# STATE OF MICHIGAN

# COURT OF APPEALS

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EXCALIBUR ELECTRIC CO., L.L.C.,

Plaintiff/Counterdefendant-Appellant,

v

WHITECO CONSTRUCTION SERVICES, a Division of WHITECO INDUSTRIES, INC., and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
February 21, 2003

No. 234949
Wayne Circuit Court
LC No. 98-840338-CK

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Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order dismissing its lawsuit for discovery violations. Plaintiff also challenges a default judgment entered in defendants' favor. We affirm.

On appeal, plaintiff contends that the trial court abused its discretion in dismissing plaintiff's complaint for violating discovery. We review a trial court's decision to impose discovery sanctions for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

MCR 2.313(B)(2)(c) authorizes a trial court to dismiss a proceeding or render a judgment by default against a party who fails to obey a discovery order. *Bass*, *supra*, at 26. The following factors are considered when determining the appropriate sanction: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests; (3) the prejudice to the other party; 4) whether there is a history of engaging in deliberate delay; (5) the degree of compliance with other provisions of the court's orders; (6) an attempt to timely cure the defect, and (7) whether a lesser sanction would better serve the interests of justice. See *id.* at 26-27. "The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate." *Id.* at 26.

Here, we agree with the trial court's finding that plaintiff's conduct evidenced a pattern of willful discovery abuses. For example, plaintiff contends that it unable to comply with certain discovery requests because the documents purportedly did not exist. However, rather than stating that the documents did not exist, plaintiff provided vague answers that prevented discovery from proceeding at a proper pace. Formulating those vague answers required conscious conduct. To be willful, the conduct need not be accompanied by wrongful intent; it is sufficient if it is conscious or intentional, rather than accidental or involuntary. *Bass, supra* at 34-35. Similarly, plaintiff provided answers to some interrogatories that were so vague that defendant was essentially precluded from preparing for trial. Again, artful drafting is conscious conduct.

In addition, plaintiff had a history of failing to comply with discovery requests. Moreover, some of the discovery abuses involved a failure to comply with court orders. In fact, several trial court orders were required to facilitate discovery. The trial court orders extended over a period of several months. In other words, this certainly was not a one-time occurrence.[1]

Further, we agree that plaintiff's discovery violations prejudiced defendants. Obviously, the repeated motions to compel and discovery hearings required defendants to incur unnecessary legal expenses. More importantly, plaintiff's discovery violations prevented defendants from adequately preparing for trial. Indeed, during the hearings on defendants' motion to dismiss, it remained unclear what plaintiff's many witnesses were going to testify about. If plaintiff's evidence was that unsettled so close to trial, it stands to reason that defendants were not prepared to defend against claims arising out of the witnesses' testimony. In other words, after that many months of discovery, the issues for trial should have been narrowed and the witnesses' expected testimony should have been disclosed. In the absence of any idea as to where plaintiff's case was going, despite defendants' thorough discovery requests, we can only conclude that defendants were prejudiced by plaintiff's discovery abuses.

Finally, a lesser sanction would not have better served the interests of justice. The trial court specifically warned plaintiff that the next sanction would be a dismissal. When it became clear that the discovery abuses had not been corrected, it follows that dismissal was an appropriate sanction.

Moreover, at some point in the continuum of imposing lesser sanctions, the sanctions become so severe that they are tantamount to preventing a party from presenting a case. The interests of justice are not served by allowing a party to prevent a case so limited that there is no hope of prevailing. It should be noted that the trial court's comments suggested that it was leaning towards alternative sanctions. However, after defendants presented their arguments as to each logical alternative sanction, it became plainly apparent that imposing those lesser sanctions would have rendered plaintiff's claim futile. Impaneling a jury to hear a futile case does not serve the interests of justice. Requiring defendants to expend money and effort to defendant against such a case similarly does not serve the interests of justice. As such, we believe that the interests of justice supported the trial court's dismissal of plaintiff's case. In light of the all the

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[1] In addition, the number of discovery violations supports our finding that the violations were willful.

circumstances, we reject plaintiff's contention that the trial court abused its discretion in dismissing its case. *Bass, supra* at 26.

Next, plaintiff argues that the trial court abused its discretion in entering a default judgment. A trial court's decision to enter a default judgment will not be disturbed absent an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 223; 600 NW2d 638 (1999). "An abuse of discretion involves far more than a difference in judicial opinion." *Id.* at 227. As noted above, an abuse of discretion requires a result that "is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman, supra* at 233. Here, plaintiff's principals were specifically ordered, in writing, to appear at a hearing. In fact, the trial court's order noted that a failure to attend the hearing could result in a default judgment. Not only did they not appear, but plaintiff's counsel also did not appear. Accordingly, the trial court did not abuse its discretion in granting a default judgment.

Plaintiff also contends that the trial court erred in denying their motion to set aside the default. A motion to set aside a default or a default judgment may be granted if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Alken-Ziegler, supra* at 223. Good cause sufficient to warrant setting aside a default or default judgment may be shown by: (1) a procedural irregularity or defect, or (2) a reasonable excuse for failing to comply with the requirements that created the default. *Id*. at 233.

Here, plaintiff did not present a reasonable excuse for the failure to attend the January 5, 2001, hearing. Although there was a "mix up" in plaintiff's counsel's office, a lawyer's negligence is attributable to the client and does not constitute grounds for setting aside a default. *Park v American Casualty Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996). Moreover, as noted above, plaintiff's principals directly share some of the blame in not attending the hearing. Indeed, one of the purposes of the hearing was to substitute counsel, and plaintiff's principals had appeared at earlier proceedings of a similar nature. Thus, we are not persuaded that there was a reasonable excuse for plaintiff's failure to attend the hearing. *Id.* Therefore, we reject plaintiff's contention that the trial court erred in refusing to set aside the default judgment.

Finally, plaintiff argues that the trial court erred in entering a default judgment awarding defendants $399,697.00 without giving plaintiff the right to a trial by jury on the issue of damages. We note that plaintiff did not properly preserve this issue for review by raising it below. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Accordingly, we could simply decline to consider the issue.

Generally, MRE 2.603(3)(b)(*ii)* states that a trial court "may" hold a hearing to determine the amount of damages. Thus, a trial court has discretion to hold a hearing to determine damages. *Michigan Bank-Midwest v DL Reynaert, Inc*, 165 Mich App 630, 649; 419 NW2d 445 (1988). Our Supreme Court has ruled that a defaulting party who has properly invoked his or her right to jury trial "retains that right *if* a hearing is held to determine the amount of recovery." *Wood v DAIIE*, 413 Mich 573, 583-584; 321 NW2d 653 (1982) (emphasis in original). The *Wood* Court further opined: "If, upon remand, the trial court finds that additional proceedings are not necessary to its entry of the default judgment, then, *a fortiori*, there will be no hearing to which defendant's right to jury trial can attach." *Id.* at 590; see also *Reynaert, supra* at 648-649. Thus, a party's right to a hearing is contingent on there actually being a hearing.

Here, the trial court determined that a hearing was not necessary. Unless that decision was erroneous, the *Wood* decision indicates that plaintiff's right to a jury trial was not violated. *Wood*, *supra*. However, plaintiff does not challenge the trial court's decision not to hold a hearing. Instead, plaintiff contends that the trial court could not determine defendants' damages without holding a hearing. This argument is plainly contrary to MCR 2.603(B)(3)(b)(*ii*), which states that the trial court "may" hold a hearing to determine the amount of damages. In the absence of any argument explaining how the trial court erred in determining the damages, we are not persuaded that the trial court abused its discretion. Therefore, we reject defendant's final contention of error.

Affirmed.

/s/ William C. Whitbeck, C.J.
/s/ Richard Allen Griffin
/s/ Donald S. Owens