



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

June 19, 2013

To:

Hon. J. Mac Davis
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Stefanie Carton
Simandl Law Group
20975 Swenson Dr., Ste. 250
Waukesha, WI 53186

Michael J. Hanrahan
Fox, O'Neill & Shannon, S.C.
622 N. Water St., Ste. 500
Milwaukee, WI 53202-3590

E. John Raasch
Raasch & Tikalsky, SC
300 Wisconsin Ave., Ste. 200
Waukesha, WI 53186-4714

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

2012AP2092

Kenrich Industrial, Inc. v. Ergonomic Handling Systems, Inc.
(L.C. #2010CV1738)

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

Ergonomic Manufacturing Group, Inc. (EMG) and Dennis and Timothy Burns, EMG's president and treasurer and primary shareholders, appeal an order granting a default judgment against them, including damages of \$587,687.92, for discovery violations. The record establishes that the circuit 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. See *Sentry Ins. v. Davis*, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553. We affirm.

Kenrich Industrial, Inc., commenced a lawsuit against Ergonomic Handling Systems, Inc. (EHS) d/b/a EMG, alleging breach of contract and breach of warranty, and against Dennis and Timothy individually as the primary business contacts between Kenrich and EHS. Kenrich eventually amended the complaint twice, adding EMG as an individual defendant, rather than a d/b/a, and, as is relevant here, alleging fraudulent conveyance, personal liability and alter ego claims, and damages of \$574,042.34 for the breach of contract.

The defendants' untimely and deficient responses to Kenrich's First Set of Interrogatories and Requests for Production of Documents set the stage for a series of hearings on Kenrich's motions to compel, informal production requests and letters to the court, as well as court orders and warnings of dire sanctions. Finally, the court appointed a special master to examine the outstanding discovery issues, the adequacy of defendants' responses, and whether Kenrich was entitled to additional information. Defendants' counsel assured the special master that he was in the process of gathering responsive information and would timely supply it, yet provided nothing. Kenrich moved to strike defendants' answer and for default judgment. The special master advised the circuit court that he recommended granting Kenrich's motion because the defendants neither responded to him nor provided the required materials, despite time extensions. The court agreed, noting that in its over twenty years' experience, it could not recall "a worse example of discovery noncompliance." It continued:

If defendants or plaintiffs can go down a road like this and not produce and not give good reasons and not cooperate with the Special Master and generally stonewall, it undermines the whole ability of the civil justice system of Wisconsin to provide parties a fair and reasonable opportunity for a forum to resolve disputes.

We can't have it. There's been warning and discussion and motion and opportunity to comply over and over and over again. Defendant has been put on special notice by this recent finding of a

motion for sanctions but the Defendant has been on general notice repeatedly as we discussed these matters and by knowing the law and the statutes about potential sanctions. So I understand this is a death sentence from a civil litigation point of view. It's an extreme sanction, but under these circumstances it's justified.

EMG, Dennis, and Timothy appeal.

“[I]f a party ... fails to obey an order to provide ... discovery ... the court in which the action is pending may make such orders in regard to the failure as are just,” including “[a]n order striking out pleadings” and “rendering a judgment by default against the disobedient party.” WIS. STAT. § 804.12(2)(a)3. (2011-12).¹ Whether to impose sanctions is committed to the circuit court’s discretion. *Sentry Ins.*, 247 Wis. 2d 501, ¶19. Default judgment is an appropriate sanction for discovery violations if the court finds the noncomplying party’s conduct is without a clear and justifiable excuse, and either egregious or in bad faith. *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶13, 265 Wis. 2d 703, 666 N.W.2d 38. “[F]ailure to comply with circuit court ... discovery orders without clear and justifiable excuse is egregious conduct.” *Garfoot v. Fireman’s Fund Ins. Co.*, 228 Wis. 2d 707, 719, 599 N.W.2d 411 (Ct. App. 1999).

The defendants argue that the “Draconian” sanction of dismissal is not justified by “a party’s simple negligence or other action grounded in misunderstanding of a discovery order.” See *Dyson v. Hempe*, 140 Wis. 2d 792, 800-01, 413 N.W.2d 379 (Ct. App. 1987). Defendants’ repeated failure to provide information they claimed to be gathering, ignoring of offers to confer with, and communications from, opposing counsel, and defiance of orders of the court and the special master exceed “simple negligence” or a misunderstanding.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The defendants also claim that the circuit court was without jurisdiction as to Dennis and EMG. A party seeking to vacate a default judgment for lack of personal jurisdiction due to deficient service bears the burden of proof. *Richards v. First Union Sec., Inc.*, 2006 WI 55, ¶¶2, 27, 290 Wis. 2d 620, 714 N.W.2d 913. Kenrich mailed the second amended complaint to defendants' counsel for all defendants, and counsel accepted service. A summons may be served "upon an agent authorized by appointment or by law to accept service of the summons for the defendant," WIS. STAT. § 801.11(1)(d), and service of an amended complaint on a defendant's attorney suffices where that attorney has appeared and responded to an original summons and complaint. *Bell v. Employers Mut. Cas. Co.*, 198 Wis. 2d 347, 360-61, 541 N.W.2d 824 (Ct. App. 1995). Only half a year later did defendants' counsel claim he had not accepted service on behalf of EMG. Defendants failed to pursue a defense of improper service, thus abandoning it. They have not borne their burden.

Defendants' claim that the default judgment was error as to Dennis and Timothy also fails, as does their complaint that Kenrich did not prove its damages. Dennis and Timothy participated in defendants' foot-dragging and were excused only from having to provide their personal financials. And as defendants did not object to Kenrich's proposed order including damages or move to hold a hearing, they waived this claim on appeal. See *Kerans v. Manion Outdoors Co.*, 167 Wis. 2d 122, 132, 482 N.W.2d 110 (Ct. App. 1992). Thus,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals