

No. 1-12-2093

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

STATE FARM MUTUAL AUTOMOBILE)	Appeal from the
INSURANCE COMPANY,)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 10 M1 13987
)	
CHAD E. FITCHER,)	Hon. James Snyder and
)	Hon. Leon Wool,
Defendant-Appellee.)	Judges Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff's failure to provide advance notice that different claims representative would attend arbitration hearing warranted sanction, but particular sanction of barring plaintiff from testifying or presenting evidence at trial was too severe under the circumstances; reversed and remanded.

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¶ 2 Plaintiff State Farm Mutual Automobile Insurance Company appeals from a June 18, 2012 order of the circuit court entering judgment in favor of defendant, Chad Fitcher, in a subrogation action brought to recover a sum plaintiff paid to its insured following an automobile collision. Plaintiff contends the trial court abused its discretion by imposing a sanction that barred plaintiff from testifying or presenting evidence at trial. We reverse and remand.

¶ 3 The record reveals that on or about December 19, 2009, defendant's vehicle struck the vehicle belonging to plaintiff's insured on South Indiana Avenue in Chicago. After plaintiff's insured was compensated for the resulting damage under her insurance policy, plaintiff filed a subrogation action against defendant in the amount of \$11,161.85 plus lawsuit-related costs. On March 31, 2011, defendant filed a notice to produce pursuant to Illinois Supreme Court Rule 237 (eff. July 1, 2005), requesting in part:

"If the Plaintiff and/or the Co-Defendant is a corporation (including an Insurance Company), the claims [adjuster] with the entire claim file and **MATTHEW PRIGMORE** further, if the afore designated individual is no longer an employee of plaintiff(s) and/or co-defendant(s), the defendant [requests] notice of the same, in writing, no less than 30 days prior to the arbitration hearing, as well as the last home address and home telephone number of said individual."

Discovery continued, and on June 20, 2011, plaintiff filed a motion to strike defendant's Rule 237 notice, excuse one or more of plaintiff's representatives from attending the arbitration hearing, or require defendant to pay travel and accommodation expenses for the requested representatives. Plaintiff's motion asserted that Prigmore was merely a clerical employee and

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worked and lived outside of Cook County. On July 18, 2011, the court entered an order as follows:

"This matter coming to be heard for plaintiff's motion to excuse[,] the court being fully advised in the premises [and] retaining jurisdiction[,] it is hereby ordered, the claim representative Matthew Prigmore is excused from the arbitration hearing. Plaintiff to name the assigned claim rep 7 days before the arbitration hearing."

On July 19, 2011, plaintiff wrote a letter to defendant to inform him that Cedric Esthers¹ would be plaintiff's representative at the arbitration hearing. The letter further stated that:

"Should there be any changes another representative from [p]laintiff will appear in his place. They will testify to the business records and practices of the [p]laintiff, as well as the damages incurred by the [p]laintiff relative to this case."

¶ 4 The arbitration hearing took place on November 22, 2011. Although Esthers left plaintiff's employ 25 days before the hearing, plaintiff did not notify defendant of a new representative and produced an adjuster named Jorge Jana.² The arbitration panel entered an order finding in favor of plaintiff and against defendant in the amount of \$11,161.85 and awarding \$407 in court costs. The panel also found that all parties participated in good faith. The record does not contain a transcript of the hearing.

¹ Cedric Esthers is also referred to "Cedrick Estes" and "Cedric Esters" in the record.

² Jorge Jana's last name is also spelled "Johnna" in the record.

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¶ 5 Following the hearing, defendant filed a notice of rejection of the arbitration award. Defendant also filed a motion to bar plaintiff from testifying and/or from presenting any evidence at trial, asserting that plaintiff had failed to produce Esthers at the hearing and had instead produced Jana, who "had no personal knowledge regarding the total loss of the vehicle claimed in this case." According to defendant, plaintiff's failure to produce Esthers was a deliberate disregard for the court and rules governing arbitration and resulted in plaintiff's failure to participate in the arbitration in a meaningful manner. Defendant further asserted that plaintiff had not shown any reasonable excuse for its failure to comply with the court's July 18, 2011 order that required plaintiff to give advance notice of the specific adjuster who would attend the hearing. Defendant requested that the court bar plaintiff from testifying and/or presenting any evidence at trial pursuant to Illinois Supreme Court Rule 91 (eff. June 1, 1993) and grant defendant such other relief as the court deemed fair and just in light of plaintiff's failure to participate in good faith at the arbitration hearing.

¶ 6 Plaintiff filed a response to defendant's motion in which it asserted that the July 18, 2011 order did not require plaintiff to produce an adjuster with personal knowledge of the loss to the vehicle. Further, the order only required naming a company representative, not an adjuster. Plaintiff admitted that Esthers no longer worked for plaintiff at the time of the hearing, but asserted that he did not have any more personal knowledge than Jana. Further, defendant had not propounded any specific discovery as to plaintiff's claims representatives or deposed them.

¶ 7 On February 21, 2012, the court entered an order granting defendant's motion and stating as follows:

"This matter coming before the Court on [d]efendant's Motion to Bar, this Court being fully advised, it is hereby ordered:

Defendant's [m]otion is granted;

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Plaintiff State Farm Ins. Co. is barred from testifying or presenting evidence at the trial of this cause."

The record does not contain a transcript of the hearing on defendant's motion to bar plaintiff from testifying or presenting evidence at trial.

¶ 8 Plaintiff filed a motion to reconsider. At the hearing on the motion, plaintiff stated it had intended to bring Esthers to the hearing, but did not realize he was no longer employed by plaintiff and assigned another representative instead. Plaintiff contended it had attempted in good faith to comply with the July 18, 2011 order and its failure to inform defense counsel of the new representative was inadvertent. Plaintiff further asserted that defendant was not prejudiced because no one witness had personal knowledge or was personally involved in adjudicating the loss and Jana had the same knowledge as Esthers. In response, defendant contended the sanction was proper and characterized plaintiff's position as wanting to be able to disregard a court order and bring anyone they choose to an arbitration hearing, regardless of name or qualifications.

¶ 9 During the hearing, the court clarified that although defendant's motion for sanctions contended that plaintiff had not participated in a meaningful manner, plaintiff was ultimately sanctioned for violating Rule 237. The court further stated that it was "not of record that there was a sanction entered for anything regarding the violation of the 90 series rules or of bad faith" and "[t]his is a 237 issue."

¶ 10 The court then denied plaintiff's motion to reconsider, stating that it would not presume that plaintiff's replacement representative would not have been objectionable to defendant because the replacement was a record-keeper. An order spelled out the procedure for complying with defendant's notice, and plaintiff violated it. The court further stated that, upon realizing it needed a new representative, plaintiff could have sent defendant a letter and come to court, as "[w]e're always open here."

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¶ 11 On June 18, 2012, the court entered an order stating that, as plaintiff was previously barred from testifying and presenting evidence at trial, judgment was entered in favor of defendant.

¶ 12 On appeal, plaintiff argues that the order barring plaintiff from testifying or presenting evidence at trial should be reversed on both procedural and substantive grounds. Procedurally, plaintiff contends the order should be reversed because the trial court did not state in writing its grounds for imposing the sanction. Substantively, plaintiff argues that the trial court abused its discretion in imposing the sanction because plaintiff's failure to comply was not unreasonable or was the result of extenuating circumstances. According to plaintiff, Esthers was only a records witness, and his leaving 25 days before the hearing was an unusual and unique situation that plaintiff reasonably addressed by providing a comparable replacement records witness. Plaintiff contends that its failure to comply with the July 18, 2011 order was an oversight. Additionally, plaintiff argues that the sanction was excessive and did not bear a reasonable relationship to the information withheld as a result of bringing a different claims representative to the hearing.

¶ 13 As a preliminary matter, both parties' briefs take as a given that the trial court imposed the sanction for two reasons: plaintiff failed to act in good faith and in a meaningful manner at the arbitration hearing and plaintiff failed to comply with the Rule 237 notice. See Ill. S. Ct. R. 91(b) (eff. June 1, 1993) (a court may order sanctions if a party fails to participate in the arbitration hearing in good faith and in a meaningful manner); Ill. S. Ct. R. 237(b) (eff. July 1, 2005) (a court may impose sanctions if a party fails to comply with a notice to appear).

However, it is clear from the trial court's comments during the hearing on plaintiff's motion to reconsider that the court imposed the sanction only because of a Rule 237 violation and not because the court found that plaintiff failed to act in good faith and in a meaningful manner at the arbitration hearing. Thus, we focus our inquiry on two issues: 1) whether plaintiff should

have been sanctioned pursuant to Rule 237 for bringing a different claim representative to the hearing, and 2) if so, whether the particular sanction imposed was appropriate.

¶ 14 We first address plaintiff's contention that reversal is required because the court failed to put in writing its grounds for imposing sanctions. Rule 237, which states that a party may require the appearance at trial or hearing of a particular person by serving notice upon the opposing party (Ill. S. Ct. R. 237(b) (eff. July 1, 2005)), applies equally to arbitration hearings. Ill. S. Ct. R. 90(g) (eff. July 1, 2008). If a party fails to comply with the Rule 237 notice, a court may order a sanction or remedy provided for in Rule 219(c), which can include barring witnesses from testifying. Ill. S. Ct. R. 237(b) (eff. July 1, 2005); Ill. S. Ct. R. 219(c) (eff. July 1, 2002). Where a sanction is imposed under Rule 219(c), the judge must set forth with specificity the reason and basis for the sanction, either in the judgment order itself or in a separate written order. Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

¶ 15 Here, the court's written order imposing sanctions does not enumerate the grounds for barring plaintiff from testifying or presenting evidence at trial. Further, the record does not contain the transcript of proceedings where the sanctions were imposed. Generally, the appellant has the burden to present a sufficiently complete record to support a claim of error, and in the absence of a complete record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts which arise from the incompleteness of the record are resolved against the appellant. *Id.* at 392. However, the incomplete record does not prevent us from reaching the merits of this appeal because we can surmise the grounds for the sanctions based on defendant's motion for sanctions and the transcript of the hearing on plaintiff's motion to reconsider. While defendant's motion asserted that plaintiff violated Rule 237 and failed to participate in good faith and in a meaningful manner, the trial court's comments during the

hearing on plaintiff's motion to reconsider show that the sanctions were imposed for a violation of Rule 237. Although the court was required to state its reasons for the sanctions in writing, we do not believe that the court's failure to do so in this case is *per se* reversible error because the reason for the sanction is found elsewhere in the record. See *Nationwide Mutual Insurance Co. ex rel. Mika v. Kogut*, 354 Ill. App. 3d 1, 4 (2004) (failure to put in writing grounds for sanction, standing alone, did not require reversal where reviewing court could surmise the basis for the trial court's decision from the record); *Chabowski v. Vacation Village Ass'n*, 291 Ill. App. 3d 525, 528 (1997) (failure to put in writing grounds for sanction not *per se* reversible error where the order granted a written motion that spelled out reasons for the sanction and those reasons were supported by the record).

¶ 16 Next, we consider whether the trial court properly sanctioned plaintiff for violating Rule 237 when it brought Jana to the hearing instead of Esthers without advance notice. The decision to impose a particular sanction is within the discretion of the trial court, and therefore only a clear abuse of discretion will justify a reversal. *Rosen v. Larkin Center, Inc.*, 2012 IL App (2d) 120589, ¶ 16. An abuse of discretion occurs when the court's ruling is arbitrary or exceeds the bounds of reason. *Government Employees Insurance Co. v. Smith*, 355 Ill. App. 3d 915, 923 (2005). When sanctioned for failing to comply with a Rule 237 notice, the burden is on the offending party to show that its noncompliance was reasonable or the result of extenuating circumstances. *Id.*

¶ 17 Here, plaintiff's noncompliance with Rule 237 and the July 18, 2011 court order was neither reasonable nor the result of extenuating circumstances. The court's order excused Prigmore and required plaintiff to name its representative seven days before the arbitration hearing. There is nothing in the record to suggest that this order was entered over plaintiff's objection, and further, we resolve any doubts on this issue arising from the absence of a

transcript against the appellant. *Foutch*, 99 Ill. 2d at 392. That aside, the record shows that plaintiff was able to comply with the order without difficulty, having sent a letter to defendant the next day naming Esthers as its representative. Although Esthers left plaintiff's employ 25 days before the arbitration hearing, plaintiff had plenty of time to inform defendant of the new representative that would attend the hearing. Instead, plaintiff simply substituted Jana for Esthers on its own accord, which was a clear violation of the court order. Plaintiff admitted that its failure to inform defendant was an oversight. Other than asserting that its situation was unique and its noncompliance was inadvertent, plaintiff has not shown that extenuating circumstances justified its actions.

¶ 18 At the same time, the goal of Rule 219(c) sanctions is not merely to punish, but to ensure that discovery is handled efficiently. *Reyes v. Menard, Inc.*, 2012 IL App (1st) 112555, ¶ 26. Barring a witness from testifying is a drastic sanction and should be imposed sparingly. *Rosen*, 2012 IL App (2d) 120589 at ¶ 18. A trial court should impose drastic sanctions only when a party demonstrates deliberate, contumacious, or unwarranted disregard of the court's authority. *Reyes*, 2012 IL App (1st) 112555 at ¶ 26. Further, a sanction that prevents a case from being decided on the merits should be a trial court's last resort, when all other enforcement powers at the court's disposal have failed to advance the litigation. *Id.* at ¶ 30, 46. Further, the sanction imposed must bear some reasonable relationship to the information withheld in defiance of the discovery request or order. *Pickering v. Owens-Corning Fiberglas Corp.*, 265 Ill. App. 3d 806, 820 (1994).

¶ 19 Here, the sanction of barring plaintiff from testifying or presenting any evidence at trial was drastic and prevented a trial on the merits, and was too severe in light of plaintiff's sole discovery violation. Plaintiff's only discovery violation was to bring a different claims adjuster to the hearing without providing advance notice. To be sure, court rules and orders are not

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merely suggestions to be complied with if convenient (*Clymore v. Hayden*, 278 Ill. App. 3d 862, 869 (1996)), and we agree plaintiff should be sanctioned for not complying with the July 18, 2011 order. However, this is not a case where plaintiff failed to produce the claims adjuster altogether at the hearing (*Smith*, 355 Ill. App. 3d at 925). Further, drastic sanctions have been employed and upheld in cases where the trial court had previously warned the offending party that the drastic sanctions would result if it continued its disregard of court rules and discovery orders, which did not occur here. See *Rosen*, 2012 IL App (2d) 120589 at ¶ 20 (court order stated that plaintiff, who had willfully violated deadlines and discovery rules over four years, could avoid being barred as a witness by complying with a court order); *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 825 (2010) (court's order to answer all outstanding written discovery provided that failure to comply with specific terms of the order would result in the defendants being barred from testifying and presenting evidence at the arbitration hearing or at trial); *Campuzano v. Peritz*, 376 Ill. App. 3d 485, 487 (2007) (after defendant did not respond to discovery requests, court's order stated that failure to comply with discovery would result in an order barring defendants from testifying or presenting evidence at the arbitration and at trial); *Pickering*, 265 Ill. App. 3d at 821 (defendant was warned prior to imposition of sanctions that failure to comply with Rule 237 notices might result in sanctions). Here, the record does not show that plaintiff violated any other discovery rules or orders, and plaintiff had not been warned of a drastic sanction if it failed to comply with the court order to provide advance notice of the assigned claims representative. The sanction appears to have been used to punish plaintiff, rather than ensure that discovery proceeded efficiently, and was not used as a last resort. Under these circumstances, while we agree plaintiff should be sanctioned, we find that barring plaintiff from testifying or presenting evidence at trial was too severe a sanction and an

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abuse of discretion. Upon remand, the court may, in its discretion, impose a sanction that reasonably reflects a sanction warranted by the violation.

¶ 20 For the foregoing reasons, we reverse the order granting judgment for defendant and remand for further proceedings.

¶ 21 Reversed and remanded.