

No. 1-11-0531

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THORNTON EQUIPMENT SERVICES, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 2010 L 4903
)	
CHARLES DIERINGER,)	
)	
Defendant-Appellant.)	The Honorable
)	James N. O'Hara
)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

Held: Appellate court lacked jurisdiction to review circuit court's sanction order which respectively struck and dismissed defendant's affirmative defense and motion to dismiss brought under the Citizen Participation Act: The Act does not confer jurisdiction upon this court to review such orders, defendant untimely filed a petition for leave to appeal under a separate docket number, sanction order was not the result of a contempt proceeding, and discovery sanctions are not appealable until the underlying action is completed.

¶ 1 This appeal stems from a defamation action brought by Thornton Equipment Services, Inc. (Thornton Equipment) against Charles Dieringer. Disputes arose during the underlying

discovery proceedings which resulted in Dieringer being sanctioned, from which he now appeals. For the reasons discussed below, the appeal is dismissed.

¶ 2 I. BACKGROUND

¶ 3 Because the underlying action remains pending, the following facts were derived from the pleadings and circuit court orders in the record on appeal. Thornton Equipment provides various excavation and maintenance services to public and private entities. One of Thornton Equipment's areas of expertise is the maintenance of waterways, with one of its historical clients being the Metropolitan Water Reclamation District (MWRD). On July 15, 2009, Thornton Equipment and MWRD entered into a contract to provide maintenance services to the Deer Creek waterway in Glenwood, Illinois. Maintenance work commenced on the Deer Creek waterway on March 8, 2010. Dieringer, who at that time had no connection to MWRD, Thornton Equipment, or the maintenance work itself, began appearing at the work site. Dieringer allegedly approached a MWRD supervisor and inquired about debris in the area as a result of the maintenance being done. Dieringer also had video recording equipment and appeared to film Thornton Equipment conducting its work.

¶ 4 On or around March 25, 2010, Thornton Equipment learned that two videos regarding their services was posted to an online website, YouTube, by Dieringer. The two videos, respectively entitled Stream1 and Stream2, contained video recordings of Thornton Equipment's maintenance work at Deer Creek in connection with the above MWRD contract. Dieringer allegedly made a number of disparaging remarks regarding Thornton Equipment's work performance and business operations throughout the videos. Dieringer also allegedly made a

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number of libelous statements in e-mail correspondences, which contained a link to the Stream2 video, sent to at least seven different individuals.

¶ 5 Thornton Equipment then filed an 11 count complaint against Dieringer. The complaint advanced several libel claims against Dieringer based on the alleged defamatory statements made by Dieringer in the videos posted to the internet and in his e-mail correspondences. Dieringer filed a motion to dismiss the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)) on June 15, 2010. The motion to dismiss was fully briefed by both parties and on August 31, 2010, the circuit court denied the motion as to counts I through IX, and granted it as to X through XI. That order also set a case management date of November 2, 2010, and established a discovery schedule, requiring the parties to propound discovery by September 14, 2010, but also allowing subsequent supplemental discovery.

¶ 6 On September 14, 2010, Thornton Equipment timely served its first set of interrogatories and requests to produce on Dieringer. One of the production requests was for Dieringer's computer hard drive for the purposes of a forensic examination. In a written correspondence dated September 15, 2010, Dieringer acknowledged receipt of the propounded discovery and promised to timely respond, but asserted that Thornton Equipment had "given no legitimate reason" to require production of the computer hard drive and that he would "reject" the request to produce. Thornton Equipment replied in a letter, renewing its production request and stating that production of the computer hard drive was necessary because Dieringer admitted he took videos of the MWRD contract work and had posted those videos to the internet, but denies that the allegations in the underlying complaint accurately reflected the statements made by him on the

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videos. Dieringer had also asserted that the content of the e-mail included in the complaint was not accurate. Based on these denials and assertions, Thornton Equipment advised Dieringer that it was entitled to "any and all discovery related to the creation and distribution of the videos, Stream1 and Stream2, as well as the e-mail that [Dieringer] sent to a number of individuals on or about March 15, 2010." Although Dieringer agreed to provide some materials, he continued to reject the request for his computer hard drive.

¶ 7 Thornton Equipment then proposed a search protocol to address Dieringer's reluctance to allow anyone to "broadly rummage" through his hard drive. The search protocol would allow a forensic expert to examine a duplicate copy of the hard drive with word search terms agreed upon by the parties. Dieringer would also be allowed to review any documents for privileged information before production. Dieringer rejected this request on September 30, 2010, stated he no longer wished to discuss the matter and encouraged Thornton Equipment to file a motion if it felt it was nevertheless entitled to the hard drive.

¶ 8 On October 25, 2010, Thornton Equipment advised Dieringer in a written letter that it had not received any documents or written responses related to any discovery requests. Dieringer did not respond. On November 1, 2010, one day prior to the scheduled case management conference, Dieringer informed Thornton Equipment that it intended to raise an affirmative defense to the underlying complaint and file a motion to dismiss based upon the Citizen Participation Act (Act) (735 ILCS 110/5 *et seq.* (West 2008)). On November 2, 2010, the circuit court stayed pending discovery and granted Dieringer leave to file his affirmative defense and motion to dismiss. It also entered and continued a motion by Thornton Equipment to compel

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discovery. Dieringer filed his affirmative defense on November 5, 2010, and his motion to dismiss on November 9, 2010.

¶ 9 On November 16, 2010, the circuit court amended the discovery schedule, requiring the discovery related to Dieringer's affirmative defense be issued and responded to by December 14, 2010. Thornton Equipment timely issued a second set of interrogatories and production requests to Dieringer; however, Dieringer again failed to respond by December 14, 2010. On December 21, 2010, Dieringer allegedly had still failed to respond to discovery but stated, in open court, that Thornton Equipment "should contact him to review such documents at his office." Thornton Equipment subsequently requested copies of documents and information from Dieringer, who in turn responded that Thornton Equipment would only be allowed to review the documents in his office. Dieringer also continued to refuse to produce the requested computer hard drive. Thornton Equipment then called Dieringer's counsel and asked that copies of documents be made and sent since it was "not an efficient use of time, resources or money to review the documents in his office." Dieringer's counsel then admitted he did not actually have any copies of the requested documents from his client but would contact Thornton Equipment when they came into his possession. On January 7, 2011, Dieringer sent certain documents to Thornton Equipment; however, Thornton Equipment discovered that several documents were only partial and incomplete copies of larger, more comprehensive documents.

¶ 10 Thornton Equipment filed an "emergency motion for sanctions against Charles Dieringer for his abuse of the discovery process and motion to compel his production of electronic information" on January 26, 2011. The circuit court entered and continued the sanctions motion

to January 28, 2011, and ordered that Dieringer was to produce "electronic copies of emails, Stream1 and Stream 2 to the court on January 28, 2011." Dieringer did not produce any copies or information and on January 28, 2011, the circuit court ordered to parties to submit proposed findings of fact and proposed orders related to the sanctions motion by January 31, 2011. On January 31, 2011, the circuit court ordered, in pertinent part:

- "1. Dieringer's Affirmative Defense is hereby stricken pursuant to the Court's inherent authority and Illinois Supreme Court Rule 219(c) as a sanction for Dieringer's failure to comply with this Court's discovery order and the Illinois Supreme Court Rules.
2. Dieringer's motion to dismiss is hereby dismissed with prejudice pursuant to the Court's inherent authority and Illinois Supreme Court Rule 219(c) as a sanction for Dieringer's failure to comply with this Court's discovery order and the Illinois Supreme Court Rules."

The order also reestablished the discovery schedule as to the defamation claims. Dieringer filed his notice of appeal on February 15, 2011.

¶ 11

II. ANALYSIS

¶ 12 Dieringer raises only one contention on appeal, arguing that the order striking his affirmative defense and motion to dismiss based on the Act was an abuse of discretion. Before addressing the merits of Dieringer's contention, however, we must determine whether this court has jurisdiction to consider the instant appeal. Dieringer's initial brief asserts that this court has jurisdiction under section 20 of the Act. We have, however, previously held that the denial of a motion to dismiss brought under the Act is not subject to interlocutory review and jurisdiction is

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not conferred upon this court by the Act. *Stein v. Krislov*, 405 Ill. App. 3d 538, 542-43 (2010); see *Mund v. Brown*, 393 Ill. App. 3d 994, 997-98 (2009).

¶ 13 We observe that Dieringer has previously acknowledged this holding. After filing his February 11, 2011, notice of appeal, Dieringer filed a petition for leave to appeal on May 19, 2011, under the separate appeal docket number 1-11-1420. In that petition, Dieringer acknowledged that he had just become aware of this court's decision in *Stein* and conceded that the Act did not confer jurisdiction over his February 11, 2011, appeal. He instead argued that Illinois Supreme Court Rule 306(a)(9) (eff. February 16, 2011), conferred jurisdiction upon this court. While Rule 306(a)(9) does grant this court jurisdiction regarding orders of the circuit court denying a motion to dispose under the Act (Ill. Sup. Ct. R. 306(a)(9) (eff. February 16, 2011)), this court nevertheless denied Dieringer's petition for leave to appeal. The order denying the petition does not state the reasons why, but we note that Dieringer's petition was, at the least, untimely. Rule 306(a)(9) became effective on February 16, 2011, and the relevant order was entered on January 31, 2011. Accordingly, Dieringer had 14 days to timely file his petition and potentially take advantage of the new rule. However, Dieringer's petition was filed nearly five months after the circuit court's order was entered and was thus untimely. See Ill. Sup. Ct. R. 306(c)(1) (requiring that a petition for leave to appeal be filed within 30 days after the entry of the order).

¶ 14 Despite this, Dieringer has advanced yet a third theory in his reply brief in the instant appeal as to why this court has jurisdiction. He argues that Illinois Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010), allows this appeal to be taken as "an order finding a person or

entity in contempt of court which imposes a monetary or other penalty." We disagree. Although Dieringer correctly notes that Rule 304(b)(5) has been used to test a discovery order, it is only done so in the context of an actual order of contempt. See *Cutler v. Northwest Suburban Community Hospital, Inc.*, 405 Ill. App. 3d 1052, 1070 (2010). It is the "collateral and independent characteristics of the contempt proceeding coupled with the finality of imposing an appropriate penalty for the contempt" that make contempt orders with a penalty appealable. *Lewis v. Family Planning Management, Inc.*, 306 Ill. App. 3d 918, 924 (1999).

¶ 15 Here, however, there was no order of contempt entered at any time. The circuit court's order explicitly provided that Dieringer's affirmative defense and motion to dismiss were respectively stricken and dismissed pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), which governs the actions a court may take when a party fails to comply with certain discovery rules. Nowhere in the circuit's court order does the term "contempt" appear, nor does the order actually find any party in contempt. Our own review of the record reveals nothing that a contempt proceeding occurred or that the sanctions were the result of one. Instead, the circuit court's order is clear that it is exercising its authority under Rule 219(c). The fact that a failure to comply with a circuit court's order may constitute contemptuous conduct "does not vitiate the necessity that the trial court make a finding of contempt." *Lewis*, 306 Ill. App. 3d at 924. Accordingly, because there is no finding of contempt, the circuit court's January 31, 2011, order striking Dieringer's affirmative defense and dismissing his motion to dismiss is a sanction under Rule 219(c) for discovery violations and thus Rule 304(b)(5) also does not grant this court jurisdiction to consider the instant appeal. Moreover, we note that discovery orders and

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sanctions under Rule 219(c) are generally not final and appealable until the underlying action is completed (which Dieringer does not dispute), and thus it would be premature for this court to consider the instant appeal under the context of that rule. *In re Marriage of Young*, 244 Ill. App. 3d 313, 316 (1993).

¶ 16

III. CONCLUSION

¶ 17 In conclusion, we are unpersuaded by Dieringer's varied attempts to establish this court's jurisdiction under section 20 of the Act, Rule 306(a)(9), or Rule 304(b)(5), and for the foregoing reasons, we dismiss the cause for want of jurisdiction.

¶ 18 Dismissed.