COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2603 **Cir. Ct. No. 2011CV4266**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

PETER BERNEGGER,

PLAINTIFF-APPELLANT,

V.

DAVID COOPER AND SCOTT JOHNSON,

DEFENDANTS-RESPONDENTS,

MILLER BREWING COMPANY AND DONNIE KISNER,

DEFENDANTS.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Blanchard, JJ.

¶1 CURLEY, P.J. Peter Bernegger, *pro se*, appeals the trial court's order dismissing his fraudulent misrepresentation claim against Scott Johnson

pursuant to WIS. STAT. § 802.06(2)(a)6. (2011-12).[1] He also appeals the trial court's order dismissing his claims against Johnson and David Cooper in their entirety for want of prosecution pursuant to WIS. STAT. § 805.03. Bernegger claims that the trial court erred in dismissing his fraudulent misrepresentation claim against Johnson because he was not given adequate notice that the issue would be heard on the hearing date that the trial court considered it. He also claims that the trial court erroneously exercised its discretion in dismissing his claims against Johnson and Cooper in their entirety. We affirm.

BACKGROUND

¶2 Bernegger filed his original complaint in March 2011 and amended it in June of that year. The amended complaint alleged four claims against Johnson, Cooper, Donnie Kisner, and Miller Brewing Company: tortious interference with a contract; breach of fiduciary duty; intentional fraudulent misrepresentation; and breach of good faith and fair dealing.

¶3 The essence of Bernegger's claims was that the defendants tricked him into abandoning a potentially profitable business venture. The amended complaint stated that in 2004 Bernegger met with Cooper, Johnson, Kisner,[2] and

[1] The order in which the trial court dismissed Bernegger's fraudulent misrepresentation claim against Johnson pursuant to WIS. STAT. § 802.06(2)(a)6. also dismissed all of Bernegger's claims against Donnie Kisner and Miller Brewing Company. Bernegger does not appeal the portion of the order dismissing all claims against Miller Brewing and Kisner.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] At various points in the record, some of which we quote below, "Kisner" is misspelled. For ease of reading, our record quotations will simply use the correct spelling, and will not utilize brackets or "*sic*" to denote any spelling errors.

others to form a corporation called CPI, LLC. The purpose of CPI was to turn food waste from "existing food and/or beverage processing plants" into "value added products." Bernegger, the manager of CPI, "came up with the idea to take spent grain from the beer brewing process and extract the remaining protein and dietary fiber from it," and to sell the remaining product to food manufacturers. Bernegger also contacted Miller Brewing in 2006 to pitch the idea. According to the amended complaint, the projected gross revenue from the project would have exceeded ten million dollars; however, the complaint did not say that there actually was any contract or deal between CPI and Miller Brewing, and Bernegger points to no evidence in the record showing that any such deal was made.[3]

¶4 The amended complaint explains that Bernegger signed a petition to dissolve CPI after it was made clear that nobody wanted to work with him after Bernegger was indicted on federal fraud charges.[4] According to the amended complaint, Bernegger received an email from Miller Brewing stating that it was terminating the project in September 2008 because of Bernegger's indictment. Additionally, in May 2009, the other members of CPI served upon Bernegger a petition to dissolve the company. According to the amended complaint, some of the reasons the other members of the company gave for wanting to dissolve CPI were that potential clients were unwilling to transact business with the company

[3] Johnson's brief says, "it is undisputed that neither CPI nor its successor ever turned a profit." Bernegger does not refute this statement in his reply brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (an issue not refuted is accepted as true).

[4] Bernegger was eventually convicted of bank fraud and mail fraud. *See* ***United States v. Bernegger***, 661 F.3d 232, 234 (5th Cir. 2011) (per curiam).

because of Bernegger's indictment, and the other members did not want to have their business affairs affiliated with Bernegger for the same reason.

¶5 According to the amended complaint, the defendants' approaching Bernegger regarding dissolution of CPI was improper because it amounted to an "end run" around Bernegger to steal his ideas about spent grain and dietary fiber and cut him out of the potential profits. Bernegger alleged that he came to this conclusion after learning, at his fraud trial, that some of the defendants were working together on a project having something to do with food byproducts being used for other purposes. According to the amended complaint, each of the defendants "interfered" with what would have otherwise been a profitable business venture that should have included him.

¶6 Following the filing of the complaint in this action, discovery ensued. As relevant here, the defendants filed several motions to dismiss. Johnson, a Mississippi resident, and Cooper, a California resident, both filed motions to dismiss on the basis of personal jurisdiction. Additionally, Miller Brewing filed a motion to dismiss pursuant to WIS. STAT. § 802.06(2)(a)6. on the basis that Bernegger "fail[ed] to set forth any allegation remotely approaching a legally cognizable claim," and argued, among other things, that Bernegger failed to plead fraud with the requisite particularity. Johnson and Kisner later joined Miller Brewing's motion to dismiss on these grounds.

¶7 Thereafter, in February 2012, the trial court ordered a stay on further discovery unrelated to the personal jurisdiction issues pending its ruling on Johnson's and Cooper's motions. The court explained that the discovery stay was meant to simplify and streamline discovery:

> I will try to do this one at a time so we don't get overly confused as to where we're going. Because my guess is that if I find there is jurisdiction over Mr. Johnson as well as Mr. Cooper that they'll probably be joining in again with the motions to dismiss, because it appears that everyone is aligned in interest in terms of their position of this case after the jurisdictional issue….

¶8 Just a few weeks later, however, Bernegger violated the trial court's order, sending extremely broad discovery demands having nothing to do with jurisdiction regarding Johnson or Cooper. For example, Bernegger sent interrogatories to Kisner, who at the time was not challenging personal jurisdiction, asking for numerous details regarding Kisner's stake, if any, in PET, LLC—the company allegedly formed after CPI was dissolved—including "the first and last name" and address and phone number "of each attorney who worked on or drafted or signed or filed any legal paper or document" of PET's. He also asked Kisner for the names, addresses, telephone numbers, and all emails to and from any/all companies with whom PET communicated. Bernegger also sent broad discovery to Kisner's wife, who was not a party to the lawsuit.

¶9 At a subsequent motion hearing in May 2012, the trial court made it clear that Bernegger had violated the order, and that discovery was to be limited to issues of personal jurisdiction relating to Johnson and Cooper:

> [I]t is my understanding … that there is broad based discovery that has been filed with the Court with regard to everyone in this case; including Miller, including Mr. Kisner, and … from Mrs. Kisner, who is not a party.
>
> I mean, this is getting to be a problem….
>
> The issues involving personal jurisdiction are very straightforward. It's minimum contacts with the State and then follows State statutes with different aspects of contacts….
>
> To do a written deposition of a non-party right now is totally inappropriate.

¶10 In response, Bernegger objected, insisting that his discovery was appropriately limited and that Wisconsin law allowed him to ask questions as broadly as he did. The trial court again explained the substance of the law on personal jurisdiction and explained that the court had the discretion to limit discovery to just the issue of personal jurisdiction. Bernegger again objected.

¶11 The trial court then warned Bernegger that if he continued to violate the court's orders, the case would be dismissed.

¶12 Shortly after the court admonished Bernegger to limit his discovery to comply with its order, Bernegger *again* sent extremely broad discovery to the defendants. He again sent discovery to Kisner, to Kisner's wife, and to Miller Brewing. When the defendants brought this information to the trial court's attention, Bernegger responded that the discovery pertaining to Mrs. Kisner—who still was not a party to the action—was sent on belief that she had "discoverable information leading the court to find that it has personal jurisdiction over Johnson and Cooper, or at least in part." However, Bernegger did not hint about what that information might be, beyond saying that Mrs. Kisner "may know the location of documents" about the spent grain project in Wisconsin and may know the names of others involved in the project.

¶13 At the next motion hearing, in August 2012, the trial court again warned Bernegger that failure to obey the court's discovery order could result in dismissal of his case:

> And … technically right now, I should dismiss your claims throughout the entire case for violation of the Court order. I chalked it up the first time around [to] the fact that you were *pro se* and you just didn't understand exactly what we were talking about. So then I was quite clear as to the very limited nature, I believe, of the discovery involving the jurisdiction issues. And, yet, you continue to

> say, ["]well, the statutes allow me to do it, so I will do whatever I want.["] I'm not going to go through this throughout the entire case[;] if this matter survives today, the motions to dismiss by Miller and Kisner, I'm not going to do this every single time. And at some point, I'm going to say, enough is enough, and then the case is going to be gone.

(Emphasis added.)

¶14 At the August 2012 motion hearing, the trial court dismissed Bernegger's claims against Miller Brewing and Kisner pursuant to WIS. STAT. § 802.06(2)(a)6. for failure to state a claim. The court also dismissed Bernegger's fraud claim against Johnson pursuant to § 802.06(2)(a)6. for failure to state a claim. At the hearing, Bernegger objected to the court's considering his fraud claim regarding Johnson, saying that he had no notice that any motions relating to Johnson were going to be heard on that day. The trial court explained that Bernegger suffered no prejudice from the court's hearing the issue that day because Johnson had joined in Miller Brewing's motion to dismiss nearly a year earlier and that the issues were identical. However, the trial court ultimately decided to allow Bernegger to respond to Johnson's motion to dismiss at the next hearing date, which was when the court had scheduled argument on the personal jurisdiction issue.

¶15 Another hearing was held several weeks later, on October 10, 2012, at which Bernegger, who was in federal prison, was scheduled to appear by videoconference, but did not do so. Bernegger was not available when the case was called, but did later appear by telephone. When Bernegger stated that he did not appear on time because his case manager did not receive notice from the court, the trial court's clerk took exception and told Bernegger that she was not responsible for his case.

¶16 The court admonished Bernegger for his failure to appear, and warned him that if he continued to violate the court's orders, his case would be dismissed for want of prosecution. Bernegger responded by objecting, and continued to blame the court and the clerk for not submitting notice to his case manager by fax. The court responded that if Bernegger failed to appear at the next hearing, his case would be dismissed for want of prosecution.

¶17 At this point, Bernegger demanded that the court recuse itself and again blamed the court and the clerk for his failure to appear. The trial court then dismissed Bernegger's claims for want of prosecution.

¶18 Bernegger appeals. Additional facts will be developed below.

ANALYSIS

¶19 On appeal, Bernegger challenges the trial court's order dismissing his claims against Johnson and Cooper for want of prosecution pursuant to WIS. STAT. § 805.03. He also challenges the part of the trial court's earlier order dismissing his fraudulent misrepresentation claim against Johnson. Bernegger does not appeal the dismissal of his claims against Miller Brewing and Kisner.

¶20 We first consider Bernegger's appeal of the court's dismissal, pursuant to § 805.03, of his claims against Johnson and Cooper.[5] Bernegger claims that it was the clerk's fault that he did not appear at the October 12, 2012 hearing at which he was supposed to appear by video conference, and that there is

[5] This court has thoroughly reviewed Bernegger's brief and reply to discern his arguments for each issue on appeal. To the extent we do not address an argument, we conclude it is not dispositive. *See, e.g.*, ***State v. Waste Mgmt. of Wisconsin, Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

no additional support in the record for dismissal. He also argues that the trial court failed to give advance notice of dismissal. We disagree.

¶21 "We review a [trial] court's decision to dismiss an action for failure to prosecute under WIS. STAT. § 805.03 … for an erroneous exercise of discretion." ***Theis v. Short***, 2010 WI App 108, ¶6, 328 Wis. 2d 162, 789 N.W.2d 585. Under this standard, we "'affirm the trial court's exercise of discretion unless" the court "fails to properly apply the law or makes an unreasonable determination under the existing facts and circumstances.'" ***Id.*** (citation omitted). "'[W]e will sustain the sanction of dismissal if there is a reasonable basis for the [trial] court's determination that the noncomplying party's conduct was egregious and there was no clear and justifiable excuse for the party's noncompliance.'" ***Id.*** (citation omitted). We need not affirm the dismissal using the same rationale as the trial court. *See* ***The Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.***, 2008 WI App 116, ¶34, 313 Wis. 2d 93, 756 N.W.2d 461 (we may affirm a correct trial court decision for reasons other than those relied upon by trial court).

¶22 WISCONSIN STAT. § 805.03 provides, as relevant here:

> For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07.

A dismissal of a party's action is included in the list of orders authorized under WIS. STAT. § 804.12(2)(a). *See* § 804.12(2)(a)3.

¶23 Although dismissal of a complaint "is an extremely drastic penalty that should be imposed only where such harsh measures are necessary," it is appropriate "where the noncomplying party's conduct is egregious or [done in] bad faith and without a clear and justifiable excuse." *See* ***Dawson v. Goldammer***, 2006 WI App 158, ¶22, 295 Wis. 2d 728, 722 N.W.2d 106. A court may dismiss a complaint for bad faith if it finds that the noncomplying party intentionally or deliberately delayed or obstructed discovery, or refused to follow a discovery order. *See* ***id.*** To find bad faith, the trial court "is not required to analyze a specific set of factors before awarding a default judgment; instead, it should focus on 'the degree to which the party's conduct offends the standards of trial practice.'" *See* ***Brandon Apparel Grp., Inc. v. Pearson Props., Ltd.***, 2001 WI App 205, ¶11, 247 Wis. 2d 521, 634 N.W.2d 544 (citation omitted). For instance, bad faith may be "based on a 'spirit of noncooperation.'" *See* ***id.*** (citation omitted). "To dismiss a complaint for egregious conduct, the court must find that the noncomplying party's conduct, though unintentional, is so extreme, substantial and persistent that it can properly be characterized as egregious." ***Dawson***, 295 Wis. 2d 728, ¶22.

¶24 As detailed more fully above, the record provides ample evidence supporting dismissal. The trial court told the parties numerous times that discovery was limited only to matters relating to whether the court had personal jurisdiction over Johnson and Cooper; the court also repeatedly explained its reasons for limiting discovery and that the order was an important rule to be followed for the benefit of all involved, not merely a suggestion to be casually disregarded. Moreover, contrary to what Bernegger argues, the trial court repeatedly warned Bernegger that his continued violation of the court's orders could result in dismissal. Yet despite the court's thorough explanations and

admonitions, Bernegger repeatedly and flagrantly violated the court's orders. Bernegger repeatedly sent extremely broad discovery to Miller Brewing and Kisner, asking Kisner, for example, the names, addresses, telephone numbers, and all emails to and from any/all companies with whom PET communicated. Bernegger also repeatedly sent discovery to Mrs. Kisner—who was not a party—asking for information that appears to have been in no way linked to personal jurisdiction. We conclude that the trial court had before it an ample record to support a conclusion that Bernegger's decision to repeatedly send discovery requests obviously unrelated to personal jurisdiction regarding Johnson and Cooper, after the trial court had specifically told him not to do so, was egregious, *see* ***Dawson***, 295 Wis. 2d 728, ¶22. We conclude that the record supports characterizing it as having been done in bad faith, *see* ***Brandon Apparel Grp.***, 247 Wis. 2d 521, ¶11 (bad faith may be "based on a 'spirit of noncooperation'") (citation omitted). Moreover, there is no "clear and justifiable excuse" for Bernegger's behavior in violating clear court orders. *See* ***Dawson***, 295 Wis. 2d 728, ¶22.

¶25 Indeed, it appears to us that the trial court need not have waited until Bernegger's inappropriate interactions with the clerk at the October 10, 2012 hearing to dismiss the case. When the trial court told Bernegger, in August 2012, that "technically right now, I should dismiss your claims throughout the entire case for violation of the Court order," Bernegger's conduct was already "so extreme, substantial and persistent" that it could have been "properly be characterized as egregious," *see* ***Dawson***, 295 Wis. 2d 728, ¶22, and the trial court would have properly exercised its discretion in dismissing the case at that point, *see* ***id.*** By that point in the litigation, Bernegger had not only twice violated the trial court's clear discovery order with impunity, but had also made false

statements at a hearing about Johnson and Cooper without any substantiating information and had repeatedly added new arguments to his motions contrary to the briefing schedule.[6]

¶26 In sum, this is not, as Bernegger argues, a case where the trial court "jumped too quickly to a dismissal," nor is it a case where the trial court dismissed the case solely because of Bernegger's failure to appear at the October 10, 2012 hearing. Rather, Bernegger repeatedly and flagrantly flouted the trial court's orders—and did so at the expense of the other parties, the court, and ultimately, the people of Wisconsin. Consequently, dismissal was entirely proper.

¶27 Therefore, although our reasons differ from those articulated in the trial court's written order that followed its oral dismissal, *see* ***The Farmers Auto. Ins. Ass'n***, 313 Wis. 2d 93, ¶34, we conclude that the trial court did not erroneously exercise its discretion in dismissing Bernegger's claims against Johnson and Cooper.

¶28 Because we conclude that dismissal of *all* of Bernegger's claims against Johnson and Cooper in their entirety was proper pursuant to WIS. STAT. § 805.03, we need not discuss Bernegger's appeal of the portion of the order dismissing his fraudulent misrepresentation claim against Johnson. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 ("we decide cases on narrowest possible grounds"). For all of the reasons given above, that claim too was properly dismissed.

[6] At the August 2012 hearing, Bernegger made allegations against the characters of Johnson and Cooper, without substantiating the allegations. The trial court subsequently admonished Bernegger for making allegations against Johnson and Cooper that were not substantiated.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.