IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Keith Bartelli,	:	
	:	
Appellant	:	
	:	
v.	:	No. 589 C.D. 2012
	:	
Jeffrey A. Beard, Angela Auman, DEP SUPT Edgar Kneiss, DEPT SUPT James McGrady, Dr. Arenada, Dr. Bohinski, Dr. Olga, Dr. Stanish, P. Ginochette, Walter Koss, Lt. P. Bleich, Lt. Marcin, Jill Moran, RN Leah, RN Murdock, SGT Mosier, SGT Starzomslo, SUPT James Wynder, Cheryl Wienewski	:	Submitted: December 14, 2012

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: January 24, 2013**

Keith Bartelli, pro se, appeals from the March 16, 2012 Order of the Court of Common Pleas of Luzerne County (trial court) granting "Defendants' Second Motion for Summary Judgment" (Second Motion) filed by: Jeffrey A. Beard, Angela Auman, DEP SUPT Edgar Kneiss, DEPT SUPT James McGrady, Dr. Arenada, Dr. Bohinski, Dr. Olga, Dr. Stanish, P. Ginochette, Walter Koss, Lt. P. Bleich, Lt. Marcin, Jill Moran, RN Leah, RN Murdock, SGT Mosier, SGT

Starzomslo, SUPT James Wynder, and Cheryl Wienewski (collectively referred to as "Defendants").[1,2] The trial court granted Defendants' Second Motion due to Bartelli's failure to: (1) comply with the trial court's June 30, 2011 Order directing Bartelli to, within forty-five days, retain experts and advise Defendants of the identity of the experts; and (2) comply with Luzerne County Civil Rule 1035.2 which requires any party wishing to contest a motion for summary judgment to file a comprehensive brief within thirty days of service of the motion. (Trial Ct. Op. at 1-3, March 16, 2012, S.R.R. at 10b-12b.)

Bartelli is an inmate who was formerly incarcerated at the State Correctional Institution at Dallas (SCI-Dallas). On November 27, 2006, Bartelli filed a complaint against Defendants alleging that he sustained injuries to his head, neck, and shoulder on or about November 29, 2004, when the bunk bed in his cell, upon which he was sitting, collapsed. Defendants filed preliminary objections, which were denied in part and sustained in part. After the filing of several motions regarding discovery and the completion of the pleadings, Defendants filed their first motion for summary judgment (First Motion). By Order dated June 30, 2011, the trial court disposed of the First Motion. The pertinent part of the trial court's June 30, 2011 Order is the denial, in part, of the First Motion based upon Bartelli's

[1] The Defendants are past and present employees of the Pennsylvania Department of Corrections and include former Secretary Jeffrey A. Beard and former Superintendent James Wynder of the State Correctional Institution at Dallas (SCI-Dallas). (Defendants' Brief at 3.)

[2] We note that Bartelli filed an unopposed "Motion for Stay and Abeyance" (Motion) with this Court on December 24, 2012 seeking to place this matter in abeyance and stay any further action; however, as Bartelli failed to set forth any reason why he is seeking such relief, we will deny his Motion.

lack of the expert testimony necessary to establish that the bunk bed was defective. The trial court granted Bartelli forty-five days to retain experts and advise Defendants of the identity of the experts. (Trial Ct. Op. at 1-5, June 30, 2011, S.R.R. at 1b-5b; Trial Ct. Order, June 30, 2011, S.R.R. at 6b.) Hence, Bartelli was required to retain and identify his expert witnesses by August 15, 2011. (Trial Ct. Op. at 2, March 16, 2012, S.R.R. at 11b.)

On August 15, 2011, Bartelli filed a request with the trial court seeking a thirty day extension to produce the name and address of an expert witness. The trial court denied Bartelli's request for an extension by order dated September 26, 2011. On September 7, 2011, Defendants received a document from Bartelli, dated September 2, 2011, listing the names and addresses of three expert witnesses and twelve supporting witnesses. (Trial Ct. Op. at 1-2, March 16, 2012, S.R.R. at 10b-11b.)

Defendants waited until January 17, 2012, to file their Second Motion with the trial court. Therein, while acknowledging that they had received a document from Bartelli on September 7, 2011 listing the names and addresses of three expert witnesses and twelve supporting witnesses, Defendants alleged, *inter alia*, that Bartelli failed to comply with the trial court's June 30, 2011 Order. On January 24, 2012, Bartelli filed a motion for enlargement of time to file a response in opposition to Defendants' Second Motion. However, the trial court never ruled on Bartelli's motion.

By Order dated March 16, 2012, the trial court granted Defendants' Second Motion because Bartelli failed to: (1) comply with the trial court's June 30, 2011 Order; and (2) respond to the Second Motion in violation of Luzerne County Civil Rule 1035.2(a)(3). (Trial Ct. Op. at 2-3, March 16, 2012, S.R.R. at 11b-12b.) The trial court opined that it was within its discretion to grant Defendants' Second Motion as a sanction for Bartelli's failure to comply with its June 30, 2011 Order and that Luzerne County Civil Rule 1035.2(a)(5) provides that, "[i]f any opposing party fails to file its brief in opposition within the time" required by Civil Rule 1035.2(a)(3), the "party shall be deemed not to oppose the matter." (Trial Ct. Op. at 2-3, March 16, 2012, S.R.R. at 11b-12b.) The trial court acknowledged that it never ruled on Bartelli's motion for an enlargement of time to respond to Defendants' Second Motion, but noted that Bartelli had not filed a brief in opposition at the time the trial court entered its March 16, 2012 Order. (Trial Ct. Op. at 3 n.1, March 16, 2012, S.R.R. at 12b.)

Bartelli timely appealed the trial court's March 16, 2012 Order to this Court.[3] By order dated April 13, 2012, the trial court ordered Bartelli to file,

[3] An appellate court's scope of review of an order granting summary judgment is plenary. Stimmler v. Chestnut Hill Hospital, 602 Pa. 539, 553, 981 A.2d 145, 153 (2009). As stated by our Supreme Court:

> Our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or clearly abused its discretion. Summary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party, resolving all doubts as to the existence of a genuine issue of material fact against

(Continued…)

within twenty-one days, a concise statement of errors complained of on appeal pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 1925(b). Thus, Bartelli's 1925(b) Statement was due on May 4, 2012; however, the trial court's docket entries reflect that the 1925(b) Statement was docketed on May 8, 2012. On that same date, May 8, 2012, the trial court entered an order stating that Bartelli failed to comply with its April 13, 2012 Order; therefore, there was no issue preserved for appellate review and no Rule 1925(a) opinion would be issued in support of the trial court's March 16, 2012 Order.

Here, we initially address Defendants' contention that because Bartelli failed to timely file a 1925(b) Statement, there is no issue preserved for appeal. In his brief,[4] Bartelli contends that he did timely file his 1925(b) Statement as shown by the proof of service attached to the 1925(b) Statement, which indicates that it was

---

> the moving party. When the facts are so clear that reasonable minds cannot differ, a trial court may properly enter summary judgment.

Id. at 553, 981 A.2d at 153-54.

[4] We note that Bartelli has actually filed two main briefs in support of this appeal. The first brief was filed on September 14, 2012, and the second brief was filed on December 19, 2012. It appears that Bartelli believed he was required to file a second brief in response to this Court's October 25, 2012 Order directing that this appeal would be submitted on briefs, without oral argument. Because Defendants have not objected to the filing of Bartelli's second brief, we shall consider both briefs in support of Bartelli's appeal. We note further that, by Order entered November 19, 2012, this Court granted Bartelli's unopposed "Application for Extension of Time to File Reply Brief" and directed him to file a reply brief on or before December 14, 2012. On December 20, 2012, this Court received a request in the form of a letter, rather than a motion, asking for another extension to file a reply brief; however, since Bartelli has thoroughly responded, in the two main briefs he has already filed, to the issues raised by Defendants in their brief in opposition to this appeal, there is no longer any need for Bartelli to file a reply brief.

mailed on May 2, 2012 to, *inter alia*, the trial court.[5] Also contained in the certified record is a copy of a "Department of Corrections, S.C.I. Rockview Postage Order And Receipt" indicating that Bartelli paid the required postage and received official approval on May 2, 2012 to mail legal documents to the trial court judge. Defendants neither challenge the legitimacy of the proof of service nor the "Department of Corrections, S.C.I. Rockview Postage Order And Receipt."

Rule 1925(b)(1) governs the filing and service of a 1925(b) Statement and provides, in pertinent part, that an "[a]ppellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail as provided in Pa. R.A.P. 121(a)." Pa. R.A.P. 1925(b)(1). Rule 121(a) of the Pennsylvania Rules of Appellate Procedure provides, in pertinent part:

> A pro se filing submitted by a prisoner incarcerated in a correctional facility is deemed filed as of the date it is delivered to the prison authorities for purposes of mailing or placed in the institutional mailbox, as evidenced by a properly executed prisoner cash slip or other reasonably verifiable evidence of the date that the prisoner deposited the pro se filing with the prison authorities.

Pa. R.A.P. 121(a). In the present matter, the "Department of Corrections, S.C.I. Rockview Postage Order And Receipt" contained in the certified record is sufficient to verify that Bartelli deposited his 1925(b) Statement filing with the prison authorities on May 2, 2012. Accordingly, the 1925(b) Statement is deemed

[5] We note that this Court received and docketed Bartelli's 1925(b) Statement on May 7, 2012.

filed as of May 2, 2012; therefore, we conclude that it was timely filed resulting in the preservation of the issues relevant to this appeal raised therein.

Bartelli challenges the trial court's granting of Defendants' Second Motion based upon the trial court's determination that he failed to comply with its June 30, 2011 Order. Bartelli recognizes that he filed his list of expert witnesses late; however, he argues that he has never acted in bad faith during these proceedings, but instead has proceeded diligently under the circumstances. Bartelli further contends that Defendants' claim of prejudice set forth in their brief is without merit because they failed to file a timely motion to compel discovery or a motion for sanctions. Bartelli argues that Defendants' presumption that he will not be able to retain expert witnesses anytime soon given his incarceration and financial situation are not reasons to grant summary judgment in favor of Defendants. In addition, Bartelli argues that the foregoing presumption shows bias and prejudice toward him as an inmate.

As explained by our Supreme Court:

> Generally, courts are afforded great discretion in fashioning remedies or sanctions for violations of discovery rules and orders. See e.g. Fox [v. Gabler], [534 Pa. 185, 189,] 626 A.2d [1141,] 1143 (1993); Pa. R.C.P. No. 4019 (setting forth circumstances when discovery sanctions may be imposed and the type of sanction orders available to a court). Indeed, even where a trial court "imposes a judgment by default . . . as a sanction for failure to respond adequately to discovery requests, it is acting well within its discretion and the latitude given it by our Rules of Civil Procedure to enter a judgment by default against the disobedient party." Fox, [534 Pa. at 189,] 626 A.2d at 1143 (internal quotations omitted); see also Pa. R.C.P. No. 4019(c)(3) (allowing for an order "entering a judgment of non pros or by default against the disobedient party or party advising the

> disobedience" of a discovery order). *Notwithstanding those general propositions, we highly disfavor dismissal of an action, whether express or constructive, as a sanction for discovery violations absent the most extreme of circumstances.* Calderaio v. Ross, 395 Pa. 196, 150 A.2d 110, 112 (1959); see also Pride Contracting, Inc. v. Biehn Constr., Inc., . . . 553 A.2d 82, 84 ([Pa. Super.] 1989) (citing Calderaio).
>
> Of course, considerations of due process foster this Court's hesitancy to endorse complete preclusion of a party's evidence or litigation in light of a discovery violation. As the Supreme Court of the United States has oft-stated, parties are technically deprived of their procedural due process rights under the Fourteenth Amendment when they are not afforded full opportunities to present evidence before a court. See e.g. Logan [v. Zimmerman Brush Co., 455 U.S. 422 (1982)]; Butler Bros. v. McColgan, 315 U.S. 501 . . . (1942); Saunders v. Shaw, 244 U.S. 317 . . . (1917). Identical considerations must be given under Article I, Section 1 of the Pennsylvania Constitution as well. See Nixon v. Commonwealth, 576 Pa. 385, 839 A.2d 277 (2003); Pa. Game Com'n v. Marich, 542 Pa. 226, 666 A.2d 253 (1995). Accordingly, all tribunals . . . must carefully weigh multiple aspects of a case before concluding that dismissal of an action, whether explicitly or constructively through the exclusion of evidence, is a proper remedy for a discovery violation.

City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Breary), 604 Pa. 267, 284-85, 985 A.2d 1259, 1269-70 (2009) (emphasis added). The Supreme Court has adopted "four factors as the proper standard for evaluation of the severity and, ultimately, the vitality, of a discovery sanction." Id. at 286-87, 985 A.2d at 1271. These factors are:

> (1) the prejudice, if any, endured by the non-offending party and the ability of the opposing party to cure any prejudice; (2) the noncomplying party's willfulness or bad faith in failing to provide the requested discovery materials; (3) the importance of the excluded evidence in light of the failure to provide the discovery; and (4) the number of discovery violations by the offending party.

Id. at 286, 985 A.2d at 1270.

Here, there is no indication that the trial court considered any of the foregoing factors when it granted Defendants' Second Motion resulting in the dismissal of Bartelli's action as a sanction for Bartelli's noncompliance with the trial court's June 30, 2011 Order. Notwithstanding, upon consideration of the factors adopted by the Supreme Court as the proper standard for evaluating the severity of the trial court's sanction imposed upon Bartelli, we conclude that the trial court abused its discretion by granting Defendants' Second Motion.

First, while Defendants argue prejudice, they do not expound upon exactly what prejudice they have endured other than the age of this litigation. Notably, Defendants themselves have also contributed to the length of this litigation. Bartelli's list of expert witnesses was due by August 15, 2011 but, rather than immediately filing any type of motion to move the proceedings along, Defendants waited almost five months to file their Second Motion, and waited over four months after actually receiving the list from Bartelli.

Second, Defendants argue that Bartelli showed bad faith in failing to timely comply with the trial court's June 30, 2011 Order. Defendants admit that Bartelli provided them with a list of his expert and supporting witnesses on September 7, 2011, as required by the trial court, but contend that the list was defective in that it did not indicate the exact areas of expertise of the individuals, their backgrounds, and no expert reports were submitted. However, the trial court's June 30, 2011 Order did *not* direct Bartelli to file any expert reports or to explain each expert's

background. Instead, the trial court only directed Bartelli to retain experts and to advise Defendants of the identity of the experts. There is no dispute that Bartelli advised Defendants of the identity of his experts on September 7, 2011. Thus, we conclude that there is no evidence that Bartelli acted in bad faith.

As further justification for the grant of the Second Motion, Defendants contend that it is unlikely that Bartelli could retain any expert witnesses, even if the trial court had granted him additional time, given his imprisonment and financial situation. Defendants argue that it was not clear if Bartelli had, in fact, retained the experts he listed and what, if any, relevant opinion evidence the experts may have relating to any remaining issues in this case. Because speculation is not the proper standard for the grant of a motion for summary judgment, Defendants' presumptions are not a valid basis upon which to affirm the trial court's March 16, 2012 Order granting Defendants' Second Motion.

Like the Supreme Court, "we highly disfavor dismissal of an action, whether express or constructive, as a sanction for discovery violations absent the most extreme of circumstances." City of Philadelphia, 604 Pa. at 284, 985 A.2d at 1270. Our review of this matter reveals that there are no extreme circumstances that warranted the trial court's grant of summary judgment to Defendants due to Bartelli's failure to timely comply with the trial court's June 30, 2011 Order. Therefore, we regretfully find that the trial court abused its discretion by granting Defendants' Second Motion on this basis. The same is true for the trial court's grant of the Second Motion because Bartelli failed to file, pursuant to Luzerne County Civil Rule 1035.2(a)(3), a comprehensive brief in opposition to

Defendants' Second Motion. Although Luzerne County Civil Rule 1035.2(a)(5) permits the trial court to deem a motion unopposed if a party fails to file such a brief, the rule does not mandate that the trial court grant the motion. To the contrary, the trial court is directed to dispose of the unopposed motion "in accordance with the law as a matter of course." Luzerne County Civil Rule 1035.2(a)(5). In other words, the motion must be disposed of on the merits, not solely because it is "deemed" unopposed.

For the foregoing reasons, we must reverse the trial court's March 16, 2012 Order granting Defendants' Second Motion.[6]

RENÉE COHN JUBELIRER, Judge

[6] Of course, our reversal of the trial court's March 16, 2012 Order does not preclude the trial court from considering any future motions in accordance with the law.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Keith Bartelli,	:	
	:	
Appellant	:	
	:	
v.	:	No. 589 C.D. 2012
	:	
Jeffrey A. Beard, Angela Auman, DEP SUPT Edgar Kneiss, DEPT SUPT James McGrady, Dr. Arenada, Dr. Bohinski, Dr. Olga, Dr. Stanish, P. Ginochette, Walter Koss, Lt. P. Bleich, Lt. Marcin, Jill Moran, RN Leah, RN Murdock, SGT Mosier, SGT Starzomslo, SUPT James Wynder, Cheryl Wienewski	:	

O R D E R

NOW, January 24, 2013, the March 16, 2012 Order of the Court of Common Pleas of Luzerne County entered in the above-captioned matter is **REVERSED**. It is further **ORDERED** that the "Motion for Stay and Abeyance" filed by Keith Bartelli, seeking to place this matter in abeyance and stay any further proceedings, is **DENIED**.

RENÉE COHN JUBELIRER, Judge