COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1940 **Cir. Ct. No. 2005CV1725**

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

WIGGINS LANDSCAPE CONTRACTOR, INC.,

PLAINTIFF-APPELLANT,

V.

CHRISTOPHER L. BRUSKIEWICZ AND CARLA BRUSKIEWICZ,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Order reversed and cause remanded with directions.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Wiggins Landscape Contractor, Inc., appeals from an order dismissing its lawsuit for failure to comply with the court's scheduling order. Wiggins's noncompliance was not egregious, and the circuit court did not

give Wiggins an opportunity to avoid dismissal. Therefore, we reverse. We remand with instructions that: (1) Wiggins may have three business days from the date of this opinion to comply with paragraphs two and seven of the circuit court's scheduling order dated September 27, 2005; and (2) Wiggins's witness list may include only Earl Wiggins.

Background

¶2 Wiggins sued Christopher and Carla Bruskiewicz for breach of contract in February 2005. The court conducted a scheduling conference by telephone on September 27, 2005, and issued a scheduling order.

¶3 The scheduling order set April 27, 2006, as the date for a pretrial conference with the trial date to be chosen at that time. Paragraph two of the scheduling order required that opposing counsel exchange witness lists and itemized statements of damages. Paragraph seven required the parties to file with the court pretrial reports on or before April 20, 2006, containing substantial detail about the facts, theories, and evidence supporting their respective positions. Paragraph seven further required that these reports be signed by the attorneys trying the case. Other provisions set discovery deadlines and required good faith settlement negotiations. The order cautioned that failure to comply with its terms might result in sanctions including dismissal of claims and defenses.

¶4 Wiggins never submitted a witness list or itemization of damages. Nonetheless, the parties conducted depositions, exchanged discovery, and took part in mediation. No party sought the court's assistance in any pretrial dispute. On January 16, 2006, the parties resolved the Bruskiewiczes' counterclaims against Wiggins, and the court signed an order dismissing those counterclaims.

¶5 On April 26, 2006, the Bruskiewiczes filed their pretrial report six days late. On April 27, 2007, the day of the pretrial conference, Wiggins filed its pretrial report seven days late.

¶6 At the pretrial conference, Wiggins appeared by its attorney, Patrick Anderson. The circuit court queried Anderson as to why Wiggins had not filed a pretrial report earlier. Anderson explained that he had changed law firms during the course of the case and that matters were "difficult" during that process.

¶7 The court noted inadequacies in Wiggins's pretrial report and asked Anderson whether he had claims or witnesses. He replied, "no witnesses, just Mr. [Earl] Wiggins himself." As to plaintiff's breach of contract claim, Anderson stated that it was ready for trial and could be resolved in half a day.

¶8 During the court's colloquy with plaintiff's attorney, defendants made an oral motion to dismiss. Anderson responded by describing the completed pretrial discovery and trial preparation. He requested twenty-four hours to file a statement of damages and a witness list naming only Earl Wiggins. He added that damages were reviewed in detail at Earl Wiggins's deposition and would not surprise the defendants. He twice indicated that he did not want Wiggins prejudiced by attorney error.

¶9 The court dismissed the case from the bench, stating, "I look at my files ahead of time…. I saw nothing." It concluded: "[t]here is really nothing going on here. The plaintiff has an obligation if you're coming to court to comply with the orders of the court so we can proceed." It directed defendants' attorneys to prepare an order dismissing the case. That order was signed on May 11, 2006.

¶10 Wiggins moved to reconsider. The court denied the motion on July 18, 2006, noting that Wiggins "still ha[d] not complied" with the scheduling order. This appeal followed.

Discussion

¶11 Dismissal for either the violation of a court order or failure to prosecute is largely left within the circuit court's discretion. ***Hlavinka v. Blunt***, ***Ellis & Loewi, Inc.***, 174 Wis. 2d 381, 392, 497 N.W.2d 756, 760 (Ct. App. 1993). Our standard of review is therefore deferential. ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898, 906. Nonetheless, "'[e]xercise of discretion' … is not license for mere 'unfettered decision making,'" but requires "application of correct legal principles to the facts of record." ***Hlavinka***, 174 Wis. 2d at 392, 497 N.W.2d at 760.

¶12 We review the circuit court's actions in light of the principle that dismissal for failure to comply with a pretrial order should rarely be granted. ***Trispel v. Haefer***, 89 Wis. 2d 725, 732, 279 N.W.2d 242, 245 (1979). Because the sanction is so harsh, it is appropriate only in cases of egregious conduct. ***Ibid.***

¶13 Here, the circuit court never considered whether Wiggins's conduct was egregious. We have reviewed the record independently to determine whether it reasonably supports such a conclusion. *See* ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶22, 247 Wis. 2d 501, 517, 634 N.W.2d 553, 562. It does not.

¶14 Egregiousness may be evinced by conduct that is '"extreme, substantial and persistent.'" ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶14, 265 Wis. 2d 703, 717–718, 666 N.W.2d 38, 45–46 (citation omitted).

The inquiry is fact-intensive. *See* ***Industrial Roofing Servs.***, 2007 WI 19, ¶3, 299 Wis. 2d at __, 726 N.W.2d at 900.

¶15 Paragraph two of the scheduling order required "counsel [to] provide" Wiggins's witness list and itemization of damages to the defendant by December 20, 2005. Wiggins conceded its failure to comply. Paragraph seven of the order required each party to submit to the court by April 20, 2006, a detailed pretrial report signed by "the attorney who will try the case." Wiggins's report was a week late and it failed to include a variety of required components in its submission. Wiggins's report was inadequate to satisfy paragraph seven.

¶16 We do not condone the inadequacies here. Nonetheless, failing to submit formal documentation to opposing counsel and submitting an inadequate pretrial report in violation of a single court order cannot be deemed extreme or persistent under the circumstances. The record shows Wiggins actively participating in the lawsuit, producing witnesses, tendering discovery, and successfully engaging in settlement procedures. The court made no finding to suggest that Wiggins stonewalled the defendants' discovery or trial preparation. To the contrary, the defendants' own pretrial report reflects their knowledge that Earl Wiggins would testify and reflects their ability to impeach him with his deposition if necessary. *Cf.* ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 543–545, 535 N.W.2d 65, 69–70 (Ct. App. 1995) (inadequate discovery response addressing issue and not part of a continuous attempt to obstruct or delay litigation cannot be categorized as egregious).

¶17 Significantly, the failures and omissions were with Attorney Anderson. Paragraphs two and seven required action by Wiggins's attorney, rather than by Wiggins or its principal. The circuit court therefore ought to have

considered Wiggins's knowledge of, or complicity in, Anderson's conduct, and whether Wiggins failed to act in a reasonable and prudent manner.[1] *See* ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 727-28, 599 N.W.2d 411, 421 (Ct. App. 1999). These considerations should have preceded imputing Anderson's conduct to his client and imposing so harsh a sanction as dismissal. *See* ***id.***

¶18 "Whether a client acts reasonably and prudently depends in part on whether the client knew, or should have known, about the attorney's failures and whether the client failed to act to correct the situation when presented with an opportunity to do so." ***Industrial Roofing Servs.***, 2007 WI 19, ¶71, 299 Wis. 2d at ___, 726 N.W.2d at 913. The circuit court did not consider these factors, either as to the plaintiff, Wiggins Landscape Contractor, Inc., or its principal, Earl Wiggins. For example, the court did not find that Wiggins received or understood the implications of the scheduling order. Moreover, although the court stated that it had reviewed the file prior to the hearing, it did not send the parties notice that it was considering dismissal as a sanction for Wiggins's inadequate filings.

¶19 In its July 18, 2006, decision on reconsideration, the court twice observed that Wiggins "to date" had not complied with the scheduling order. It

[1] Our supreme court modified this rule in 2007 and "determine[d] that it is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, where the client is blameless." ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶61, 299 Wis. 2d 81, ___, 726 N.W.2d 898, 910. In civil cases, we generally presume retroactive application of court decisions. ***Wenke v. Gehl Co.***, 2004 WI 103, ¶69, 274 Wis. 2d 220, 267, 682 N.W.2d 405, 428. We do not decide whether the stricter standard of ***Industrial Roofing Servs.*** applies retroactively here, however, because the circuit court did not make findings sufficient to satisfy the less rigorous standard previously in effect. *See* ***Industrial Roofing Servs.***, 2007 WI 19, ¶61 n.10, 299 Wis. 2d at n.10, 726 N.W.2d at 910 n.10.

added: "[e]ven after this court indicated that dismissal was the proper sanction, plaintiff still has not complied with the Scheduling Order." While these comments imply that the court meant to take an interim step giving Wiggins an opportunity to protect its claim, it did not do so. The court gave no advance notice and offered no opportunity to cure before it dismissed the case with prejudice on April 27, 2006. As a matter of law, no reasonable and prudent client would have acted to correct the situation by complying with earlier court orders after April 27, 2006. *See* ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶31, 283 Wis. 2d 384, 401, 700 N.W.2d 27, 36 (application of undisputed facts to a legal standard is a question of law). The order of dismissal is therefore reversed.

¶20 Fairness to the defendants on remand requires judicially estopping the plaintiff from changing the position it took at the pretrial conference in opposing the proposed sanction. *See* ***Coconate v. Schwanz***, 165 Wis. 2d 226, 231, 477 N.W.2d 74, 75 (Ct. App. 1991) (judicial estoppel prevents a party from asserting a position in a legal proceeding different from that previously asserted). Anderson represented that he required twenty-four hours to comply with the scheduling order and represented that Wiggins's only witness would be Earl Wiggins. Accordingly, on remand Wiggins shall, within three business days of the release of our opinion: (1) submit a witness list and an itemization of damages in compliance with paragraph two of the scheduling order; and (2) file a pretrial report in compliance with paragraph seven of the court's scheduling order. The witness list shall include only Earl Wiggins.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).