COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0633 **Cir. Ct. No. 99 CV 8303**

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

SUKHJITPAL DHILLON,

PLAINTIFF-RESPONDENT,

V.

GARY LESNIAK,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

CITY OF MILWAUKEE AND CITY OF MILWAUKEE POLICE DEPARTMENT,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Gary Lesniak appeals from an order dismissing his counterclaim, dismissing his third-party claim,[1] and granting default judgment in favor of Sukhjitpal Dhillon. He claims the trial court erred by dismissing his counterclaim, his third-party claims against the City of Milwaukee and the City of Milwaukee Police Department, and granting judgment to Dhillon.

¶2 Because it was reasonable under the circumstances presented for the trial court to determine that Lesniak's conduct was egregious and because Lesniak failed to provide sufficient evidence that he had a clear and justifiable excuse for his delays in advancing his counterclaims and third-party complaint, we affirm.

I. BACKGROUND

¶3 On September 1, 1999, Dhillon filed a small claims eviction action against Lesniak. Lesniak was operating a used-car dealership on Dhillon's property. Dhillon alleged that Lesniak was $3,000 delinquent in rent payments, and sought other unspecified damages related to Lesniak's failure to obtain proper permits for the storage of motor vehicles and operation of the dealership located at 6313 West Forest Home Avenue in the City of Milwaukee.

¶4 Lesniak admitted that he owed some rent, but disputed the amount alleged. By way of affirmative defenses and counterclaim, Lesniak alleged that Dhillon's actions led to damages to motor vehicles he stored on the premises, and loss of business or business opportunity in the sum of $160,000. As a result, the action was transferred to large claims court. Lesniak also amended his third-party

[1] Lesniak filed a third-party complaint against the City of Milwaukee and the City of Milwaukee Police Department.

complaint, adding the City of Milwaukee and its police department as third-party defendants for participating in the removal, destruction or sale of seventy of his vehicles. As a result, he sought damages for loss of the vehicles, loss of business or business opportunity, punitive damages, costs, disbursements, attorney's fees and any other relief the court deemed just and equitable. Dhillon, the City and the police department filed answers and affirmative defenses.

¶5 On April 6, 2000, the trial court conducted a scheduling conference and ordered that all discovery be completed by August 15, 2000. On May 22, 2000, Lesniak was deposed but, because he failed to produce all the requested documents and because there was inadequate time to complete the deposition, the parties agreed to recess the proceeding to provide more time for Lesniak to produce the appropriate documents and to set a new date for continuing the deposition. Neither was forthcoming.

¶6 A new pretrial conference was scheduled for September 8, 2000. Lesniak, however, became ill and was hospitalized, so the pretrial was adjourned to November 22, 2000. On November 10, 2000, the trial court held a telephonic conference and ordered that Lesniak provide Dhillon and the third-party defendants twelve categories of documents on or before 5:00 p.m. on December 11, 2000. Failure to comply would result in a judgment being entered in favor of Dhillon and the dismissal with prejudice of Lesniak's counterclaim and claim against the third-party defendants. The order was signed November 30, 2000. On December 11, 2000, at 4:54 p.m., Lesniak delivered nine of the twelve requested documents. Portions of the documents were covered when photocopied and others were illegible.

¶7 On December 15, 2000, Dhillon filed a motion to allow the parties to file motions for default judgment. On January 2, 2001, Dhillon filed an affidavit by his counsel averring that Lesniak had failed to comply with the November 30th order in not providing: (1) a copy of a $40,000 check allegedly supporting Lesniak's claim that he had made a loan to certain third parties; (2) the insurance policy for the vehicles on the premises that were towed by the City of Milwaukee; and (3) copies of any canceled checks which he paid to Dhillon for rent.

¶8 At the hearing on the default judgment motion, Lesniak responded that the $40,000 note related to a business acquisition and was not relevant to the lease payments due Dhillon. He argued that none of the documents requested in any way affected his claim against the City. He suggested that because he had turned over nine out of the twelve documents requested, and had provided all of the documents that he was able to obtain, that monetary sanctions previously contemplated by the court would be a more appropriate sanction than dismissal of the action.[2] The trial court granted judgment in favor of Dhillon and the third-party defendants ruling that Lesniak had failed to comply with the November 30, 2000 stipulated order; it entered a judgment in favor of Dhillon for the sum of $3,000 plus statutory costs and disbursements; and it dismissed with prejudice Lesniak's counterclaims against Dhillon and the third-party complaint against the City of Milwaukee and the City of Milwaukee Police Department. Lesniak now appeals.

[2] Lesniak's counsel informed the hearing court that some of the documents requested no longer existed. These included the $40,000 note which may have been lost in one of the vehicles that was towed away. Lesniak mistakenly thought he had insurance policies for the vehicles, but instead it was a dealer's bond. His bank was unable to locate copies of checks on microfiche.

II. ANALYSIS

¶9 Lesniak claims the trial court erroneously exercised its discretion when it granted judgment in favor of Dhillon and dismissed his counterclaim and third-party complaint with prejudice solely as a sanction for failing to produce three documents Lesniak was simply unable to obtain. Lesniak argues the trial court's decision was erroneous because: (1) there was no egregious conduct; (2) his non-compliance was neither intentional nor in bad faith, and the trial court was obligated to explore sanctions that were less severe than judgment and dismissal; and (3) the sanction of dismissal was too harsh and, therefore, inappropriate. We are not convinced.

¶10 In reviewing a trial court's dismissal of a cause of action for failure to comply with scheduling and discovery orders, we apply an erroneous exercise of discretion standard of review whether we do so under the rubrics of WIS. STAT. § 805.03 (1999-2000)[3] or under the aegis of inherent authority. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). Regardless of which is applied, we must analyze whether the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶11 For an aggrieved party to demonstrate an erroneous exercise of discretion in ordering a dismissal, it must show that there is no reasonable basis for the trial court's determination that a non-complying party's conduct was

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

egregious and there is a clear and justifiable excuse for the delay. A trial court need not explicitly make a finding of egregious conduct. An implicit finding of egregious conduct or bad faith is implied if the trial court's ruling is supported by sufficient facts establishing such conduct. ***Englewood Community Apartments Ltd. Partnership v. Alexander Grant & Co.***, 119 Wis. 2d 34, 39 n.3, 349 N.W.2d 716 (1984).

¶12 The trial court, in arriving at its decision to dismiss Lesniak's counterclaim and third-party claim by way of sanction, made numerous oral findings of fact. As an appellate stratagem, Lesniak parses the trial court's findings, challenges the correctness of two of the findings, and then argues that there is an absence of egregiousness, and a justifiable excuse for non-compliance; hence, he contends the sanction of dismissal was too harsh. His stratagem is unavailing.

¶13 Lesniak essentially challenges the trial court's findings of undue delay and the absence of good faith in producing the missing documents. To present a complete picture of the procedural history of this case, we recount the following events.

¶14 Dhillon commenced this action on September 1, 1999. Lesniak filed his third-party claim and amended counterclaim on February 2, 2000. The initial scheduling conference was held on April 6, 2000, at which time an order was made that all discovery was to be completed by August 15, 2000. On May 22, 2000, the deposition of Lesniak began. Because of time limitations, he was not able to complete his deposition. Both parties agreed to recess the deposition to provide Lesniak more time to obtain the requested documentation that he failed to produce for the first deposition. Several times, Dhillon's counsel, in person and

by telephone, requested that Lesniak's counsel provide a date for further discovery; however, Lesniak was not produced. On June 21, 2000, Dhillon's counsel wrote to Lesniak's counsel again requesting a date for the recessed deposition requesting nine documents that Lesniak had earlier agreed to produce. There was no response.

¶15 A pretrial date had been set for September 8, 2000. Lesniak requested an extension of time because of hospitalization. The pretrial was adjourned until November 22, 2000. When Lesniak had not complied by November 10, 2000, with the earlier discovery demand, the trial court held a telephonic conference on November 10, 2000. At that time, a stipulated order was made which was entered on November 30, 2000, requiring Lesniak to produce twelve items no later than 5:00 p.m. on December 11, 2000. The order indicated that failure to comply would result in dismissal of Lesniak's counterclaim and third-party claim and entry of default judgment in favor of Dhillon. On December 11, 2000, at 4:54 p.m., nine of the ordered twelve documents were delivered. Some of the documents had portions covered when they were photocopied and others were not legible.

¶16 On January 4, 2001, the trial court held a hearing on Dhillon's request for judgment and dismissal as a sanction for failure to produce the three items ordered by the court. After hearing arguments and considering the record, the trial court granted the motions pursuant to the November 30th order.

¶17 We first address the question of undue delay. There can be no doubt that Lesniak failed to respond to the repeated efforts of Dhillon to reschedule his recessed deposition. Prior to the November 30th stipulated order, Lesniak was twice granted extensions to produce the requested documents. He failed to

perform. By the November 30th order, Lesniak, for the third time, was provided additional time to produce documents he had earlier committed to produce. Again, he failed to meet the deadline.

¶18 Lesniak attempts to use his hospitalization as an excuse for further delay, but his medical condition was the basis for rescheduling the September pretrial to November 22, 2000. No mention was made two months later of a medical excuse for the extension from November 10th to December 11th. Thus, his earlier hospitalization excuse no longer provided justification for delay.

¶19 To exacerbate matters, Lesniak's argument of document unavailability, which we discuss later in this opinion, was well-known long before December 11, 2000. Yet, Lesniak made no responsible request for an extension or modification of the November 30th order. Thus, the trial court's finding of "delay, delay" is well-supported by the record. The finding is not clearly erroneous.

¶20 Lesniak also challenges the trial court's rejection of his good-faith effort argument to locate three of the twelve ordered documents. He argues that because the three documents were unavailable, he should not be held responsible for failing to produce them. The trial court was not persuaded for reasons to be stated and neither are we.

¶21 The trial court found that Lesniak had sufficient time to comply with the various discovery requests and promises. On May 22, 2000, to accommodate Lesniak, Dhillon afforded him more time to present himself for further depositions and to produce the requested documents. His argument of document unavailability made at the January 4, 2001 hearing rings hollow in view of his repeated affirmative assurances to produce the very documents he finally claimed were unavailable.

¶22 It is self-evident from the trial court's oral decision that Lesniak displayed a lack of forthrightness with the court and this tactic did not go unnoticed. There was good reason for the trial court not to be persuaded that Lesniak made good faith efforts to produce evidence of a $40,000 loan to third parties, an insurance policy, and cancelled rent payment checks.

¶23 Lesniak contends that these three documentary items are irrelevant to Dhillon's fundamental claim for unpaid rent and therefore dismissal of his counterclaim and third-party claim was an unwarranted harsh sanction. We reject this rationale for three reasons.

¶24 First, if the production of the three documents was irrelevant, why did Lesniak consistently promise to produce them without any attempt to modify the order to produce unless the documents contained information going to the merits of his defense or the other claims pled.

¶25 Second, relevancy for the purpose of discovery is quite different from relevancy for the purposes of proof on the merits. The issue of proposed sanctions for the failure to comply with discovery requests arose at the November 10th teleconference that precipitated the November 30th order. To argue irrelevance of the ordered discovery materials to the merits of the claims and counterclaims was premature.

¶26 Third, the production of documentary evidence relating to the third party loan and the existence of insurance coverage could reasonably affect the context of the counterclaim and third-party claim.

¶27 If non-compliance with discovery orders constitutes a pattern of abuse demonstrating a callous disregard for responsibilities owed to the court and

to the adverse parties, it is tantamount to egregious conduct warranting dismissal. ***Englewood***, 119 Wis. 2d at 39 n.3. As a result of the conditions set forth in the November 30th order, Lesniak knew the responsibility he had to shoulder. The original order for completion of discovery was ignored for over five months. He did not comply in spite of persistent efforts by counsel, nor did he seek appropriate extensions or modification. Finally, he had sufficient notice of the consequences of non-compliance. In succinct terms, Lesniak cannot escape an implied finding of egregious conduct by belatedly claiming he should not be faulted for doing what he previously promised he would do on several occasions.[4]

By the Court.—Order affirmed.

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

[4] We find no evidence that the pattern of abuse was attributable to Lesniak's counsel.