

No. 1-12-3788

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).

MASTER HAND CONTRACTORS, INC.,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	
)	No. 10 CH 6495
CONVENT OF THE SACRED HEART OF CHICAGO,)	
ILLINOIS, an Illinois not-for-profit corporation,)	
)	
Defendant-Appellee,)	
)	
(Fifth Third Bank, Ryszard E. Bester, Boguslaw A.)	
Moskal, Dariusz A. Jaworski, Unknown Owners and Non-)	
Record Claimants,)	Honorable
)	Lisa R. Curcio,
Defendants).)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 **Held:** The trial court did not abuse its discretion by dismissing a mechanics lien case with prejudice as a sanction for plaintiff’s failure to comply with discovery orders.

¶ 2 Acrimonious discovery disputes pervaded this school building construction lawsuit between a contractor and property owner. Eventually, the trial court dismissed the case as a

sanction for the contractor's failure to comply with various orders compelling it to turn over discovery materials to the defendant. We find that the trial court did not abuse its discretion in dismissing the lawsuit and therefore affirm.

¶ 3

BACKGROUND

¶ 4 Master Hand Contractors, Incorporated, (Master Hand) and the Convent of the Sacred Heart of Chicago, Illinois, (Sacred Heart) entered into a contract under which Master Hand would perform construction work to remodel the "Conway Mansion" owned by Sacred Heart into school facilities. The planned work was quite extensive, with a total contract price well over \$2 million. The construction included, among other things: demolition; interior carpentry, painting, and related construction; attic ceiling reinforcement; elevator installation; plumbing and sewer work; sprinkler installation; new mechanical and electric systems; window replacement; and reconstruction of the front porch.

¶ 5 Construction began, but Sacred Heart terminated it "for convenience" after becoming dissatisfied with Master Hand's work. Master Hand then filed this lawsuit for foreclosure of its mechanics lien and other relief, seeking \$378,867.19, which it claimed was still due to it despite the contract termination. Sacred Heart filed a counterclaim for breach of contract and fraud, affirmative defenses, and an answer denying that it owed money to Master Hand. The parties engaged in discovery, but disputes over compliance soon dominated the attention of both the court and the attorneys.

¶ 6 Because discovery requests and responses are not filed in the court record (See Ill. Sup. Ct. R. 201(m) (eff. Jan. 1, 2013)), and because the record contains no transcripts, the parties have provided us with a helpful stipulation to fill in the gaps in the record. The 87-paragraph, 21-page

stipulation filed under Supreme Court Rule 323(d) (Ill. Sup. Ct. R. 323(d) (eff. Dec. 13, 2005)) sets forth what occurred regarding discovery at 12 different court appearances spanning from June 7, 2011, to November 27, 2012. Virtually every time the case was before the court, the court dealt with some claim by Sacred Heart that Master Hand had not complied with Sacred Heart's discovery requests or a previous court order requiring it to turn over discovery. The straw that broke the camel's back, however, was Master Hand's failure to turn over its "electronically stored information" (ESI). For sake of brevity, we set forth herein only the most relevant events relating to discovery and to the dismissal order which is the subject of this appeal.

¶ 7 On June 14, 2011, Sacred Heart served document requests on Master Hand seeking its ESI. On August 15, 2011, Master Hand turned over 3,000 loose pages of non-ESI materials that were not paginated, stapled, or organized. At a hearing on November 16, 2011, the court was advised that Master Hand had not yet turned over its ESI. Master Hand insisted that Sacred Heart should pay for the ESI production costs. Sacred Heart objected to the tardy production of the ESI materials, and further objected to Master Hand's demand to reverse the usual rule requiring each party to pay for the production of its own records. The court ordered Master Hand to produce all responsive documents by January 31, 2012.

¶ 8 Shortly before a hearing on February 8, 2012, the parties agreed that: (1) Master Hand would identify all potential custodians and locations of responsive ESI; (2) the parties would prepare an agreed list of search terms; (3) with attorney oversight, Master Hand would search the ESI locations using the search terms; and (4) the attorney would review the documents before turning them over to Sacred Heart. Based on this agreement, the court extended the discovery deadline to April 30, 2012. However, by April 30, Master Hand had not yet produced any ESI

response. At a hearing on May 3, 2012, Master Hand again insisted that producing the ESI was too expensive. The court disagreed, finding that Master Hand violated a previous court order and ordered Master Hand to disclose its list of custodians within 21 days. On June 4, 2012, after hearing a progress report, the court ordered Master Hand to provide an affidavit regarding its record custodians, create a list of English and Polish search terms on its own, and undertake certain other tasks. On August 7, 2012, the court gave Master Hand until September 5 to comply, but stated it was a “final” extension.

¶ 9 Sacred Heart moved for sanctions after Master Hand failed to meet the September 5 deadline. In response, Master Hand filed a motion seeking relief from “abusive discovery.” On September 17, the court denied that motion, finding it raised issues that had been previously resolved. The court ordered Master Hand to provide responsive ESI, including emails, no later than October 16, 2012, indicating that it was the “final, final, final, final, final” extension and that continued non-compliance would result in sanctions.

¶ 10 On October 19, 2012, the court found that Master Hand had violated the court’s discovery compliance orders in a “knowing, willful, and intentional” manner. The court imposed both a one-time sanction of \$500 and an additional sanction of \$50 per day against Master Hand. The court also ordered it to run certain ESI searches under the supervision of its legal counsel to ensure better compliance with the discovery request. The same day, Master Hand’s attorney moved to withdraw from the case.

¶ 11 On November 1, Sacred Heart filed a motion to dismiss the case under Supreme Court Rule 219(c) (Ill. Sup. Ct. R. 219(c) (eff. July 1, 2002)) as a sanction for non-compliance with discovery requests. On November 5, 2012, the court allowed Master Hand’s attorney to

withdraw, provided Master Hand 21 days to obtain a new attorney of record, and kept the October 23 sanctions order in effect, including the daily fines for noncompliance. The court continued Sacred Heart's motion to dismiss. On November 27, 2012, a new attorney appeared for Master Hand who indicated he had only received the file four days before. The new attorney explained that he believed that many of the problems were caused by a lack of communication between Master Hand and its previous attorney. The trial court issued a written order finding that Master Hand had not complied with its discovery obligations "for approximately the last 18 months," and that it had "violated 7 orders of this court, including 3 expressly final deadlines to produce electronic discovery materials." The court dismissed the case with prejudice as a sanction for failure to comply with previous discovery orders. This appeal followed.

¶ 12

ANALYSIS

¶ 13 Illinois Supreme Court Rule 219(c)(v) specifically allows trial courts to dismiss cases with prejudice for failure to comply with discovery orders. Ill. Sup. Ct. R. 219(c) (eff. July 1, 2002). The imposition of sanctions is also an exercise of the trial court's inherent authority. We review dismissals for failure to comply with discovery orders for abuse of discretion. *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 66-67 (1995). "An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court." *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997); see also *Sander*, 166 Ill. 2d at 67; *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112 (1998).

¶ 14 Master Hand claims that the court abused its discretion because its failure to comply with discovery orders did not rise to the level of deliberate, contumacious, or unwarranted disregard of

the court's authority. It also suggests that the court should have taken some intermediate step to coerce compliance before dismissing the case. Finally, it argues that the court dismissed the case only one day after a new attorney substituted in for the attorney who had handled the case all along.

¶ 15 Our supreme court's decision in *Sander* establishes the framework for our review. The *Sander* court acknowledged that a trial court may, in appropriate situations, dismiss a complaint with prejudice. That power derives from both Supreme Court Rule 219(c) (Ill. S. Ct. R. 219(c) (eff. July 1, 2002)) and from the trial court's inherent authority to control its docket. *Sander*, 166 Ill. 2d at 65. In *Sander*, the supreme court explained there were two primary bases for a trial court's authority to dismiss cases for discovery violations. First, there is the trial court's inherent authority to take such steps as are "necessary" to "prevent undue delays in the disposition of cases caused by abuses of procedural rules, and also to empower courts to control their dockets." *Id.* at 66. Second, the dismissal power is appropriately exercised when "the record shows deliberate and continuing disregard for the court's authority." *Id.* at 67.

¶ 16 Construction projects, particularly those involving \$2 million of work, can easily produce electronic, written, and oral discoverable material of mammoth proportions. Those involved in the industry, whether plaintiffs or defendants, must come to court fully prepared to comply with complex discovery requests requiring the production of large amounts of material on relatively short notice. Discoverable material in a construction case might easily include emails of every employee who dealt with the project, change order logs, pay applications, blueprints, correspondence, punch lists, photographs, meeting minutes, inspection reports, and the like. See generally Michael T. Callahan and Barry B. Bramble, *Discovery in Construction Litigation*,

§ 4.4(A) (4th ed. 2003). Trial judges are the first line of defense against abusive discovery. As part of our analysis of the court’s use of its discretion, we note that the court below is one of three specialized calendars in the Circuit Court of Cook County exclusively devoted to hearing large-value construction disputes. Accordingly, the court below had significant experience that aided it in determining whether the materials sought, and the time granted to produce it, was appropriate.

¶ 17 Our supreme court has cautioned that dismissals with prejudice are “drastic sanctions and should only be employed when it appears that all other enforcement efforts of the court have failed to advance the litigation.” *Sander*, 166 Ill. 2d at 67-68. Our review of the record, however, leads us to conclude that the sanction of dismissal here was warranted. Perhaps Master Hand’s replacement attorney could have gotten better control over the discovery problems, but we doubt that the last-minute substitution of attorneys made any difference in the court’s ultimate judgment. The replacement attorney was not at fault for the delays caused by his client while it was represented by the previous attorney, and the court had already given ample opportunities for Master Hand to comply with previous orders.

¶ 18 Before dismissing the case, the trial court applied progressive discipline to coerce compliance and gave Master Hand ample opportunities to escape possible discovery sanctions. The same judge heard the case over 12 times. Along the way, the court was asked to resolve problems such as Master Hand’s pervasive use of employee’s personal computers and personal email accounts to conduct company business, Master Hand’s conduct of its internal written communications in Polish rather than English, and Master Hand’s Luddite approach to the ESI request, under which the company owner – who called himself a “computer idiot” in open court –

self-selected emails relating to the Sacred Heart project instead of using a search tool to find them, and printed them out one at a time, all without supervision of counsel.

¶ 19 It has been aptly noted that “court rules and orders are not merely suggestions to be complied with if convenient” but instead “constitute obligations that counsel disregard at their *personal* peril and that trial courts must enforce.” (Emphasis in original.) *Clymore v. Hayden*, 278 Ill. App. 3d 862, 869 (1996). The record thus sets forth more than a sufficient basis for the trial court’s actions. Accordingly, the court did not abuse its discretion by dismissing the case.

¶ 20 CONCLUSION

¶ 21 The trial court did not abuse its discretion by dismissing the case as a discovery sanction. Accordingly, we affirm the order of dismissal.

¶ 22 Affirmed.