

STATE OF MICHIGAN
COURT OF APPEALS

CLEAR IMAGING, LLC,

Plaintiff-Appellant,

v

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION, d/b/a
SMART,

Defendant-Appellee.

UNPUBLISHED

June 17, 2014

No. 314672

Oakland Circuit Court

LC No. 2012-126692-NF

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order of January 31, 2013, dismissing the case without prejudice as a sanction for its alleged discovery violations. We reverse and remand.

I

On May 3, 2012, plaintiff filed its complaint in this matter, alleging that it had provided medical-imaging services for four different patients who had been injured in automobile accidents. Plaintiff claimed that pursuant to Michigan's no-fault act, MCL 500.3101 *et seq.*, defendant was obligated to pay personal protection insurance (PIP) benefits to cover the costs of the medical-imaging services for these four patients.

In lieu of filing an answer, defendant moved for summary disposition pursuant to MCR 2.116(C)(4). Defendant argued that plaintiff was not permitted to aggregate the four patients' individual claims for purposes of satisfying the \$25,000 jurisdictional limit,¹ and that the circuit court therefore lacked subject-matter jurisdiction.

On June 13, 2012, plaintiff filed a first amended complaint, adding new allegations concerning a fifth patient for whom it had provided medical-imaging services. Plaintiff alleged that defendant was obligated to pay PIP benefits to cover the costs of these services as well.

¹ See MCL 600.605; MCL 600.8301.

Defendant renewed its motion for summary disposition, again arguing the circuit court lacked subject-matter jurisdiction and contending that plaintiff was not permitted to aggregate the five patients' individual claims for purposes of satisfying the \$25,000 jurisdictional limit.

In a written opinion dated July 25, 2012, the circuit court ruled that it did not lack subject-matter jurisdiction and denied defendant's motion for summary disposition brought pursuant to MCR 2.116(C)(4).

On August 1, 2012, defendant served on plaintiff a set of written interrogatories,² a written request for the production of documents,³ and a notice of the taking of plaintiff's deposition. In its request for the production of documents, defendant demanded all records pertaining to the treatment of the five patients at issue, including copies of all x-rays, MRIs, prescriptions, treatment plans, medical reports, correspondence, notes, billing statements, and other documents. In its set of written interrogatories, defendant asked plaintiff, among other things, (1) to identify the names, addresses, former addresses, ages, social security numbers, and driver's license numbers of each of its owners, including all entities possessing a partial ownership interest in the company, (2) to identify the names and addresses of all locations where each of its owners had provided medical-imaging services in the preceding ten years, (3) to identify the names and addresses of each of its officers and directors, (4) to identify its place of organization and the name and address of its resident agent, (5) to identify all of its employees during the preceding five years, (6) to describe its education and training, (7) to disclose whether it had filed income tax returns during the preceding seven years, (8) to identify the exact medical condition of each of the five patients at issue in this case, (9) to describe all medical supplies and equipment used during the treatment of each of the five patients, and (10) to identify the date on which each of the five patients was treated and the amount billed for each patient.

On September 28, 2012, defendant filed an answer to plaintiff's first amended complaint. Then, on October 17, 2012, defendant filed a motion to compel discovery. Defendant asserted that more than 28 days had elapsed since it served its written interrogatories and request for the production of documents, but that plaintiff had not responded. Defendant requested that the circuit court order plaintiff to respond to the interrogatories and request for documents within seven days.

In a response submitted on October 22, 2012, plaintiff pointed out that defendant had served its discovery requests *before* answering the complaint. Indeed, plaintiff noted that whereas defendant's discovery requests were served on August 1, 2012, defendant did not answer the complaint until September 28, 2012. Accordingly, plaintiff noted, only 24 days had elapsed since the answer was filed. Plaintiff contended that defendant's motion to compel discovery was unripe and should be denied.

² See MCR 2.309.

³ See MCR 2.310.

On October 24, 2012, the circuit court entertained oral argument on defendant's motion to compel discovery. The circuit court repeatedly asked plaintiff's counsel, "When are you going to get your answers in?" Counsel pointed out that plaintiff had several opportunities to default defendant for failing to answer the complaint, yet did not do so. He then noted that 28 days had not elapsed since the date the answer was filed. Counsel argued that plaintiff should have at least 28 days from the date of the answer to respond to the interrogatories and request for documents.

Defense counsel suggested that plaintiff was withholding the names of its owners, officers, and directors, as well as the address of its registered agent. Defense counsel suggested that she had been unable to obtain this information from the Michigan Department of Licensing and Regulatory Affairs website. The circuit court remarked, "This is a very simple case," and admonished the parties to "[w]ork together." The court then instructed plaintiff, "Get your answers in, all the discovery, by a week from today, October 31st, or I'll dismiss the case." The court clarified that this "include[d] the MRI films" and "everything [defendant] seeks."

Defendant prepared a proposed order for submission to the court under the seven-day rule of MCR 2.602(B)(3). Plaintiff initially objected to the proposed order but later withdrew its objections. For reasons that are unclear, the court did not enter defendant's proposed order until December 18, 2012.

On or about October 30, 2012, plaintiff responded to defendant's interrogatories and request for documents. Plaintiff provided its full business address, its federal tax ID number, the name and address of its resident agent, and a copy of its articles of organization. With respect to each of the five underlying patients, plaintiff provided the MRI reports, diagnosis codes, referral forms, insurance information, and billing statements. Plaintiff also noted that it would make its manager, Josh Katke, available for deposition.

However, plaintiff objected to certain of defendant's interrogatories. For example, with regard to defendant's interrogatories concerning the names, addresses, former addresses, social security numbers, and driver's license numbers of the company's owners, plaintiff objected on the grounds that "defendant's request in an invasion of privacy, and abuse of the discovery process, and aimed at harassment of the owner(s) who have no particularized or specialized knowledge of the facts leading to this litigation." Plaintiff further objected on the ground that "the requested discovery is overbroad, and is irrelevant and not likely to lead to the discovery of admissible evidence." Plaintiff similarly objected to defendant's interrogatories concerning its past income tax returns and the medical supplies and equipment used to treat each of the five patients.

Nearly two months later, on December 18, 2012, the circuit court finally entered the order proposed by defendant, directing plaintiff to "provide full and complete" responses to defendant's interrogatories and other discovery requests by October 31, 2012, including "the actual films and/or MRIs on CD of each underlying claimant." The order went on to state that "if plaintiff fails to provide this discovery on or before October 31, 2012, the case will be dismissed." Lastly, the order stated that "the discovery deadline shall be extended by a new scheduling order to be issued by the [c]ourt."

On January 23, 2013, defendant filed a motion to enforce the discovery order of December 18, 2012, arguing that plaintiff's discovery responses were "incomplete, evasive[,] and non-responsive." Specifically, defendant complained that plaintiff had "withheld pertinent information as to the identification of [its] owner(s)" in violation of the discovery order. Defendant argued that because plaintiff had withheld information concerning the identity of its owners, officers, and directors in violation of the discovery order, the circuit court should dismiss the case.

The circuit court held oral argument on January 30, 2013. Defense counsel again complained that plaintiff had failed to answer the interrogatories regarding the identity of its owners, officers, and directors. Plaintiff's counsel noted that plaintiff had answered most of the interrogatories, but had objected to certain of them as irrelevant and outside the scope of reasonable discovery. Defense counsel insisted that plaintiff's objections to the interrogatories were not permitted under the terms of the order to compel. The circuit court abruptly announced, "Case dismissed," and stated that plaintiff "didn't follow my order." The court remarked that it had ordered plaintiff to answer each of the interrogatories, not to object to them. That same day, the circuit court entered an order dismissing the case without prejudice as a "[d]iscovery [s]anction."

II

We review for an abuse of discretion the circuit court's decision to dismiss an action as a sanction for discovery violations. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). An abuse of discretion occurs when the circuit court's decision falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). We review de novo questions concerning the proper interpretation and application of the court rules. *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007).

III

It is certainly within the circuit court's authority to dismiss an action as a sanction for discovery violations. MCR 2.313(B)(2)(c). However, "[d]ismissal is the harshest sanction that the court may impose on a plaintiff." *Donkers*, 277 Mich App at 369 (citation omitted). Accordingly, the sanction of dismissal must be "exercised cautiously." *Dean*, 182 Mich App at 32. "[T]he fact that [the sanction of dismissal] is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate." *Id.*; see also *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). "[T]he record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it." *Dean*, 182 Mich App at 32. Among the factors that should be considered are (1) whether the discovery violation was willful or accidental, (2) the party's history of refusing to comply with discovery requests, (3) the prejudice to the opposing party, (4) whether there exists a history of the party engaging in deliberate delay, (5) the degree of compliance by the party with other provisions of the court's order, (6) any attempts by the party to timely cure the defect, and (7) whether a lesser sanction would better serve the interests of justice. *Id.* at 32-33.

Plaintiff responded to the vast majority of defendant's interrogatories immediately after the hearing of October 24, 2012. As noted previously, plaintiff provided its full business address, its federal tax ID number, the name and address of its resident agent, and a copy of its articles of organization. And with respect to each of the five underlying patients, plaintiff provided the full MRI reports, diagnosis codes, referral forms, insurance information, and billing statements.

Even assuming arguendo that plaintiff improperly objected to certain of defendant's interrogatories, dismissal was still an improper sanction in this case. It is plainly evident from the record that the circuit court did not consider any other options before imposing the sanction of dismissal. *Dean*, 182 Mich App at 32. Plaintiff had no history of refusing to comply with discovery requests or engaging in deliberate delay. In fact, the delays in this case were largely attributable to defendant's unorthodox litigation strategy—namely, serving its discovery requests before answering the complaint. Moreover, in light of the limited discoverability and questionable relevance of the information that defendant sought in certain of its interrogatories, it can hardly be said that defendant was prejudiced by plaintiff's objections. We reiterate that plaintiff provided full and complete answers to the vast majority of defendant's interrogatories, only objecting to a small number. Plaintiff's discovery violation, if any, was far too minor to warrant the severe sanction of dismissal. *Id.* at 32-33. The circuit judge abrogated his responsibility by failing to consider the relevant factors and hastily dismissing the action without providing any compelling justification or considering any alternatives. This constituted a clear abuse of discretion.⁴

We reverse the circuit court's order dismissing the action and remand for reinstatement of this case. On remand, the circuit court shall make findings of fact concerning whether plaintiff was justified in objecting to the specific interrogatories at issue and whether those interrogatories sought the disclosure of relevant, discoverable information. After making these findings, and only if the circuit court determines that plaintiff wrongfully refused to answer the interrogatories at issue, the court shall consider each relevant factor on the record and shall order an appropriate, less drastic sanction. *Dean*, 182 Mich App at 32-33.

Reversed and remanded. We do not retain jurisdiction. As the prevailing party, plaintiff may tax its costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Christopher M. Murray

⁴ We note that the circuit court speaks only through its written orders and judgments, not through its oral pronouncements. *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). No order to compel had yet been issued at the time plaintiff responded to defendant's discovery requests on or about October 30, 2012. Indeed, as explained earlier, no written order was entered until December 18, 2012. Accordingly, the circuit court erred when it determined that plaintiff's objections to the interrogatories at issue were made in violation of a standing order.