor Company, McGregor Company, Vernon Holderman and McGregor Group filed a motion for a Civ.R. 41(B)(1) hearing or an order to compel discovery based upon unanswered discovery requests served upon appellants on July 26, July 28, August 4, August 5, 2010, and January 26, 2011. (*See* Motion for a Civ.R.41(B)(1) Hearing or an Order to Compel Discovery.) In support of their motion, appellees attached, as exhibits, three e-mails dated December 23, 2010, January 19 and January 26, 2011, from Jeffrey K. Lucas to appellants' counsel, Natalie J. Bahan. (*See* Motion, Exhibit A.) In the December 23, 2010 e-mail, Jeffrey K. Lucas requested that appellants' counsel provide discovery responses by December 30, 2010. (*See* Motion, Exhibit A.) Further, in the January 19, 2011 e-mail, Jeffrey K. Lucas wrote:

> Natalie,
>
> I am preparing to file a motion to compel on discovery issues. I am concerned that you are getting yourself in a position that will be difficult professionally. I do not want to see this happen to you and I believe if we sit down we can find a resolution to this case. You are forcing me into a position where I will have to seek the court's involvement and file a claim against you and Mr. Watkins. I think we should get together either Thursday or Friday to avoid this. I can meet you somewhere in Marysville at the beginning or end of the day if that works for you or you can meet me at my office in Columbus. Please provide some proposed time slots to get together.
>
> If you don't respond to my email, I will presume that you have no interest in resolution and will move forward with the court filings.

(*See* Motion, Exhibit A.) Finally, in the January 26, 2011 e-mail, Jeffrey K. Lucas wrote:

> Natalie,
>
> Please see additional discovery request attached hereto. Please provide a date for completion for the discovery previously served upon you. The prior discovery was served upon you on July 26, 2010; July 28, 2010; and August 5, 2010. Defendants' [d]ocuments were provided to you on or about September 16, 2010 which indicates that your case is frivolous and said documents were provided to you without a discovery request. I have sent two emails to you requesting that you complete my discovery request and I have made three phone calls to your office with the promise of a return phone call. In addition, Kyle has told me he has called your office a number of times and sent you correspondence. Neither Kyle [n]or I has [sic] received any response from you on this case since our last meeting on September 2, 2010. You are leaving me with very few options regarding the case but to seek the involvement of the court.

(*See* Motion, Exhibit A.) The record is void of any evidence that appellants responded to appellees' motion for a Civ.R. 41(B)(1) hearing or an order to compel discovery.

**{¶ 5}** On March 3, 2011, the trial court journalized an entry granting appellees' motion, stating:

> [Appellees] have met their Civ. R. 37(E) burden. Between July 26, 2010 and August 5, 2010 [appellees] served [appellants] with a series of discovery requests. The twenty-eight day time period for responding to these discovery requests came and went with no response from [appellants]. Per agreement, [appellants] were given an extension of time until October 22, 2010 in which to respond to [appellees'] outstanding discovery requests. [Appellants] still did not provide responses. [Appellees'] counsel then sent a series of e-mails between December 23, 2010 and January 26, 2011 inquiring as to the status of [appellants'] responses to [appellees'] outstanding discovery requests. To date, [appellants] have not provided [appellees] with responses to their outstanding discovery requests. It is the opinion of the Court that [appellees] have made a reasonable attempt to resolve the present discovery dispute extra-judicially. As such, [appellees] have met their Civ. R. 37(E) burden and their motion must be granted.

(*See* Decision and Entry Granting Motion for Order to Compel Discovery, 2.) Further, the trial court ordered appellants to serve responses to appellees' outstanding discovery requests within 14 days of the date of the filing of the decision. The trial court also advised that "[f]ailure on the part of [appellants] to comply with this order shall result in the imposition of sanctions against [appellants] up to and including dismissal of [appellants'] Complaint in its entirety." (*See* Decision and Entry, 3.)

**{¶ 6}** On March 24, 2011, appellees filed a motion for sanctions pursuant to the trial court's March 3, 2011 order. In support of their motion, appellees attached the affidavits of Jeffrey K. Lucas and Kyle J. Stroh, attesting that: (1) as of March 22, 2011, they had not received any discovery or other communications from appellants; (2) appellees cooperatively provided documents to appellants, in response to oral requests, in order to bring resolution to the case; (3) the documents provided demonstrated that appellants' case was without any sufficient basis in law or fact; (4) appellants have been totally unresponsive since receiving the documents; (5) appellees have repeatedly called and sent e-mails regarding discovery in an attempt to resolve the dispute; and (6) appellants have not provided any schedule or explanation as to why they have not responded to discovery or participated in the case. (*See* Jeffrey K. Lucas Affidavit and Kyle J. Stroh Affidavit, Defendants' Motion for Sanctions, Exhibits A and B.) As sanctions for appellants' failure to abide by the trial court's March 3, 2011 order, and for their failure to prosecute this case or participate in it after they filed it, appellees moved the trial court to dismiss the case with prejudice and to award appellees their cost in defending the case. (*See* Defendants' Motion, 2.). The record is void of any evidence that appellants filed a memorandum contra to appellees' motion for sanctions.

**{¶ 7}** On May 3, 2011, the trial court granted appellees' motion for sanctions and, pursuant to Civ.R. 37(B)(2)(c), dismissed appellants' case, in its entirety, with prejudice. In reaching its decision, the trial court stated that "[t]he fourteen days contemplated in the above decision have come and gone and [appellants] still have not provided [appellees] with responses to their outstanding discovery requests. Since this is so, pursuant to Civ.R. 37(B)(2)(c), the Court will now follow through on its threat and it will dismiss [appellants'] Complaint in its entirety." (*See* Decision and Entry Granting

Defendants' Motion for Sanctions and Entry Dismissing Plaintiffs' Complaint with Prejudice, 2.)

**{¶ 8}** On June 1, 2011, appellants filed a timely notice of appeal and set forth three assignments of error for our consideration:

> [1.] The trial court abused its discretion when it granted Defendant[s'] Motion to Compel and for Sanctions because the Plaintiff[s] complied with Defendant[s'] requests for discovery and interrogatories to the extent possible.
>
> [2.] The trial court abused its discretion when it granted Defendant[s'] Motion for [sic] to Compel and for Sanctions because the Defendant[s] did not file the Motion with clean hands, to wit the Defendant[s] [have] the sole possession of all the documents and records of the Plaintiff[s], as alleged in the Plaintiff[s'] Complaint and Prayer for Relief.
>
> [3.] The trial court abused its discretion when it granted Defendant[s'] Motion to Compel and for Sanctions because the Plaintiff[s] allege[ ] in [their] complaint that the Defendant[s] [have] in [their] sole possession the books and records and financial information the Plaintiff[s] would need in order to more fully respond to the Defendant[s'] discovery requests.

**{¶ 9}** Prior to addressing appellants' assignments of error, we will consider appellee McGregor Company's September 1, 2011 motion to strike portions of appellants' brief. In its motion, appellee McGregor Company argues that, pursuant to App.R. 9(A), appellants should be barred from presenting any argument regarding the discovery requests because the discovery requests are not part of the record. (*See* Motion to Strike, 1-3.) Further, appellee McGregor Company argues that "[a]ppellants[' ] brief is based upon the premises [sic] that the records requested in [a]ppellee[s'] multitude of discovery requests were limited to the records requested in [appellants'] prayer for relief," which, according to appellee McGregor Company, is factually untrue. We note that appellants did not file a memorandum contra to this motion to strike.

**{¶ 10}** After careful review of the record, we agree that appellants failed to raise the following arguments in the trial court, or to provide any evidence in the record regarding the same: (1) appellants' inability to provide discovery to appellees; (2) appellees having

sole possession of documents (books, records, financial reports, bank statements and tax returns); (3) appellants' compliance with discovery to the extent possible; (4) appellants' proof of providing copies of checks drawn on Marysville Air Charter's bank accounts which were made payable to Vernon Holderman and Gail Holderman; (5) appellants' communicating with appellees regarding possession of documents; (6) appellees operating in bad faith during the discovery process by requesting information maintained in their sole possession; and (7) appellants' inability to comply with the trial court's order to compel discovery.

**{¶ 11}** "The burden of affirmatively demonstrating error on appeal rests with the [appellant]." *Miller v. Johnson & Angelo*, 10th Dist. No. 01AP-1210, 2002-Ohio-3681, ¶ 2; *see also* App.R. 9 and 16(A)(7). Pursuant to App.R.16(A)(7), "[t]he appellant shall include in its brief, under the headings and in the order indicated, all the following: * * * (7) [a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, *with citations to the authorities, statutes, and parts of the record on which appellant relies*." (Emphasis added.) Further, pursuant to App.R. 9(A), the record on appeal, in all cases, constitutes "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court." Here, appellants filed a complaint in the trial court without making any subsequent filings in support of their case and/or in defense of appellees' motions to compel and for sanctions. However, in their brief, appellants presented arguments for the first time on appeal that they never made in the trial court. Therefore, pursuant to App.R. 9 and 16(A)(7), we find appellee McGregor Company's motion to be well-taken because appellants' arguments are not supported by the record and fail to provide any citations to authorities, statutes, and parts of the record upon which appellants relied. Therefore, McGregor Company's motion to strike is hereby granted, and those portions of appellants' brief, as indicated in the motion, shall be stricken.

**{¶ 12}** With this in mind, we now consider appellants' assignments of error, regarding whether the trial court abused its discretion in granting appellees' motion to

compel and for sanctions, bearing in mind the portions of the brief we have stricken. We address appellants' three assignments of error together because they are interrelated.

**{¶ 13}** In their assignments of error, appellants argue that the trial court abused its discretion in granting appellees' motions to compel and for sanctions because: (1) appellants complied with appellees' requests for discovery and interrogatories to the extent possible; (2) appellees did not file their motion with "clean hands" because they had sole possession of all of appellants' documents and records as alleged in appellants' complaint; and (3) appellants alleged in their complaint that appellees had sole possession of the books, records, and financial information that appellants would need in order to more fully respond to appellees' discovery requests. (*See* appellants' brief, 3.)

**{¶ 14}** First, we address appellants' arguments with respect to the March 3, 2011 order compelling them to respond to appellees' outstanding discovery requests. It is well-settled that "[a] trial court enjoys broad discretion in the regulation of discovery, and an appellate court will not reverse a trial court's decision to sustain or overrule a motion to compel discovery absent an abuse of discretion." *Stark v. Govt. Accounting Solutions, Inc.*, 10th Dist. No. 08AP-987, 2009-Ohio-5201, ¶ 14, citing *Coryell v. Bank One Trust Co. N.A.*, 10th Dist. No. 07AP-766, 2008-Ohio-2698, ¶ 47, citing *513 E. Rich St. Co. v. McGreevy*, 10th Dist. No. 02AP-1207, 2003-Ohio-2487, ¶ 10. As such, "[u]nder this standard of review, we must affirm the trial court's action absent a showing that the trial court acted unreasonably, unconscionable or arbitrarily." *Id.*, citing *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990).

**{¶ 15}** Civ.R. 37(A)(2) provides, in relevant part, that "[i]f a * * * party fails to answer an interrogatory submitted under Rule 33 * * * the discovering party may move for an order compelling an answer or an order compelling inspection in accordance with the request." *See also* Civ.R. 34(B)(1) compelling production of documents, and Civ.R. 36 (A)(3) compelling answer to request for admission. Further, Civ.R. 37(E) states that "[b]efore filing a motion authorized by this rule, the party shall make a reasonable effort to resolve the matter through discussion with the attorney, unrepresented party, or person from whom discovery is sought. The motion shall be accompanied by a statement reciting the efforts made to resolve the matter in accordance with this section."

**{¶ 16}** Here, the record indicates that appellees served discovery requests upon appellants on July 26, July 28, August 4, August 5, 2010, and January 26, 2011. (*See* Motion for a Civ.R. 41(B)(1) Hearing or an Order to Compel Discovery, 1.) Additionally, the record indicates that appellees' counsel e-mailed and telephoned appellants' counsel on several occasions regarding the outstanding discovery. (*See* Motion, 1-2.) Because appellants' counsel remained unresponsive, appellees filed their motion for a Civ.R. 41(B)(1) hearing or an order to compel discovery on February 3, 2011. (*See generally* Motion for a Civ.R. 41(B)(1) Hearing or an Order to Compel Discovery.) In order to illustrate their efforts to resolve the discovery dispute, appellees attached three e-mails as exhibits to their motion. (*See* Motion, Exhibit A.) In these e-mails, appellees' counsel explained to appellants' counsel that, if she did not comply with the discovery requests, she left him no choice but to seek the trial court's assistance. (*See* Motion, Exhibit A.) Appellants did not oppose appellees' motion.

**{¶ 17}** In its March 3, 2011 order granting appellees' motion to compel, the trial court noted the requirements for properly filing this kind of motion pursuant to Civ.R. 37(A) and (E), and Loc.R. 47.01 of the Franklin County Court of Common Pleas. (*See* Decision and Entry Granting Motion for Order to Compel Discovery, 1-2.) The trial court further noted that appellees agreed to give appellants an extension of time until October 22, 2010, in which to respond to outstanding discovery but that appellants still did not provide responses. (*See* Decision and Entry, 2.) Additionally, the trial court noted that, between December 23, 2010 and January 26, 2011, appellees' counsel sent a series of e-mails inquiring as to the status of appellants' discovery responses, but, to date, appellants have not provided appellees with responses to their outstanding discovery. (*See* Decision and Entry, 2.) The trial court then opined that appellees met their Civ.R. 37(E) burden by making a reasonable attempt to resolve the discovery dispute extra-judicially. (*See* Decision and Entry, 2.) Based upon the foregoing, we cannot find that the trial court acted unreasonably, unconscionably or arbitrarily. Therefore, the trial court did not abuse its discretion in granting appellees' motion to compel.

**{¶ 18}** Finally, although appellants argue that: (1) they complied with discovery to the extent possible; (2) appellees had unclean hands in filing their motion; and (3) appellees had sole possession of the books, records and financial information that

appellants would need in order to more fully respond to appellees' discovery requests, appellants failed to present any of these arguments to the trial court in the form of a memorandum contra to appellees' motion to compel, or otherwise. Because appellants did not raise any of these issues in the trial court, they have waived their right to raise them on appeal. *See Moore v. Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-732, 2011-Ohio-1607, at *6 ("It is well settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal."). However, because the complaint is part of the record, we will further address appellants' argument that the prayer for relief put the trial court on notice of future discovery issues. (*See* appellants' brief, 4.)

**{¶ 19}** Appellants contend that they placed the issue of appellees having sole possession of the documents needed to respond to discovery before the trial court from the outset because "possession of this documentation was specifically requested in the [appellants'] Prayer for Relief." (*See* appellants' brief, 4.) However, appellants' argument is misdirected for two reasons: (1) in the prayer for relief, there is no mention of "appellees' having *sole* possession of documents" or that appellants "needed certain documents to respond to discovery," and (2) the prayer for relief is not evidence of any alleged wrongdoing on the part of appellees. The prayer for relief simply asks the trial court, among other things, to order appellees to "return all corporate documents including but [not] limited to incorporation document[s], bank statements, checks, asset reports, tax filings and returns." (*See* Complaint, 18.) We do not believe that this request places the trial court on notice regarding future discovery issues. As such, the record is void of any evidence supporting appellants' assignments of error.

**{¶ 20}** Second, we address appellants' arguments with respect to the May 3, 2011 order granting appellees' motion for sanctions and dismissing appellants' case with prejudice. "Civ.R. 37 provides the trial court with the authority to impose sanctions upon a party for failure of that party to comply with a court order." *Whitt v. Newmedia, Inc.*, 10th Dist. No. 97APE12-1625, 1998 WL 400750, at *1. "Among the sanctions available to the court, pursuant to Civ.R. 37(D), are the striking out of a pleading or parts thereof, dismissal of an action, and treating as a contempt of the court the failure to obey its orders." *Id*.

**{¶ 21}** "Civ.R. 41(B)(1) permits a trial court to dismiss an action with prejudice, after notice to plaintiff's counsel, when a party fails to comply with a court order." *Tymachko, D.O. v. Ohio Dept. of Mental Health*, 10th Dist. No. 04AP-1285, 2005-Ohio-3454, ¶ 14. Pursuant to Civ.R. 41(B)(1), "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." Further, "[a] party 'has notice of an impending dismissal with prejudice for failure to comply with a discovery order when counsel has been informed that *dismissal is a possibility* and has had a reasonable opportunity to defend against dismissal.' " (Emphasis added.) *Tymachko* at ¶ 15, quoting *Quonset Hut, Inc. v. Ford Motor Co*, 80 Ohio St.3d 46, 49 (1997). Finally, Civ.R. 41(B)(3) states that "[a] dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as *an adjudication upon the merits* unless the court, in its order for dismissal, otherwise specifies." (Emphasis added.)

**{¶ 22}** "The Ohio Supreme Court has held that dismissal with prejudice pursuant to Civ.R. 41(B) may be used when the parties' failure to comply with a court order is due to willfulness, bad faith or any fault of the party." *Whitt* at *2, citing *Toney v. Berkemer*, 6 Ohio St.3d 455, 458 (1983). However, "[a] trial court is not required to use the terms 'willfulness or bad faith' in a dismissal order, so long as such behavior can be established from the record." *Tymachko* at ¶ 14, *see also LJEL, Inc. v. Overland Transp. Sys., Inc.*, 10th Dist. No. 95AP-1250, 1996 WL 145515. In addition, "[a] trial court's 'imposition of the sanction of dismissal cannot be disturbed unless the dismissal was an abuse of the trial court's discretion.' " *Whitt* at *2. As stated above, "[a]n abuse of discretion connotes more than an error of law or judgment and implies that the court's attitude is arbitrary, unconscionable and unreasonable." *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

**{¶ 23}** In the present matter, appellants do not raise an argument regarding the notice of dismissal or the harshness of the sanction of dismissal with prejudice but, instead, argue that the trial court abused its discretion in granting appellees' motion for sanctions and dismissing appellants' complaint with prejudice because: (1) appellants complied with appellees' requests for discovery and interrogatories to the extent possible;

(2) appellees did not file their motion with "clean hands" because they had sole possession of all of appellants' documents and records as alleged in appellants' complaint; and (3) appellants alleged in their complaint that appellees had sole possession of the books, records, and financial information that appellants would need in order to more fully respond to appellees' discovery requests. (*See* appellants' brief, 3.)

**{¶ 24}** Because we thoroughly addressed the deficiencies in appellants' assignments of error above, we decline to address this matter further with respect to the May 3, 2011 decision and entry granting appellees' motion for sanctions and dismissing appellants' complaint with prejudice. However, for the following reasons, we find no abuse of discretion on the part of the trial court in granting appellees' motion for sanctions and dismissing appellants' complaint with prejudice.

**{¶ 25}** The record indicates that, in its March 3, 2011 decision and entry granting appellees' motion to compel discovery, the trial court put appellants' counsel on notice that "[f]ailure on the part of [appellants] to comply with this order shall result in the imposition of sanctions against [appellants] up to and including *dismissal of [appellants'] Complaint in its entirety*." (Emphasis added.) (*See* Decision and Entry, 3.) Further, the trial court gave appellants 14 days from the date of the filing of its decision to comply with the outstanding discovery requests. (*See* Decision and Entry, 3.) Up until this point, appellants had from October 22, 2010 to March 17, 2011, to respond to appellees' discovery requests but remained unresponsive. Then, on March 24, 2011, appellees filed a motion for sanctions, asking the trial court to dismiss appellants' complaint with prejudice because of noncompliance with the trial court's March 3, 2011 order compelling discovery. (*See* Motion for Sanctions, 1-2.) On May 3, 2011, nearly two months later, the trial court journalized an order granting appellees' motion for sanctions and dismissing appellants' complaint with prejudice. (*See* Decision and Entry Granting Motion for Sanctions and Dismissing Complaint with Prejudice.) In its decision and entry, the trial court stated that "[t]he fourteen days contemplated in the above decision have come and gone and [appellants] still have not provided [appellees] with responses to their outstanding discovery requests. Since this is so, pursuant to Civ.R. 37(B)(2)(c), the Court will now follow through on its threat and it will dismiss [appellants'] Complaint in its entirety." (*See* Decision and Entry, 2.)

**{¶ 26}** Based upon appellants' blatant disregard for the March 3, 2011 order compelling discovery and continued unresponsiveness to opposing counsel and the trial court throughout this litigation, we find that the trial court did not act arbitrarily, unconscionably, and/or unreasonably by issuing a sanction pursuant to Civ.R. 41(B). Therefore, based upon the record before us, the trial court did not abuse its discretion in granting appellees' motion for sanctions and dismissing appellants' complaint with prejudice.

**{¶ 27}** Appellants' first, second, and third assignments of error are overruled.

**{¶ 28}** Having overruled all three of appellants' assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

*Motion to strike granted; judgment affirmed.*

SADLER and CONNOR, JJ., concur.

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