

STATE OF MICHIGAN
COURT OF APPEALS

ALBERT PATRICIO VALDEZ,

Plaintiff-Appellant,

UNPUBLISHED
June 10, 2014

v

HOME OWNERS INSURANCE COMPANY and
DAVID RALPH SPAULDING,

No. 315524
Oakland Circuit Court
LC No. 2012-129100-NI

Defendants-Appellees.

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

PER CURIAM.

Plaintiff appeals as of right two orders granting defendants' motions to dismiss. We reverse and remand.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a car accident. Plaintiff filed suit on August 31, 2012, alleging that defendant David Spaulding's (Spaulding) vehicle struck him while he was walking down Hilton Avenue in Ferndale, Michigan. Plaintiff alleged negligence on the part of Spaulding, and failure to pay personal protection benefits on the part of Spaulding's insurer, defendant Home Owners Insurance Company (Home Owners).

On or about September 24, 2012 and October 1, 2012, respectively, Home Owners and Spaulding served interrogatories and requests for production of documents on plaintiff. Plaintiff failed to respond within the 28-day time period provided by MCR 2.309 and 2.310. On October 24, 2012, Home Owners filed a motion to compel plaintiff to answer interrogatories and requests for production of documents. On November 1, 2012, Spaulding filed a similar motion. On or about November 14, 2012, the trial court entered an order (Home Owners order), stipulated as between plaintiff and Home Owners, compelling plaintiff to provide responses to Home Owners's interrogatories and requests for production of documents within 28 days of the entry of the order. Also on or about November 14, 2012, the trial court entered an order (Spaulding order), stipulated as between plaintiff and Spaulding, compelling plaintiff to provide signed answers to Spaulding's interrogatories and a written response to Spaulding's request for production of documents, with responsive documents, on or before December 12, 2012. Plaintiff did not meet the deadlines set forth in those orders.

On December 14, 2012, Home Owners filed a motion to dismiss plaintiff's complaint for violation of the Home Owners order, alleging that plaintiff continued to fail to provide any response to Home Owners's interrogatories or requests for production of documents and requesting that the trial court dismiss plaintiff's complaint pursuant to MCR 2.313(B)(2), for failure to comply with a court order. On January 2, 2013, Spaulding filed a substantially similar motion, seeking dismissal of plaintiff's complaint for failing to comply with the Spaulding order.

On January 30, 2013, the trial court held a hearing on defendants' motions to dismiss; plaintiff failed to appear for the hearing. The trial court granted defendants' motions, and entered separate orders dismissing with prejudice plaintiff's claims against Home Owners and Spaulding "for the reasons stated on the record." The record reflects, however, that the trial court noted the absence of plaintiff's counsel at the hearing, but otherwise stated no reasons on the record. On February 12, 2013, plaintiff served answers and responses to defendants' discovery requests, and related documents, on defendants. On February 13, 2013, plaintiff moved for rehearing pursuant to MCR 2.119(F)(3) and/or for relief from the dismissal orders pursuant to MCR 2.612(C)(1)(a), and attached his discovery responses to the motion. The trial court construed the motion as a motion for reconsideration, and denied the motion, without oral argument, in an Opinion and Order dated March 13, 2013. On March 25, 2013, plaintiff filed a further motion for relief from orders pursuant to MCR 2.612(C)(1)(a). The trial court denied that motion in an Opinion and Order dated April 17, 2013. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews "a trial court's imposition of discovery sanctions for an abuse of discretion." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 659; 819 NW2d 28 (2011). "An abuse of discretion occurs when the decision is outside the range of principled outcomes." *Id.* at 659-660.

III. DISCUSSION

Plaintiff first argues that the trial court abused its discretion by granting defendants' motions to dismiss without articulating its reasoning on the record, including whether it considered alternative discovery sanctions. Under the circumstances presented, we agree.

Because plaintiff failed to provide responses to defendants' interrogatories or requests for production of documents before December 12, 2012, pursuant to the court's orders compelling discovery, defendants filed separate motions to dismiss plaintiff's complaint. The trial court granted both of defendants' motions to dismiss, pursuant to MCR 2.313, which provides for sanctions if a party fails to provide or permit discovery and subsequently fails to comply with a trial court order compelling discovery. Specifically, MCR 2.313(B)(2) provides:

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:

(a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;

(c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, *dismissing the action or proceeding or a part of it*, or rendering a judgment by default against the disobedient party;

(d) in lieu of or in addition to the foregoing orders, an order treating as a contempt of court the failure to obey an order, except an order to submit to a physical or mental examination;

(e) where a party has failed to comply with an order under MCR 2.311(A) requiring the party to produce another for examination, such orders as are listed in subrules (B)(2)(a), (b), and (c), unless the party failing to comply shows that he or she is unable to produce such person for examination.

In lieu of or in addition to the foregoing orders, the court shall require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. [Emphasis added.]

The trial court relied on MCR 2.313(B)(2)(c), which gives the court discretion to dismiss an action for failure to comply with a court order compelling discovery. However, dismissal is the most severe sanction, and thus, should only be imposed when other sanctions would not be adequate. *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994). This Court has provided a nonexhaustive list of factors that the trial court *should* take into consideration when sanctioning a party for a discovery violation:

(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 defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Richardson v Ryder*, 213 Mich App 447, 451; 540 NW2d 696 (1995) (internal citations and quotations omitted).]

The trial court should carefully consider the specific circumstances of a case, especially when implementing a drastic sanction, such as dismissal. *Id.* In fact, this Court has held that “[t]he record should reflect that the trial court gave careful consideration to the factors involved and

considered all its options in determining what sanction was just and proper in the context of the case before it.” *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled in part on other grounds by *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618 (2008). A court’s failure to consider alternative sanctions on the record can constitute an abuse of discretion. *Thorne*, 206 Mich App at 635.

In the instant case, in granting defendants’ motions to dismiss, the trial court did not provide any discussion of the factors listed in *Richardson* or state why alternative sanctions would have been inadequate. The record reflects that the court merely stated that the motions were granted. Further, in dismissing plaintiff’s complaint, the trial court did not state a determination on the record whether plaintiff’s failure to comply with the court’s order compelling discovery was willful or merely accidental. *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995). The trial court also did not consider on the record the fact that this was plaintiff’s first violation of the court’s discovery orders, *Bass*, 238 Mich App at 26; instead, it appears to have premised its ruling on the fact that plaintiff’s counsel did not appear for the motion hearing.

In that regard, plaintiff maintains that he did not receive notice of the January 30, 2012 motion hearing, either directly from counsel for either of defendants or through the trial court’s electronic filing system, nor did counsel for defendants seek concurrence in their motions (such as would have put plaintiff on notice of the motions) as required by the local court rules. Plaintiff thus contends that his failure to appear for the motion hearing was the result of mistake or inadvertence, and that notice of the motions would have prompted him to serve his discovery responses. Defendants do not deny that they failed to seek concurrence in their motions, or that plaintiff’s counsel was unaware of the motions or the motion hearing.

Without passing on their merits, we note that plaintiff’s arguments concerning the electronic filing service used by the trial court and the lack of notice of the filing of the motions and of the January 30, 2012 hearing, even if true, would only explain plaintiff’s failure to contest the motions and to appear at the motion hearing; they have no direct bearing on plaintiff’s earlier failure to comply with the court’s discovery orders within the time period required by those orders.¹ Nonetheless, in the context of this case, where the trial court, in dismissing plaintiff’s

¹ In its opinion and order denying plaintiff’s motion for rehearing, the trial court noted that it had reviewed its electronic filing system and had determined that (a) plaintiff’s counsel had received an email copy of Home Owners’s motion to dismiss, but did not open that email until February 7, 2013 at 5:51 p.m. (after the motion hearing); and (b) plaintiff’s counsel was not listed as a recipient of Spaulding’s motion to dismiss. The trial court correctly observed that it is plaintiff’s counsel’s responsibility to insure that he is properly listed as a service contact on an e-file case; however, inasmuch as the trial court’s findings appear to support plaintiff’s position that he did not have actual notice of the motions or the motion hearing, that is a factor that should be considered in the context of the trial court’s evaluation on the record of the *Richardson* factors, and in the context of its consideration of whether lesser sanctions (than dismissal with prejudice) would better serve the interests of justice.

claims, offered no rationale on the record other than observing that plaintiff's counsel was absent from the hearing, it appears that the alleged lack of notice may have significantly impacted the relief ordered by the court, i.e., the dismissal of plaintiff's claims with prejudice. Therefore, it is a factor that should be considered in the context of the trial court's evaluation on the record of the *Richardson* factors, and in the context of its consideration of whether lesser sanctions (than dismissal with prejudice) would better serve the interests of justice.

Additionally, the trial court did not address whether defendants were actually prejudiced by plaintiff's violation of the orders compelling discovery. Finally, the trial court never considered, on the record, whether justice would be better served by imposing a lesser sanction. Plaintiff's claims were dismissed with prejudice. We conclude that the trial court abused its discretion in ordering the most severe sanction without placing its reasoning on the record. *Thorne*, 206 Mich App at 635.

The trial court subsequently did offer some reasoning in its opinion and order denying plaintiff's motion for rehearing; however, the trial court still did not articulate why lesser sanctions would not be appropriate and only concluded, after giving a brief procedural history, that plaintiff willfully failed to provide discovery material. The trial court did not make any factual findings in support of its conclusion that plaintiff acted willfully. The court did not address any of the remaining *Richardson* factors, and specifically did not address whether or how defendants were prejudiced by plaintiff's delay in providing the requested discovery. The court did not address the adequacy or responsiveness of the discovery that plaintiff ultimately provided, nor do defendants argue on appeal that the discovery, while untimely, was deficient.

Finally, by failing to engage in any analysis at the time of defendants' motions to dismiss, and by instead addressing the issue only in the context of a motion for rehearing, the trial court improperly avoided its own initial responsibilities to evaluate on the record the pertinent factors and to consider available alternatives, and instead foisted upon plaintiff an obligation, under a heightened burden of proof, to demonstrate the "palpable" and "dispositive" nature of the court's error.²

For all of these reasons, we find that the trial court abused its discretion because it failed to evaluate either alternative sanctions or the relevant factors at the hearing on the motions to dismiss. We therefore remand this case to the trial court for consideration, on the record, of the appropriateness of lesser sanctions as well as the relevant factors to be considered when imposing sanctions for discovery violations. On remand, the trial court should specifically consider the fact that plaintiff cured the defect, albeit two months later, in determining whether plaintiff's violation was willful and whether defendants were prejudiced by plaintiff's conduct.

² The burden of proof is considerably higher in the context of motion for rehearing or reconsideration. "A party bringing a motion for reconsideration must establish that (1) the trial court made a palpable error and (2) a different disposition would result from correction of the error." *Luckow v Luckow*, 291 Mich App 417, 426; 805 NW2d 453 (2011); MCR 2.119(F)(3).

Because we hold that the trial court abused its discretion by granting defendants' motions to dismiss, we need not address the trial court's denial of plaintiff's motions for rehearing and relief from judgment.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Christopher M. Murray

/s/ Mark T. Boonstra