

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-332

JANUARY TERM, 2018

Mirela Pasic* v. University of Vermont	}	APPEALED FROM:
Medical Center	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 799-9-16 Cncv

Trial Judge: Robert A. Mello

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the superior court’s dismissal of her lawsuit, which was based on her failure to oppose the motion and to proceed with discovery as ordered. We affirm.

In September 2016, plaintiff filed a complaint alleging that defendant wrongfully terminated her. On November 9, 2016, after filing its answer, defendant served plaintiff with a first set of interrogatories and a request for production of documents. Plaintiff failed to respond, and on February 7, 2017, defendant moved for sanctions. The following day, the court scheduled a discovery conference for February 24, stating, in part, as follows: “[U]nless a completed Discovery Stipulation and Proposed Order is filed prior to the [date of the conference], personal attendance is mandatory. No phone calls will be permitted. No exceptions.” Plaintiff’s attorney failed to appear for the conference even though no discovery stipulation and proposed order had been filed. After reaching plaintiff’s counsel by telephone, the court stated that because at that point there was no court order to compel discovery, it would treat defendant’s motion for sanctions as a motion to compel. Plaintiff’s attorney informed the court that he was meeting with his client the next day to complete defendant’s discovery requests. The court then granted the motion to compel and gave plaintiff twenty days to respond to the discovery requests or be subject to sanctions.

On March 22, defendant notified the court that plaintiff had failed to comply with the February 24 order. On April 26, the court granted plaintiff’s motion to extend time retroactively and until May 1 to comply with the order. The court also sanctioned plaintiff by requiring her to reimburse defendant \$1000 for attorney’s fees. On May 3, plaintiff filed documents with the court certifying that she had sent defendant responses to its first set of discovery requests.

On May 25, defendant filed a motion to dismiss the complaint, stating that on May 4 it had received belated discovery responses from plaintiff that were “frankly evasive and incomplete in multiple respects” and thus in violation of the court’s order. In its lengthy motion, defendant detailed the deficiencies in the responses, noting, among other things, that the interrogatories were not answered under oath as required by rule, included unsworn factual assertions in place of requested documents, and in many cases produced answers that were totally nonresponsive to the questions asked. Defendant also noted that plaintiff’s counsel had failed to respond to its May 4

letter detailing the deficiencies in the responses and had failed to remedy the deficiencies. In seeking dismissal of the complaint, defendant stated that plaintiff's untimely and evasive responses were pervasive and went to the heart of her case and that plaintiff had never suggested that her chronic noncompliance with the court's discovery order was due to factors beyond her control.

On June 23, defendant filed with the superior court a document it had served upon plaintiff and entitled "Notice of Non-Opposition to Defendant's Motion to Dismiss," in which it stated that any opposition to the motion to dismiss was due on June 12, but that plaintiff had neither opposed the motion or remedied the situation. On that same day, the parties stipulated to an extension of time until July 7 to allow defendant to oppose the motion to dismiss. On July 10, plaintiff filed a motion labeled as a request for an extension of time in which to comply with the court's discovery order, but stating therein that it requested until May 14 to respond to the motion to dismiss. The trial court docket entries indicate that the court treated that request as seeking an extension of time to respond to defendant's motion to dismiss until July 14. On July 19, defendant filed an opposition to the motion, pointing out that assuming plaintiff was seeking an extension of time until July 14, she had still not responded to the motion.

On August 7, the superior court filed two entry orders. The first denied the motion to extend time until July 14, noting that "July 14th came and went, but plaintiff filed no response to defendant's motion to dismiss." The second granted the motion to dismiss, noting that plaintiff had not opposed the motion and that she still had not complied with the order requiring her to respond to defendant's discovery requests by May 1, insofar as the responses that were served on defendant on that date "clearly are insufficient and appear evasive." On August 8, defendant filed with the court and served upon plaintiff a proposed final judgment order stating that the matter would be dismissed with prejudice. Plaintiff filed no objection to the proposed order within the five days allowed by rule, V.R.C.P. 58(d), and the court entered its final judgment on August 30.

On appeal, plaintiff argues that the superior court abused its discretion in granting defendant's motion to dismiss. In John v. Med. Ctr. Hosp. of Vt., 136 Vt. 517, 519 (1978) this Court held that a discretionary ruling on discovery sanctions is "not subject to appellate review unless it is clearly shown that such discretion has been abused or withheld". As plaintiff points out, we emphasized in John that the trial court findings must indicate bad faith or willful disregard, as well as prejudice, before the ultimate sanction of dismissal may be imposed for discovery violations, and that dismissal "cannot be imposed merely as a punishment for failure to comply with the court's order." Id. at 519. She argues that in this case, the superior court should have taken a less drastic approach to defendant's motion to dismiss, noting that she did file discovery responses by May 1, as ordered, and that the court failed to hold a hearing on the motion to dismiss, as is generally required when dismissal is being considered as a discovery sanction.

Given the circumstances of this case, we conclude that the superior court acted within its discretion in dismissing the matter. First and foremost, plaintiff failed to respond to defendant's motion to dismiss, notwithstanding multiple opportunities and incentives to do so. Because she failed to respond to the motion, no hearing was required. See V.R.C.P. 78(b)(1) ("If a memorandum in opposition [to a written motion] is not timely filed when required under this rule, the court may dispose of the motion without argument."); Deutsche Bank v. Pinette, 2016 VT 71, ¶ 12, 202 Vt. 328 (stating that plaintiff lender "was required to answer a motion to dismiss within fifteen days or risk that the trial court would decide the motion without argument at any time thereafter."). The bases for the dismissal were plaintiff's failure to respond to the motion, as well as her failure to comply with defendant's discovery requests as ordered by the court. Although plaintiff asserts on appeal that she did comply with the discovery requests by the extension deadline, she made no argument to the trial court that her initial discovery responses were

adequate, and did not ever seek a hearing to advocate that position, or any position, to the trial court. Moreover, prior to dismissal, the court had imposed a lesser monetary sanction on plaintiff, to no avail.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice