

STATE OF MICHIGAN
COURT OF APPEALS

COMERICA BANK,

Plaintiff-Appellant,

V

SHAKIR W. ALKHAFAJI,

Defendant/Crossdefendant-
Appellee,

and

MUKHLES KARMO, MASOUD A. KARIM,
LAYLA KARIM, ANWAR SEMAN and HANNA
SHINA,

Defendants-Appellees,

and

HAYTHAM BESHI,

Defendant/Crossplaintiff/Third-Party
Plaintiff,

and

JALAL JAMIL,

Third-Party Defendant,

and

SAUD BARBAT,

Third-Party Defendant-Appellee.

UNPUBLISHED

August 18, 2005

No. 252472

Oakland Circuit Court

LC No. 01-036485-CK

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Plaintiff appeals by right from an order dismissing defendant/crossplaintiff/third-party plaintiff Haytham Beshi's cross-claim against defendant/cross-defendant Shakir W. Alkhafaji and Beshi's third-party complaint against third-party defendants Jalal Jamil and Saud Barbat without prejudice and without costs. But the issue on appeal is related to an earlier order granting a motion for involuntary dismissal of plaintiff's claims with prejudice pursuant to MCR 2.504(B)(1). We affirm.

On appeal, plaintiff claims that the trial court erred in granting involuntary dismissal of plaintiff's claims with prejudice as a sanction for plaintiff's failure to comply with the scheduling order. We disagree. This Court reviews a trial court's decision to dismiss an action under the abuse of discretion standard. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 359; 503 NW2d 915 (1993). An abuse of discretion occurs when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). This is a very difficult standard of review.

Plaintiff contends that the system of law favors disposition of cases on the merits, and its counsel's unintentional error or failure to timely file an exhibit/witness list should not deprive plaintiff of its day in court. MCR 2.504(B)(1) and (3), provides for dismissal of an action if a plaintiff fails to comply with the court rules or a court order and that unless otherwise specified in the order of dismissal, such a dismissal "operates as an adjudication on the merits." A written order scheduling a time for filing a witness/exhibit list clearly constitutes a "court order."

Plaintiff also contends that the sanction of dismissal with prejudice was not warranted because its failure to file a witness/exhibit list did not create "a trial by surprise," citing *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). We cannot agree that *Grubor* supports plaintiff's contention. This Court in *Grubor* stated, *id.* at 629:

In this case, the trial court refused to allow any individual representing the corporation to testify. When the plaintiff is a corporation, any number of individuals could testify on its behalf. We conclude that the trial court did not abuse its discretion in refusing to allow plaintiff's representatives from testifying. To do so would have opened the door to circumvention of the discovery rule by corporate plaintiffs. When the plaintiff is an individual, the defendant knows from the face of the complaint the identity of the testifying plaintiff. This is not so when the plaintiff is a corporation.

Similar to the plaintiff in *Grubor*, plaintiff in the instant case is a corporation. *Id.* Defendants have not been specifically informed as to the identity of plaintiff's witnesses or exhibits. The fact that they could perhaps conclude who and what they might be is not enough to allow us to find that the trial court abused its discretion.

Plaintiff further asserts that even if the order denying its request to file its witness/exhibit list were proper, defendants did not dispute under MCR 2.112(E) executing the documents, such as the promissory note and the guaranty attached to the complaint, and such documents were sufficient to establish a prima facie case for recovery on the day of trial. Contrary to plaintiff's assertion, defendants did not admit that they executed a guaranty or personally guaranteed the promissory note at issue. Defendants argued that there was a question regarding the authenticity of the signatures on the promissory note because it had been modified at least five times, and it was unclear whether defendants signed some of the amendments to the promissory note. Without the testimony of plaintiff's witnesses to authenticate the documents and lay a proper foundation for them, plaintiff cannot meet its burden of proving any liabilities or damages under the alleged promissory note and the guaranty. Plaintiff's argument that its complaint established a prima facie case is thus without merit.

The record does reflect that plaintiff attached to its complaint a copy of the written promissory note and guaranty as required by MCR 2.113(F), and defendants did not submit affidavits denying the execution or handwriting of the documents. MCR 2.112(E)(1). Thus, by operation of the court rule, these two documents were admitted to by defendants, and plaintiff did not have to prove them at trial. *Id*; *Huler v Nasser*, 322 Mich 1, 6; 33 NW2d 637 (1948) (construing analogous prior rule).

Nevertheless, the trial court still properly dismissed plaintiff's case because, even though defendants are deemed to have admitted the execution of and signatures on these two documents, plaintiff still had no witnesses available to testify as to damages or to defendants' failure to comply with the terms of the contracts. As such, plaintiff only had the ability to prove the existence of two contract documents, but had no further ability to prove its case. Dismissal was therefore appropriate.

Furthermore, MCL 440.3308 provides no relief to plaintiff, because the guarantees are not negotiable instruments for purposes of the Uniform Commercial Code (UCC). *Diversified Financial Systems Inc v Schanhals*, 203 Mich App 589, 592; 513 NW2d 210 (1994); *National Bank of Detroit v Alford*, 65 Mich App 634, 637; 237 NW2d 592 (1975). And, although promissory notes are considered negotiable instruments under the UCC, *FDIC v Heishiser Signature Properties Inc*, 777 F Supp 539, 542-543 (ED Mich, 1991), no defendant signed the promissory note in a personal capacity. Instead, it was signed by one individual in his capacity as manager of Choice Properties No. 2 LLC, which is not a party to this case. Thus, the validity of the promissory note is of no assistance to plaintiff in this case against these individual defendants.

Plaintiff also maintains that dismissing plaintiff's case was too drastic. Dismissal is a drastic sanction and should only be imposed in extraordinary circumstances. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000); *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Although we may have decided the matter differently, here the record reflects that the trial court carefully considered the factors involved and alternative sanctions in determining what sanction was just and proper under the circumstances. *Id*. The factors that the court should consider are:

“(1) Whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice.” [*Id.* at 26-27, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

Defendant specifically argues that the trial court abused its discretion by failing to consider these factors when deciding an appropriate sanction. Contrary to defendant's argument, the record in this case shows that the trial court considered these factors.

Here, plaintiff's counsel admitted that he was aware of plaintiff's obligation to file a witness/exhibit list but for fifteen-months failed to do. The trial court properly noted this fact and properly held that plaintiff's violation was unjustified. Clearly, it was an inadvertent omission. See *Bass, supra* at 34-35 (holding that the trial court did not abuse its discretion by dismissing the plaintiff's case with prejudice for willfully violating discovery orders over a fifteen month period). The trial court also considered plaintiff's history of compliance and stated, “There does not appear to be a pattern of non-compliance with the orders of the Court but the Plaintiffs [sic] have not shown good cause for the tardiness of submitting the witness list.” The fact is, although plaintiff's failure to file her requisite lists was accidental, it could not show “good cause.” Moreover, the trial court found, “Substantial prejudice to defendants is evident.” As discussed, *supra*, allowing plaintiff to add a witness/exhibit list long after discovery, case evaluation, and the deadline for filing dispositive motions would be prejudicial to defendants. Also, the trial court found, “There has been no indication from [the] defense that the Defendants were trying to hide anything or any of that matter.” As the court further concluded, other than plaintiff's speculation, nothing in the records indicates that defendants had “actual notice” of plaintiff's witnesses and exhibits, or engaged in deliberate delay. Unfortunately, plaintiff apparently did not discover its error so it made no timely attempt to cure its noncompliance. Furthermore, although the trial court considered whether justice would be better served by imposing a lesser sanction, it determined that a less drastic sanction would not have furthered the interests of justice. *Bass, supra* at 27. Because the trial court properly considered the requisite factors before concluding that the dismissal of plaintiff's case with prejudice was proper, we cannot find an abuse of discretion in the trial court's decision.

We affirm.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray