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DISTRICT II

October 1, 2014

To:

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Waukesha County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2014AP807-FT

Industrial Towel & Uniform, Inc. v. Edward T. McGrath
(L.C. #2012CV2764)

Before Brown, C.J., Reilly and Gundrum, JJ.

Attorney Janet Heins appeals from a judgment against her and her former client, Edward McGrath, jointly and severally, for discovery sanctions in the amount of \$13,112 and against Heins individually in the amount of \$5465 for contempt of court “for her intentional

disobedience, resistance and obstruction” of orders dated September 30 and October 9, 2013.¹ Pursuant to a presubmission conference and this court’s order of April 29, 2014, the parties submitted memorandum briefs. Upon review of those memoranda and the record, we affirm.

Heins represented McGrath in a case brought by Industrial Towel & Uniform, Inc., alleging that McGrath breached an agreement not to compete. The complaint was filed in September 2012; Industrial Towel served its first set of interrogatories and request for documents at the end of that month. In June 2013, after Heins and McGrath failed to respond to the discovery, Industrial Towel filed a WIS. STAT. § 804.12 (2011-12)² motion to compel a response to the discovery and sought attorney’s fees relating to that motion.

At the July 26, 2013 hearing on the motion to compel, Heins alerted the court that she needed to withdraw as McGrath’s counsel. The court required Heins to remain in the case for the remainder of the hearing. On the question of discovery sanctions, Industrial Towel argued that Heins had not responded to its motion to compel discovery. In response, Heins stated that she was in the process of compiling a discovery response but she had not been able to make contact with McGrath “for the last couple weeks.” The court deferred the decision on discovery sanctions to the judge normally assigned to the case and informed Heins that if she wanted to withdraw, she had to do so formally so that the assigned judge could address the request. With Heins’ agreement to the date, a hearing on her motion to withdraw and Industrial Towel’s motion for discovery sanctions was scheduled for September 30.

¹ Edward McGrath did not timely appeal from the judgment, and he is not a party to this appeal.

² All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

Heins neither filed a motion to withdraw nor appeared at the September 30 hearing. Industrial Towel argued in favor of discovery sanctions including attorney's fees and costs. The court reviewed the discovery problems caused by the failure of McGrath and Heins to respond to Industrial Towel's discovery sanction pleadings. The court granted the requested discovery sanctions and entered an order on September 30 assessing \$10,734.50 in sanctions against Heins and McGrath. An amended order dated October 9 increased the sanctions to \$13,112 to account for attorney's fees and costs incurred by Industrial Towel at the September 30 hearing. The court gave Heins and McGrath thirty days to pay.

Heins and McGrath did not pay the sanctions by the court-ordered deadline, and Industrial Towel filed a WIS. STAT. ch. 785 contempt motion on December 13, 2012. On January 27, Heins filed a motion to withdraw because McGrath had terminated the firm's services as mentioned at the July 26 hearing.

On January 29, 2014, the circuit court heard the contempt and withdrawal motions. Heins advised the court that difficult personal circumstances caused her to lose track of the McGrath case. The court permitted her to withdraw and then addressed the pending contempt motion to which Heins had not filed a timely response. Heins argued that because she no longer represented McGrath after July 26, she had forwarded all case materials to McGrath as her office received them. She did not attend the September 30 hearing and had no information about what occurred during that hearing. The court found Heins in contempt for her disregard of the court's September 30 and October 9 orders and imposed sanctions in the amount of \$5465. Heins appeals.

We review sanctions imposed under WIS. STAT. §§ 804.12 and 785.02 for a misuse of discretion. *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶¶63, 66, 251 Wis. 2d 68, 640 N.W.2d 788 (§ 804.12 sanctions); *Selmer Co. v. Rinn*, 2010 WI App 106, ¶31, 328 Wis. 2d 263, 789 N.W.2d 621 (contempt sanctions). We will uphold the circuit court’s findings of fact unless they are clearly erroneous. *Id.*

On appeal, Heins argues that once McGrath terminated her representation on July 26, 2013, she could no longer act on his behalf. Supreme Court Rule 20:1:16(c) states that a “lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.” Here, Heins attempted to withdraw in the middle of a hearing. The circuit court declined to permit her to withdraw and advised her to file a motion to withdraw. Moreover, Waukesha County Local Rule 2.6, which Heins does not dispute, states that counsel may only withdraw upon written motion or a signed stipulation. Counsel did not file a motion to withdraw until almost six months later, a delay she attributed to difficulties in her personal life.³ However, during the January 29, 2014 contempt hearing, the court considered the explanation she offered and was not persuaded to overlook her failure to comply with orders of the court or with Industrial Towel’s discovery requests. The court also did not accept her claim that she had difficulty communicating with McGrath as a reason to excuse her conduct in this case.

Other than the arguments offered above, Heins makes no specific argument against the contempt ruling and discovery sanctions other than to argue that they are unjust under the

³ At the July 26, 2013 hearing, the circuit court informed Heins that she had to file a motion to withdraw. On August 15, her law partner died unexpectedly. Heins did not act in the McGrath case until she filed the motion to withdraw on January 27, 2014.

circumstances. WIS. STAT. § 804.12(2)(b) (a party failing to comply with a discovery order shall pay reasonable attorney’s fees and costs “unless the court finds that the failure was substantially justified or that other circumstances made an award of expenses unjust”). On this record, we cannot agree.

The circuit court properly exercised its discretion when it imposed discovery and contempt sanctions upon Heins.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is affirmed.

Diane M. Fremgen
Clerk of Court of Appeals