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SECOND DIVISION
July 10, 2012

No. 1-11-1595
2012 IL App (1st) 111595-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MATT BALDWIN,)	Appeal from the
)	Circuit Court of
Plaintiff,)	Cook County
)	
v.)	08 M1 199873
)	
NATURAL HAIR GROWTH INSTITUTE, LTD.,)	Honorable
and STEVE BENNIS,)	Pamela E. Hill-Veal,
)	Judge Presiding.
Defendants.)	
)	
(Robert J. Shelist,)	
)	
Judgment Creditor-Appellee,)	
)	
v.)	
)	
Pokorny & Marks, LLC,)	
)	
Judgment Debtor-Appellant.))	

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

Held: Where the circuit court imposed sanctions on defendants' attorneys under Rule 219(c), sanctions were not an abuse of discretion and plaintiff was not required to comply with Rule 201(k) before seeking sanctions because sanctions were based on defendants' failure to comply with a court order rather than the discovery rules.

¶1 The circuit court sanctioned defendants' attorneys Pokorny & Marks (P&M) under Illinois Supreme Court Rule 219(c) for P&M's failure to comply with the circuit court's discovery orders. P&M appeals, arguing that (1) plaintiff's attorney Robert A. Shelist was not entitled to seek an order for sanctions because Shelist did not make reasonable efforts to resolve the discovery dispute before bringing the issue to the circuit court's attention, (2) P&M did not commit any sanctionable discovery violation, and (3) Shelist's fee petition was not supported by affidavit and included costs that are unclear and unrelated to the alleged discovery violation. We affirm.

¶2 The underlying facts of plaintiff's cause of action are not relevant to this appeal. Plaintiff filed his complaint in December 2008, and over the course of the next year defendants retained three separate law firms to represent them in the matter. Written discovery began in May 2009, but defendants had trouble complying with plaintiff's discovery requests. Plaintiff and defendants attempted to resolve the problem themselves, but this was unsuccessful and in July 2009, plaintiff filed a motion to compel defendants to respond to his discovery requests. The circuit court entered and continued the motion in order to allow defendants more time to gather their responses, but defendants did not produce the requested discovery by the circuit court's deadline. The circuit court granted plaintiff's motion to compel and ordered defendants to comply with the discovery requests. Defendants failed to meet the circuit court's new deadline.

¶3 By November 2009, defendants had missed two of the circuit court's deadlines, but the circuit court again granted defendants more time to comply with the circuit court's orders. Notably, the circuit court's order of November 9, 2009, also indicated that defendants would be sanctioned if they continued to defy the circuit court's discovery orders. Defendants finally responded to plaintiff's discovery requests, but the interrogatory responses were unverified and

contained numerous objections, and defendants did not respond to any of plaintiff's requests to produce documents.

¶4 This was the state of the case when P&M took over from the previous three firms as defendants' attorneys on February 4, 2010. At that hearing, the circuit court ordered defendants to comply with all outstanding discovery requests within 45 days, that is, by March 18, 2010. The parties differ over precisely what happened between them over the next month and a half, but the record is clear that when the parties next appeared before the circuit court on April 5, 2010, defendants had not produced the requested discovery. The circuit court gave defendants 48 hours to respond to all outstanding discovery requests, warning them again that they would be sanctioned if they failed to respond to plaintiff's interrogatories and produce all requested documents. Defendants partially complied with the order by April 7, though they produced only some of the documents that plaintiff sought. Defendants also failed to provide an affidavit of complete production, failed to identify which documents were responsive to which requests, and failed to serve revised responses to the interrogatories.

¶5 From plaintiff's perspective, perhaps the most pressing problem with the discovery response was that defendants continued to object to and refused to respond to a large number of the interrogatories, and defendants failed to respond at all to the supplemental discovery request that plaintiff had served over six months earlier in September 2009. Plaintiff asked the circuit court for a ruling on the objections.

¶6 Instead of answering the outstanding discovery requests, in August 2010, P&M moved to withdraw as defendants' attorneys, citing "irreconcilable differences" with defendants. The circuit court denied P&M's motion on September 16, 2010, and at that same hearing it overruled defendants' objections to the interrogatories. The circuit court found that defendants' discovery

responses were inadequate, and it ordered not only defendants but also P&M to verify all discovery responses, provide an affidavit of complete production, comply with plaintiff's instructions in the discovery requests, and respond to all of plaintiff's interrogatories and production requests in their entirety. The circuit court once again warned defendants that noncompliance would result in sanctions, up to and including striking defendants' pleadings and barring evidence or testimony at trial.

¶7 On October 25, 2010, P&M asked the circuit court to reconsider its order denying them leave to withdraw from the case. The circuit court again denied their request. On that same date, Shelist filed a petition for fees and costs under Rule 219(c) related to the long-standing discovery dispute. In a four-page written order, the circuit court found that defendants and P&M were aware of and willfully violated numerous court orders regarding discovery. The circuit court granted the petition and declared defendants and P&M jointly liable for Shelist's fees and costs related to the discovery dispute. The circuit court limited P&M's liability to only the period from its appearance on defendants' behalf on February 4, 2010, to the date of the circuit court's order.

¶8 The circuit court eventually allowed P&M to withdraw from the case after the fee petition was resolved, and P&M now appeals.

¶9 The sole issue on appeal is the propriety of the circuit court's order granting Shelist's fee petition, but P&M raises several arguments against it. Illinois Supreme Court Rule 219 (eff. July 1, 2002) is the enforcement mechanism for regulating discovery. Rule 219(c) authorizes the circuit court to sanction a party for failure to comply with either court orders or supreme court rules regarding discovery. There are two different types of sanctions available under this rule. The first, which is only available on motion of an opposing party, allows the circuit court to stay

proceedings, debar or strike pleadings, debar claims or defenses, bar testimony of witnesses or evidence, and enter a default judgment. The second type of sanction, which is available either on motion or *sua sponte*, allows the circuit court to impose monetary sanctions such as reasonable attorney fees against either the party itself or its attorneys and, if the sanctioned party's conduct is willful, a monetary penalty. In this case the circuit court imposed the second type of sanction against defendants and P&M when it granted Shelist's petition for fees. The decision of whether to impose sanctions under Rule 219(c) is committed to the discretion of the circuit court, and "only a clear abuse of discretion justifies reversal." *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998).

¶10 P&M first argues that Shelist was not entitled to petition the circuit court for fees as a sanction under Rule 219(c) because he failed to comply with Rule 201(k) before asking for sanctions. Under Rule 201(k), "[e]very motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord *** ." Ill. S. Ct. R. 201(k) (eff. July 2, 2002). "Strict compliance with Rule 201(k) is generally required and litigants are not entitled to seek sanctions without first exercising reasonable attempts to resolve discovery differences." *Parrish v. Hackman*, 197 Ill. 2d 500, 512 (2001). P&M contends that Shelist failed to correspond with P&M about the inadequacy of the discovery responses, arguing among other things that Shelist never attempted to resolve the objections to the interrogatories and never mentioned the outstanding supplemental discovery requests.

¶11 Shelist disagrees with P&M's interpretation of the facts surrounding the discovery dispute, but it ultimately does not matter whether the parties' attorneys tried to resolve the discovery dispute before Shelist filed his petition for fees. By the time Shelist filed his petition,

this case was long past the point where Rule 201(k) was relevant to the question of sanctions. Plaintiff originally moved to compel responses to discovery in mid-2009, and the circuit court began taking an active role in discovery no later than November 2009. By the time that P&M appeared in the case, the circuit court had already issued several orders regarding defendants' failure to comply with discovery, and the circuit court warned P&M when it entered the case that there were outstanding discovery orders.

¶12 This matters because Rule 201(k) compliance is only an issue when a party wants to move for sanctions due to the opposing party's failure to comply with rule-based discovery deadlines. It does not apply when compliance with the circuit court's own discovery orders is at issue. In *Gayton v. Levi*, we observed that the purpose of Rule 201(k) is to "curtail undue delay in the administration of justice and to discourage motions of a routine nature," which is served "when the parties attempt to iron out discovery problems before seeking court intervention and sanctions." (Internal quotation marks omitted.) *Gayton v. Levi*, 146 Ill. App. 3d 142, 149-50 (1986). The calculus changes, however, when the circuit court itself becomes involved with discovery:

"once the court does become involved in the supervision of discovery matters, as it did here at the progress-call hearing and subsequently through the entry of orders, such goals are no longer served by requiring mandatory compliance with Rule 201(k). Rule 201(k) would not serve its purpose if a party were required to continually make attempts to rectify a defiant party's non-compliance with numerous prior court orders before that party could bring the adversary's failure to comply with the orders to the court's attention itself. In fact, to require compliance with Rule 201(k) before a court could enforce its previous orders,

entered in an attempt to expedite the truth-seeking process, would permit the rule to be used to further delay, distract and harass one's opponent. Thus, the pettifoggery sought to be discouraged by a court's ability to impose appropriate sanctions under Rule 219 *** would be encouraged, rather than discouraged, by compliance with Rule 201(k) in such situations.” *Id.* at 150.

¶13 As in *Gayton*, there was no reason here to require Shelist to comply with Rule 201(k) before seeking sanctions. By the time that Shelist asked for sanctions, the circuit court had been involved in the discovery dispute for over a year. Although P&M had only represented defendants for about half that time, it was well aware that the circuit court had issued several discovery orders in the case, one of which was pending at the time P&M appeared. When P&M failed to comply with the circuit court’s April 5 deadline, it violated an order of court rather than a rule-based discovery deadline. In such a situation there are no discovery differences for the parties to resolve among themselves or confer about as Rule 201(k) contemplates. The only issue is compliance with the court order. P&M failed to comply with the circuit court’s order, so Shelist was entitled to bring the problem to the circuit court’s attention at any time without obeying the strictures of Rule 201(k). *Cf. id.* at 151; accord *Parrish*, 197 Ill. 2d at 512.

¶14 P&M next argues that sanctions were not warranted by the circumstances. Sanctions for violating court orders regarding discovery should only be imposed when noncompliance is unreasonable, that is, “when the noncomplying party's conduct shows a deliberate, contumacious, or unwarranted disregard of the court's authority.” *Blott v. Hanson*, 283 Ill. App. 3d 656, 661-62 (1996). “Once the trial court has imposed a sanction for noncompliance with a discovery rule, the sanctioned party bears the burden of establishing that the noncompliance was reasonable or justified by extenuating circumstances or events.” *Id.* at 662. In *Blott*, the circuit

court sanctioned a codefendant's attorneys for failure to comply with the defendant's discovery requests. See *id.* at 657. The attorneys appealed, contending that the sanction was unwarranted because the delays were due to their client's refusal to cooperate. The record contained an affidavit in which the attorneys attested that they had repeatedly tried, without success, to contact the codefendant in order to complete the discovery requests. The attorneys even attempted to depose their own client in order to comply with the discovery orders. See *id.* at 662. We reversed, holding that the circuit court abused its discretion by sanctioning the codefendant's attorneys because the record contained uncontroverted evidence that their failure to comply with the discovery orders was justifiable under the circumstances. See *id.*

¶15 P&M relies largely on *Blott* to argue that the sanction here is unwarranted, but *Blott* is distinguishable on its facts. The attorneys in *Blott* were unable to comply with court-ordered discovery deadlines because their client refused to cooperate. Unlike *Blott*, there is no evidence in the record that P&M's failure to comply with the circuit court's orders was similarly justified.¹ The record is clear that P&M knew about the circuit court's discovery orders and violated at least one of them, and P&M offered no evidence from which the circuit court could reasonably find that the violation was justified. There accordingly is no basis for us to conclude that the circuit court abused its discretion by sanctioning P&M for violating the court's orders.

¶16 P&M's final contention is that Shelist failed to support his petition for fees with an affidavit and sought payment for items that were not directly related to the discovery dispute. It appears from the record, however, that P&M failed to raise this issue before the circuit court. Shelist filed his petition for fees on October 25, 2010, but it does not appear from the record that

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P&M claims in its brief that defendants did in fact refuse to cooperate with P&M, but there is no evidence in the record to support this. P&M offers to make evidence about this available to us for an *ex parte, in camera* inspection, but P&M fails to explain why this evidence, if it indeed exists, was not presented to the circuit court in the first place, much less why it is so secret that it can only now be seen in chambers and *ex parte*.

P&M ever filed a response to the petition. Issues not raised in the circuit court are forfeit and will not be considered for the first time on appeal. See *Haudrich v. Howmedica Inc.*, 169 Ill. 2d 525, 536 (1996). P&M claims that it raised this issue in a response to the fee petition, but we cannot find such a response in the record. Even if it does exist, P&M fails to direct us to its location, contrary to supreme court rules. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (“[R]eference shall be made to the pages of the record on appeal *** where evidence may be found.”). As the appellant, it is P&M’s burden to provide an adequate record of the proceedings in order for us to fully review their claims on appeal (*Altaf v. Hanover Square Condominium Association No. 1*, 188 Ill. App. 3d 533, 539 (1989)), so we must resolve any doubts that may arise due to the incompleteness of the record against them (*Foutch v. O’Bryant*, 99 Ill. 2d 389, 392 (1984)). The record does show that P&M addressed this issue in its motion to reconsider the sanctions order, but “arguments raised for the first time in a motion for reconsideration are forfeited on appeal.” *Stahelin v. Forest Preserve District*, 401 Ill. App. 3d 1030, 1041 (2010). Because P&M failed to properly raise this issue before the circuit court, it is forfeit and we will not consider it.

¶17 Finally, Shelist asks us to order P&M to pay his reasonable attorney fees in connection with this appeal as a sanction under Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994) on the ground that P&M’s appeal is frivolous. We decline to do so.

¶18 Affirmed.