IN THE UTAH COURT OF APPEALS

----ooOoo----

Chris Lippman, Plaintiff and Appellant, v. Coldwell Banker Residential Brokerage Company; Owen Salkin; et al., Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20090537-CA F I L E D (April 15, 2010) 2010 UT App 89

Second District, Ogden Department, 060902994
The Honorable Pamela G. Heffernan

Attorneys: Brian P. Duncan and Tyler J. Jensen, Layton, for Appellant
David W. Overholt and Darci D. Tolbert, South Jordan, for Appellees

---

Before Judges Davis, Thorne, and Voros.

DAVIS, Presiding Judge:

Plaintiff Chris Lippman raises several points of error in the trial court's decision denying his third motion for an extension to disclose expert witnesses. Specifically, Lippman contends that the trial court abused its discretion by misconstruing the facts underlying the motion; inappropriately attempting to "even the score" with other defendants instead of properly managing discovery in the case; failing to consider "unforeseen circumstances" as required by Boice v. Marble, 1999 UT 71, ¶ 10, 982 P.2d 565; and effectively dismissing his claim by refusing to allow his "essential witness" to testify. Defendants Owen Salkin and Coldwell Banker Residential Brokerage Company (Defendants)[1] counter that exclusion of Lippman's expert witness was not an abuse of discretion because it was required by operation of rule 37 of the Utah Rules of Civil Procedure, see Utah R. Civ. P. 37(f). "We review a trial court's remedy for

---

[1]Salkin and Coldwell Banker are the only defendants who are parties to this appeal.

discovery abuses under an abuse of discretion standard." SFR, Inc. v. Comtrol, Inc., 2008 UT App 31, ¶ 9, 177 P.3d 629. We conclude that the trial court did not abuse its broad discretion in denying Lippman's motion. Accordingly, we affirm.

The trial court's rule 26 amended scheduling order required Lippman to disclose any expert witnesses by April 1, 2008. See Utah R. Civ. P. 26(a)(3) (setting forth required disclosures during discovery). For various reasons irrelevant to this appeal, Lippman was unable to secure and designate an expert witness by this deadline. On April 3, 2008, Lippman therefore filed a Motion to Amend Scheduling Order to Allow More Time for Disclosure of Experts (the first request for an extension), and the memorandum supporting this motion requested an extension until May 31, 2008. Approximately nine months later--on March 2, 2009--Lippman filed a request to submit for decision and a proposed order on the first request for an extension. In the proposed order, Lippman erroneously represented to the trial court that the first request for an extension sought an extended expert discovery deadline of March 15, 2009, rather than May 31, 2008. After Defendants filed an objection to the proposed order, Lippman filed another Motion to Amend Scheduling Order (the second request for an extension), again seeking an extension of the expert discovery deadline. On March 16, 2009, the trial court denied the first request for an extension, stating that "[t]he Motion is stale and, given the age of this case, it would be inappropriate to allow further amendments." Subsequently, for reasons that are not entirely clear, Lippman filed a motion to withdraw the second request for an extension and submitted yet another Motion to Amend Scheduling Order (the third request for an extension), which motion did not specify the length of the extension being requested. On June 10, 2009, the trial court issued a decision denying the third request for an extension, which decision is the subject of this appeal.

"Utah law mandates that a trial court exclude an expert witness report disclosed after expiration of the established deadline unless the trial court otherwise chooses to exercise its equitable discretion." Posner v. Equity Title Ins. Agency, Inc., 2009 UT App 347, ¶ 8, 222 P.3d 775 (emphases added). Indeed, pursuant to rule 37(f) of the Utah Rules of Civil Procedure,

> [i]f a party fails to disclose a witness . . . as required by Rule 26(a) . . . , that party shall not be permitted to use the witness . . . unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).

Utah R. Civ. P. 37(f) (emphasis added). Accordingly, "unless the failure to disclose is harmless or the party shows good cause for the failure," see id., "if a party fails to make the disclosures mandated by rule 26, the trial court is required to exclude the evidence and, at its discretion, may impose other sanctions in addition to or instead of exclusion." Rukavina v. Sprague, 2007 UT App 331, ¶ 8, 170 P.3d 1138 (mem.) (emphasis added). Moreover, "[t]rial courts . . . have discretion to determine whether good cause excuses tardiness or whether prejudice would result from allowing the disputed evidence at trial." Posner, 2009 UT App 347, ¶ 23.

In this case, Lippman undisputedly designated his expert after the April 1, 2008 expert discovery deadline set forth in the trial court's rule 26 amended scheduling order.[2] The trial court reasonably concluded that prejudice would flow from allowing the late designation. Because the trial court determined that the failure to disclose was not harmless, i.e., the extension would prejudice Defendants and delay trial, and did not rule that good cause was shown, the trial court was required to exclude Lippman's witness by operation of rule 37, see Utah R. Civ. P. 37(f). We see no abuse of discretion in the trial court's refusal to exercise its discretion otherwise.

Lippman's other arguments on appeal are unavailing. First, Lippman cursorily contends that the trial court misconstrued the facts underlying the third request for an extension. Lippman's argument appears to be a challenge to the factual findings underlying the trial court's decision. The trial court, however, did not make any factual findings, and Lippman has not argued on appeal that the trial court's failure to do so was error. Rather, Lippman simply states in his opening brief that "the trial court ignored [many] important facts that had direct relation to making a decision and got some of the facts wrong." Where the issue has not been properly argued or briefed, see Utah R. App. P. 24(a)(9) (setting forth briefing requirements), we decline to address it further. See Coleman v. Stevens, 2000 UT 98, ¶ 7, 17 P.3d 1122.

Next, Lippman contends that the trial court's denial of the third request for an extension was improper because it was based on the trial court's attempt "to even the score rather than follow the law." We disagree. While the trial court did refer to an earlier summary judgment granted against other defendants in the case, this was not the sole basis for the trial court's decision. Rather, the trial court outlined several other reasons justifying the denial, including that the third request for an

---

[2]Lippman filed a Certificate of Service of Plaintiff's Disclosure of Expert Witnesses and Reports on March 2, 2009.

extension was filed nearly one year after expiration of the expert disclosure deadline; that the request did not specify a particular date requested for the extension; and that the granting of another extension would cause prejudice, that is, additional expense and delay, see generally Posner, 2009 UT 347, ¶ 23 ("Trial courts . . . have discretion to determine whether . . . prejudice would result from allowing the disputed evidence at trial."). Contrary to Lippman's contention otherwise, it is clear that the trial court's decision was based on several factors and not simply on the basis of the earlier summary judgment ruling.

Third, Lippman claims that under Boice v. Marble, 1999 UT 71, 982 P.2d 565, the facts of this case present exigent circumstances warranting flexibility in the deadline for designation of experts set forth in the trial court's amended scheduling order. However, because Boice is distinguishable, we conclude that it has limited application here.

In that case, Boice filed a medical malpractice action against a treating physician. See id. ¶ 4. In accordance with the trial court's scheduling order, Boice filed his designation of experts on April 25, 1996, four days before the cut-off date of April 29, 1996. See id. ¶¶ 4, 7. Subsequently, in November of that same year, Boice's expert decided at the last minute not to offer expert testimony. See id. ¶ 7. Within eight days, Boice motioned the trial court to designate a substitute expert, which motion was denied on the basis that the substitute expert was not timely designated. See id. The Utah Supreme Court concluded that the trial court had "abused its discretion in excluding Boice's substitute expert's evidence," id. ¶ 11, and stated that "on occasion, justice and fairness will require that a court allow a party to designate witnesses . . . after the court-imposed deadline for doing so has expired," id. ¶ 10. In so concluding, the court found persuasive that Boice had designated his original expert before the trial court's deadline for designation of witnesses had expired, that Boice had not violated the trial court's scheduling order, and that he "sought leave to substitute a new expert only after . . . his previously designated expert[] decided at the last minute not to testify." Id. ¶ 11 (emphasis added). Such is not the case here. Rather, Lippman wholly failed to follow the deadlines outlined in the trial court's amended scheduling order and did not designate an expert witness at all until nearly a year after the expiration of the original deadline. Because the facts of this case are distinguishable from the facts of Boice, we conclude that this is not a situation where the trial court's refusal to change a scheduling order in light of "unforeseen circumstances," see id. ¶ 10, constitutes an abuse of discretion.

Finally, Lippman claims that the trial court's decision to exclude his witness was tantamount to a dismissal and cites Kilpatrick v. Bullough Abatement, Inc., 2008 UT 82, 199 P.3d 957, in support of this proposition. Again, the facts of that case are distinguishable from the facts of this case. In Kilpatrick, the trial court ordered an outright dismissal of the plaintiff's case as a sanction under rule 37 of the Utah Rules of Civil Procedure, for the party's failure to obey a discovery order, see id. ¶ 21. See generally Utah R. Civ. P. 37(b)(2) (authorizing the district court to, among other things, dismiss the claim of a party who "fails to obey an order to provide or permit discovery"). In this case, the trial court specifically exercised its discretion not to impose another sanction, which could have included dismissal. Instead, it excluded Lippman's expert witness as required by the rule, see Utah R. Civ. P. 37(f). The trial court did not dismiss his case. Cf. Posner v. Equity Title Ins. Agency, Inc., 2009 UT 347, ¶ 23 n.8, 222 P.3d 775 ("The trial court did not dismiss Posner's action as a sanction; rather, it excluded his expert's testimony because disclosure of the witness's identity . . . was untimely. It was the absence of expert testimony, not sanction by the trial court, that led to dismissal of Posner's claim."). Moreover, given the interlocutory nature of this appeal, Lippman will still have the opportunity to fully litigate his case--he will simply be unable to present testimony from his expert witness at trial.[3]

Affirmed.

_____
James Z. Davis,
Presiding Judge

WE CONCUR:

_____
William A. Thorne Jr., Judge

_____
J. Frederic Voros Jr., Judge

---

[3]Lippman conceded at oral argument that the trial court has not yet made a determination as to whether the expert's testimony is even necessary to "establish[] the standard of care required in cases dealing with the duties owed by a particular profession." See Preston & Chambers, PC v. Koller, 943 P.2d 260, 263 (Utah Ct. App. 1997).