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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STEVE A. SIMON d/b/a/ SASCO CONSTRUCTION COMPANY,	)	
Plaintiff-Appellant,	)	Filed November 30, 1983
vs.	)	
ROBERT L. MILLER and SONJA M. MILLER,	)	3-263 / 2-68717
Defendants-Appellees.	)	

Appeal from Adair District Court - Thomas S. Bown, Judge

Plaintiff appeals from the trial court ruling imposing sanctions which he claims foreclosed him from pursuing his cause of action. AFFIRMED.

Timothy J. Walker, Whitfield Law Firm, Des Moines, Iowa and Jaki K. Samuelson, Whitfield Law Firm, Des Moines, Iowa, for Plaintiff-Appellant.

R. E. Feilmeyer, Taylor Law Firm, Guthrie Center, Iowa, and R. Y. Taylor, Taylor Law Firm, Guthrie Center, Iowa, for defendants-appellees.

Heard by Donielson, P.J., Schlegel and Sackett, JJ.

SACKETT, J.

Plaintiff, Steve Simon, doing business as Sasco Construction Company, appeals from the trial court's ruling imposing certain discovery-related sanctions which he claims foreclosed him from pursuing his cause of action. We affirm the trial court.

Plaintiff/appellant, Steve Simon, doing business as Sasco Construction, and defendants/appellees, Robert and Sonja Miller, entered into an oral contract wherein Simon was to build a home for the Millers. After the home was completed a dispute arose as to the terms of the oral contract. Simon filed a mechanic's lien and subsequently filed a petition to foreclose his mechanic's lien. The Millers counterclaimed alleging they were overcharged, that plaintiff breached their oral contract, and that the house was not as plaintiff warranted.

Discovery sanctions were imposed for Simon's alleged failure to comply with a request for production and his failure to timely answer interrogatories. We will discuss the facts with reference to the request and interrogatories separately.

1. Request for Production. Simon was served on November 21, 1979, with a Request for Production of Documents. The following documents were requested:

> a. The entire correspondence and work notes in the personal and business files of Plaintiff relating to any agreement to construct a house for the Defendants, excepting therefrom correspondence between Plaintiff and his attorney which would constitute the work product of the attorney.
>
> b. The entire file of Plaintiff which constitutes support of the pending claim made by Plaintiff against Defendants. Such files shall specifically include, but not be limited to, all house and construction plans of any nature; all prior intermediate or final statements of account prepared by Plaintiff for payment by Defendants; all statements from Cooper Ready Mix for concrete; all statements from Jacobsen, Inc.; all statements supporting the item described in the Exhibit attached to your pleading as "error on Schultz Plumbing bill" for $176.03 and $114.56, respectively.

Iowa Rule of Civil Procedure 130 provides that the party upon whom the request was served shall within 30 days serve a written response indicating that the inspection will be permitted as requested or objecting thereto. No such response was served within the 30-day period required under the rule.

On February 19, 1980, a calendar entry was made by Judge Robert O. Frederick directing defendants [sic] to produce all documents requested by February 26, 1980, at 1:30 p.m. or be subject to the sanctions of Iowa Rule of Civil Procedure 334 [sic].

At about 2 o'clock on February 19, 1980, Simon's attorney delivered to the Millers' attorney a folder of documents which the Millers' attorney requested he be able to take with him to his office in Guthrie Center to examine. However, the Millers' attorney returned the items without explanation to the clerk's office the same day they were received. At some point the documents found their way back to Simon's attorney's office.

On May 8 of 1980, Simon's deposition was taken. The deposition is 80 pages in length. Simon was questioned extensively about the construction of the home and his billing. No request is made in the deposition for further documents nor are the documents which the Millers' attorney received referred to in any manner. There are, however, some questions with reference to a billing that Simon claims was destroyed.

On April 28, 1981, the Millers filed a renewed motion to compel discovery. Included in said motion was the following statement with reference to the request for production:

> 1. On February 19, 1980, this Court entered an order whereby Plaintiff was to produce certain documents by February 26, 1980, at 1:30 p.m. Such documents have not been furnished by plaintiff to Defendants to this date.

The motion also covered the matter of the interrogatories, which will be discussed later in this opinion.

A hearing on the motion was set for May 5, 1981, and five days notice was ordered. The Millers' attorney certified that he hand-delivered the motion and order to Simon's attorney on April 28, 1981. Simon's attorney did not appear for the hearing, nor did he file a response to the motion. He indicated at a subsequent hearing that he was committed on May 5 in another county on a criminal trial. However, no continuance was requested. Judge Richard Strickler ordered that Simon should produce the documents requested by the Millers by 4:30 p.m. on May 7, 1981. Trial was scheduled for August 3, 1981.

Not until July 28, 1981, did Simon's attorney file a Notification of Compliance to Request for Production of Documents. The notification recited that on February 19, 1980, he personally handed to the Millers' attorney a packet containing all receipts, invoices, notes and other materials requested in defendants' Motion for Production. On July 29, 1981, the same materials were redelivered to the Millers' attorney.

On August 3, 1981, the Millers' attorney filed a Motion to Invoke Sanctions Against Plaintiff under Iowa Rule of Civil Procedure 134. The motion concerned itself with answers to interrogatories, to be discussed later in this opinion, and Simon's alleged failure to produce documents. With reference to the Request for Production, the motion stated as follows:

> . . . d. On November 21, 1979, Defendants served Request for Production of Documents upon Plaintiff; on February 14, 1980, this request was renewed upon a hearing to be held on February 19, 1980: on February 19, 1980, this Court ordered Plaintiff to produce such documents as requested or be subject to the sanctions provided by RCP 134. Shortly following said hearing counsel for Plaintiff produced a shoebox full of unsorted and assorted papers of Plaintiff, the same being without identification of any nature, many of which documents related to the general business affairs of Plaintiff, without further identification. Such information was useless to Defendants and said documents were promptly returned to Plaintiff by Defendants without being able to learn of the claimed documentation of allegations made by the Plaintiff.

> 3. Following further motion by Defendants upon a hearing held on May 5, 1981, Plaintiff was again ordered and directed to make answers to interrogatories under RCP 126 and to produce documents under RCP 129, all to be done prior to 4:30 p.m. on May 7, 1981, all of which Plaintiff has ignored.
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> f. Only upon learning this cause was set for trial on August 3, 1981, did Plaintiff furnish to Defendants his answers to interrogatories and produce documents on July 30, 1981, at 3:30 p.m. . . .

The trial commenced on August 3, 1981. Prior to hearing the case the trial judge heard the Millers' motion for sanctions. At that hearing Simon's attorney testified that he had delivered material to the Millers' attorney on both February 19, 1980, and July 30, 1981. The Millers' attorney did not dispute the fact that certain materials were delivered to him; in fact, he had admitted the February 19, 1980, delivery in his motion to invoke sanctions. The only real objection to the production that we can glean from the record is the statement of the Millers' counsel that he couldn't make heads or tails out of the records. He paralleled his objection to the story of the man who goes in to file his income tax and he asks, "Have you got receipts?" He says, "Have I got receipts?" and he dumps the box on the desk. Other than these statements the record is silent as to the Millers' objection to the items produced by Simon. The Millers' attorney, in his motion to compel discovery filed on April 28, 1981, initially stated with reference to the request for production, "Such documents have not been furnished by Plaintiff to Defendants to this date." Yet when the Millers' attorney filed his motion to invoke sanctions he stated that shortly after February 19, 1980, counsel for plaintiff produced a shoebox full of unsorted and assorted papers of Plaintiff. This, coupled with the Millers' counsel's statement at the time of the hearing on sanctions, indicated that he may have asked for many records, and then when he received the box of records, he merely left them at the clerk's office rather than seeking to discuss their content and form with Simon's attorney. Iowa Rule of Civil Procedure 129 says:

> Production of documents and things and entry upon land for inspection and other purposes. Any party may serve on any other party a request
>
> (a) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of R.C.P. 122 and which are in the possession, custody or control of the party upon whom the request is served. . . .

We find nothing in the rule that demands any particular form of organization in the production.

We have had occasion to examine the documents produced by Simon. We find them to be a collection of billings to Simon from subcontractors and suppliers providing materials and labor on the Miller premises. These included invoices as well as itemized billings. In many instances the invoices are stapled to the billings. A bathroom plan is also included. There are no intermediate or final statements of account included with the items. The documents are in no particular order but do appear to be a file such as a contractor would maintain under similar circumstances. The Millers should be reminded that they asked for the entire file which constitutes support of pending claims. They got an entire file. Had Simon's attorney responded to the motion to compel indicating his compliance, or filed a notification of his compliance within a reasonable time of the May 5, 1981, hearing, we probably would have reached a different result here. But he did not. He chose to ignore both the motion and May 5 order for more than three months. Only six days before trial did he in fact file a Notification of Compliance. These actions, coupled with Simon's failure to answer interrogatories as discussed below, are sufficient to support the sanctions.[1]

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[1] We do not want to suggest by this opinion that we demand of Simon a particular form of organization of the items produced. There has been a substantial compliance with the production request and the Millers had an opportunity to depose Simon after the documents were given to him.

2. Interrogatories. The Millers served Simon with interrogatories, eleven in number. Numbers 1, 2, 3, 4 and 5 were addressed to expert testimony; number 6 asked for names of persons who had knowledge of the property value; number 7, a prior billing; numbers 8, 9, and 10 inquired about prior billings and number 11 requested identification of persons with knowledge of the facts.

On January 8, 1981, the Millers filed a motion to compel discovery indicating that interrogatories had been served on October 15, 1980, and that the interrogatories had not been answered. We have discussed earlier an April 28, 1981 Renewed Motion to Compel Discovery filed by the Millers. The Millers alleged in that motion that the interrogatories had still not been answered. The docket entries as of this date fail to show the filing of any notice of interrogatories being served on Simon by the Millers. We do note, however, that on May 1, 1981, the Millers did file a notice of interrogatories upon Simon with a proof of service stamp indicating that they were mailed to Simon's counsel on October 15, 1980. Iowa Rule of Civil Procedure 82(d) requires that all papers required to be served upon a party be filed with the clerk before service or within a reasonable time thereafter. Simon never denied that the interrogatories were served on October 15, and the late filing is not an issue here. However, a five-and-one-half-month period between service and filing is not reasonable as contemplated by rule 82(d).

The renewed motion also addressed the issue of the request for production. Our earlier discussion on that motion and the notice given is applicable here.

On May 5, 1981, the trial court ordered Simon to answer the interrogatories by May 7, 1981, at 4:30 p.m. No answers were filed or served until July 28, 1981. Trial had been set for August 3, 1981.

On August 3, 1981, the Millers filed their motion to invoke sanctions under Iowa Rule of Civil Procedure 134 setting forth the facts with reference to the late

filing of answers to interrogatories, and the request for production. They claimed prejudice and requested sanctions for failure to comply with discovery rules.

Prior to the trial the court considered the motion to impose sanctions. The court found that the plaintiff had not complied with the prior orders of the court and the court imposed sanctions as follows:

> That the claim of oral contract by Defendants be found and established as a matter of fact in law, subject only to proof thereof, and Plaintiff be precluded from offering any testimony supported by the documents and testimony from expert witnesses offered in the documents produced on July 30, 1981 and that Plaintiff be permitted only to offer answering and rebuttal evidence to the testimony of Defendant and their witnesses as to claims for all damages alleged by Defendants.

In addition thereto plaintiff was required to pay certain attorney fees. The issue of taxing of the attorney fees is not raised on appeal.

The trial commenced. It was tried over a period of time concluding on May 25, 1982.

On June 1, 1982, the trial court filed a Ruling and Judgment which confirmed the sanctions invoked against plaintiff on August 3, 1981. The court made other findings which are not at issue here and rendered judgment against Simon for $3,186.56. Simon filed a timely notice of appeal.

We must decide whether the trial court abused its discretion in depriving plaintiff, Steve Simon, of his cause of action as a sanction for failure to comply with discovery orders in a timely manner. We find no abuse of discretion.

Our review is de novo. The Iowa rules provide for sanctions where a party fails to comply with a court order regarding discovery. Iowa Rule of Civil Procedure 134 (b)(2)(A) provides:

> An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

Iowa Rule of Civil Procedure 134 (b)(2)(B) provides:

> An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

The trial court invoked sanctions under both sections. Trial courts possess broad discretion with the imposition of discovery sanctions. R. E. Morris Investments, Inc. v. Lind, 304 N.W. 2d 189, 191 (Iowa 1981). Eickelberg v. Deere & Co., 276 N.W. 2d 442, 446 (Iowa 1979). Haumerson v. Ford Motor Co., 257 N.W. 2d 7, 13-14 (Iowa 1977).

The Iowa Supreme Court has been slow to find abuse of the trial court's discretion in discovery sanction cases. Sullivan v. Chicago Northwestern Transportation Co., 326 N.W. 2d 320, 324 (Iowa 1982). A trial court's decision to impose discovery sanctions under rule 134 will not be reversed unless there had been an abuse of discretion. State v. St. John, 308 N.W. 2d 8, 10 (Iowa 1981).

Plaintiff claims that the trial court has deprived him of his cause of action, and that a party may be deprived of his cause of action as a sanction only if the failure to make discovery is due to willfulness, bad faith, or fault of the party. We do not disagree that the trial court, while not actually dismissing plaintiff's petition, has by the sanctions imposed in essence deprived him of his cause of action. We also recognize that the Iowa court has held that the drastic action of dismissal and entry of default judgment should not be ordered in the absence of willfulness, bad faith or fault for refusal to comply with Iowa Rule of Civil Procedure 134. Smiley v. Twin City Beef Co., 236 N.W. 2d 356, 360 (Iowa 1975); McQuillen v. City of Sioux City, 306 N.W. 2d 789, 791 (Iowa 1981).

Because discovery standards are designed to implement, not to impede, fair and speedy determinations of cases, it is suggested "that the court should seek to apply sanctions which affect the evidence at trial and the merits of the case as little as possible . . . " State v. Marchellino, 304 N.W. 2d 252, 257 (Iowa 1981) (quoting ABA Standards for Criminal Justice, Discovery and Procedure Before Trial, §5.1, Commentary, at 108 (1970)).

In exercising its discretion in selection of sanctions for failure to comply with discovery orders, the court should keep in mind that "radical surgery should not be performed on the . . . case if conservative therapy will bring about a cure." State v. St. John, 308 N.W. 2d 8, 11 (Iowa 1981) (quoting State v. Marchellino, 304 N.W. 2d at 257). There is a strong policy favoring a trial on the merits and against depriving a party of his day in court. Fox v. Studebaker-Worthington, Inc., 516 F. 2d 989, 996 (8th Cir. 1975). In our system of justice the opportunity to be heard is a litigant's most precious right and should be sparingly denied. Edgar v. Slaughter, 548 F. 2d 770, 773 (8th Cir. 1977).

After careful consideration of the facts and authorities and the record as a whole, we must find that the actions of plaintiff did in fact constitute bad faith and a flagrant disregard of the rules of discovery and order of the trial court so as to warrant the sanctions imposed.

In making this determination we have considered the findings of the supreme court in Smiley v. Twin City Beef Co., 236 N.W. 2d 356 (Iowa 1975). In Smiley, the plaintiff filed eight interrogatories on May 10, 1973. Defendant had 14 days to answer; however, a 30-day extension was requested; and he was granted to June 11 to answer. On June 15 defendant had not filed answers and the plaintiff asked for a default. On June 28 the defendant answered some interrogatories. On July 2 plaintiff filed an amendment to compel defendant to answer certain interrogatories. A hearing was held on July 11 and an order entered overruling plaintiff's motion of default on the condition defendant answer by July 27, 1973. On July 30, 1973, defendant still had not answered and he was defaulted by trial court. The supreme court affirmed the default and found defendant acted in bad faith and flagrant disregard of the rules of discovery. Id. at 360.

Simon argues that in addition to extinguishing his claim, the sanctions have seriously limited his ability to respond to the counterclaim. Simon's defense to

the counterclaim was based on excluded expert testimony. The sanction is no less severe than sanctions approved by this court in Wernimont v. International Harvester Corp., 309 N.W. 2d 137 (Iowa Ct. App. 1981). In Wernimont plaintiffs had been asked, in interrogatories filed January 28, 1977, to list the names of experts they expected to call to testify on their behalf. Plaintiffs failed to respond and on June 29, 1977, plaintiffs were ordered to answer interrogatories in 20 days. Plaintiffs filed answers on September 2, 1977, but continued to fail to list their experts, which prompted a second set of motions. Following a pretrial conference on April 2, 1979, the trial court gave plaintiffs until April 12 to answer. Plaintiffs answered on April 16 and defendants asked for sanctions, which were granted, prohibiting plaintiffs from calling their listed expert or any other expert to the issue of liability. We found no abuse of discretion in the imposition of such sanctions. Id. at 143-44.

Simon was to answer interrogatories by May 7, 1981. He did not answer them until August 30, 1981. In Sullivan v. Chicago Northwestern, 326 N.W. 2d 320, 324 (Iowa 1981), the supreme court affirmed the sanctions of the trial court in excluding testimony for failure to disclose witnesses until three weeks prior to trial, despite the fact there were no discovery orders. Here Simon did not answer the interrogatories until six days before the trial and more than three months after he was ordered to do so by the trial court. The discovery sanctions were not too severe. We must agree with the United States Supreme Court when they said in National Hockey League v. Metropolitan Hockey Club,Inc., 427 U.S. 639, 642-43, 49 L. Ed. 2d 747, 751, 96 S. Ct. 2778 (1976).

> There is a natural tendency on the part of reviewing courts, properly employing the benefits of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.

> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

We affirm the trial court.

AFFIRMED.

DONIELSON, J. (dissenting)

I agree that the failure of plaintiff's attorney to produce documents and answer interrogatories in a timely manner should result in sanctions of some sort. I also believe, however, that the sanctions imposed, which effectively deprived plaintiff of his cause of action, were too severe and constitute an abuse of the trial court's discretion. Accordingly, I dissent.

The majority properly cites those cases standing for the propositions that a party's right to his day in court should not be denied lightly and that, in the absence of willfulness or bad faith in not complying with discovery orders, such noncompliance should not result in depriving a party of his cause of action. Contrary to the majority, however, I do not believe that this record evinces the requisite bad faith or willfulness. First, plaintiff himself had nothing to do with the failure to comply with discovery; any failure to comply was solely the result of the action or inaction of plaintiff's attorney. Under these circumstances, I believe the trial court's sanctions were unreasonably severe in depriving plaintiff of his action in which he prayed for damages in excess of $20,000 and a meaningful opportunity to respond to defendant's counterclaim, especially in light of the fact that that counterclaim resulted in a net judgment against plaintiff in the amount of nearly $3,200. See Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977). Second, the majority admits that, at least with respect to the request for production of documents, such request was substantially complied with and the documents were given to defendants. I do not believe that plaintiff's attorney's mere failure to file a notice of compliance with that request, either by itself or in conjunction with the failures to timely answer the interrogatories, justifies the harsh sanctions imposed here.

I would vacate the sanctions imposed by the trial court with the exception of the award of fees and expenses and would remand for a full trial on the merits of plaintiff's claim along with defendant's counterclaim and for the imposition of other, less severe sanctions.