

No. 1-13-3328

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

SOUTH SUBURBAN INDUSTRIAL, L.L.C., an Illinois limited liability company,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	
)	
VILLAGE OF ALSIP, a municipal corporation,)	No. 07 CH 1934
PATRICK E. KITCHING, as Mayor of Alsip, DONALD)	
CASTALDO, DONALD GODFREY, as successor to)	
trustee Carl Ceretto, TOM COLLINS, STANLEY)	
GRACZYK, JIM QUINN, and JOHN SHPIRO, trustee)	
of Alsip,)	Honorable
)	Rita Mary Novak,
Defendants-Appellees.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

ORDER

¶ 1 *HELD:* Circuit court did not abuse its discretion in awarding sanctions pursuant to Rule 219(c) where counsel repeatedly failed to comply with discovery orders, missed court hearings, and finally, failed to disclose material information to the court; sanctions awarded pursuant to Rule 375 are warranted because appeal only served to delay proceedings and needlessly increased the cost of litigation.

¶ 2 Plaintiff, South Suburban Industrial, LLC (SSI), filed this interlocutory appeal to contest an order of the circuit court of Cook County awarding attorneys fees as sanctions pursuant to Illinois Supreme Court Rule 219(c) (eff. Jul. 1, 2002). SSI argues that the court abused its discretion in entering a fee award pursuant to Rule 219(c) where such an award served no discovery purpose and was purely punitive in nature. For the following reasons, we affirm.

¶ 3 **BACKGROUND**

¶ 4 This case concerns a property dispute between SSI and the Village of Alsip (the Village). SSI owns an industrial warehouse located at 5000 West 123rd Street in the Village (the property). Sometime in March or April of 2006, the Board of Trustees of the Village of Alsip (the Board) determined that gates should be placed at the entrances of the property to prevent truck traffic from entering off of 123rd Street. On or about May 2006, the Village erected gates at the two main entrances of the property, blocking access from 123rd Street and leaving the property with no legal access from any public road. Thereafter, in August 2006, the Village placed what SSI described as "ugly concrete blocks" along the perimeter of the property and on the property itself. SSI alleges that the value of the property has been substantially diminished.¹

¶ 5 SSI filed its complaint in this matter on January 19, 2007. Following several amendments, SSI filed its fourth amended complaint on October 16, 2008. In February 2011, the court referred the parties to mediation. The parties engaged in settlement discussions; however, such discussions proved to be unsuccessful.

¶ 6 On February 15, 2012, the court ordered the parties to supplement all discovery by March 16, 2012 (referenced as March 15, 2012 in the court's order on defendants' fee petition). The record shows that defendants were seeking supplemental discovery concerning the following issues: the amount of rent SSI charged to each tenant; the type of business conducted by each

¹ The forgoing facts were taken from the fourth amended complaint.

tenant; the reason that any tenants vacated the property; documents showing the rental income received by SSI in connection with the property; and documents to support SSI's claim that there is no legal access to the property and that no lender will approve a loan for the property.

¶ 7 SSI failed to supplement discovery by March 16, 2012. Counsel for SSI was then absent from a status hearing on March 27, 2012. The court continued the case to April 10 and ordered counsel for both parties to appear on that date. On April 10, counsel for both parties were present, and the court extended the time for filing supplemental discovery to April 24, 2012. The matter was set for status on October 18, 2012.

¶ 8 On June 22, 2012, defendants filed a motion to compel discovery from SSI. Defendants asserted that, on the last day for supplementing discovery, counsel for SSI e-mailed them only three documents: two leases and an amendment to a lease. They objected that SSI had still not supplemented its answers to the Village's first set of interrogatories and its responses to the Village's second set of requests for production. On July 9, 2012, the court granted defendants' motion to compel and ordered SSI to supplement the requested discovery by August 6, 2012.

¶ 9 SSI failed to supplement the requested discovery by the August 6 deadline. Additionally, SSI's counsel did not appear at the status hearing on August 16, 2012. Counsel for defendants informed the court that SSI's counsel was on vacation, and the court continued the matter.

¶ 10 SSI again failed to supplement the discovery by the date of the next hearing—September 10, 2012. Defendants presented a motion for rule to show cause. The court, however, "discharged" their motion and ordered SSI to comply with the discovery order by September 24, 2012, noting that "[i]f another motion for rule is necessary the court will award Defendants' reasonable attorneys fees."

¶ 11 Counsel for SSI failed to appear at another hearing on September 26, 2012.² This time, counsel was in another courtroom at the time the case was called. Counsel for defendants informed the court that SSI "had produced documents that were available to be copied and unsigned interrogatories."

¶ 12 In its order awarding fees, the court noted the status of SSI's discovery responses:

"For the next two months, discovery seemed to be progressing. However, [SSI] produced several thousand pages of documents at different intervals, and some of the documents raised concerns about the need to reopen discovery. Further, depositions of Plaintiff's tenants [were] somewhat delayed because Plaintiff had to identify the representative to be [deposed]."

¶ 13 Subsequently, SSI's counsel missed another status hearing on November 29, 2012. The court continued the matter to December 18 and ordered counsel for both parties to appear, warning that "[f]ailure to appear shall result in sanctions."

¶ 14 At the hearing on December 18, 2012, the court was advised that only one more tenant needed to be deposed. The court was also informed that on the day before this hearing, SSI produced another 178 pages of documents and served a new lease on defendants. Counsel for defendants asked if the property had been sold, and SSI's counsel responded in the negative.

¶ 15 On December 20, 2012, defendants filed a motion for leave to conduct discovery related to the newly-disclosed purchaser/tenant. In their motion, defendants pointed out that, following the December 18 status hearing, counsel for defendants returned to his office and discovered an e-mail from SSI's counsel that had been sent at 10:02 a.m., during the court's 10 a.m. call.

² We note that a discrepancy exists between this order, which indicates that counsel for each of parties appeared at the hearing, and the order awarding fees, which indicates that SSI's counsel was absent from the hearing.

Attached to this e-mail were 46 pages of documents, including: (1) a purchase and sale agreement for the property, executed by Donovan Marine, Inc. (DMI), specifying a purchase price of \$2,320,900 and containing an assignment of claims clause "related to judicial proceedings involving 'the taking or closing of any right of access to the Property' "; and (2) a 3-year lease agreement executed by DMI with a 3-year right of renewal.

¶ 16 Plaintiff filed a request for a continuance on defendants' motion on the grounds that allowing discovery could "jeopardize the sale and cause negotiations to fail." At a hearing on January 23, 2013, the court stated that counsel for SSI had not been "forthright" about the pending sale of the property at the December 18 status hearing. Counsel for SSI responded "that he had merely reported that the 'property had not been sold.'" He requested additional time to respond to defendants' motion, but did not object to the production of documents in his possession that were related to the sale. The court granted defendants' motion and ordered that SSI produce all documents related to the newly-disclosed sale by January 30, 2013. The court temporarily stayed discovery on DMI and also allowed the Village to file a fee petition.

¶ 17 On January 30, 2013, defendants filed a petition for attorney's fees pursuant to Rule 219(c). Defendants asserted that if counsel for SSI had disclosed the purchase agreement or pending sale of the property in a timely manner at the December 18, 2012 status hearing, the court could have entered the necessary discovery order at that hearing. As a result of counsel's delayed disclosure, however, defendants had to draft a motion for leave to conduct discovery and incurred an additional \$1,181.25 in fees unnecessarily as a result of SSI counsel's delay.

¶ 18 In response, SSI's counsel stated that he "learned of the alleged purchase of the building" on or about November 28, 2012. He stated that he made some inquiries and discovered that a new lease had been signed but that no purchase had been consummated. He requested a copy of

the new lease from SSI and stated that it "was the last document to be received from his client." He did not review the lease upon receiving it, and instead, "shuttled it on to the Defendants as quickly as possible so as to avoid another round of conspiracy allegations." Counsel maintained that he did not know there was a purchase and sale agreement at the time of the December 18, 2012 status hearing. Nevertheless, he maintained that the building had not been technically "sold" at the time of the hearing because a deed had not been issued.

¶ 19 On April 8, 2013, the court entered a written order granting defendants' petition for attorney's fees. The court initially remarked upon the "sluggish fashion in which [SSI] ha[d] conducted discovery and heeded this Court's deadlines." The court pointed out that one year had passed since it ordered supplemental discovery, that it twice had to compel compliance with its orders, that it had "entered multiple orders setting dates with which [SSI] did not comply," and that SSI was still serving "thousands of pages of documents" on defendants eight to nine months after supplemental discovery had been ordered.

¶ 20 With regard to the December 18 status hearing, the court observed that SSI's counsel had more than two weeks to gather information about the sale of the property, from the time he learned about the possible sale (in late November) to the date of the status hearing. Counsel, nonetheless, did not advise the court of the pending sale. Wary of SSI counsel's representation that he did not review the documents that were sent to defendants, the court indicated that he "had to know by the email from his client that a sale transaction was contemplated" and that his "[f]ailure to disclose this information *** left a materially distorted view of the actual status of the case." The court pointed out that SSI had been "recalcitrant in producing pertinent discovery about a central issue of the case—the value of the property" during the discovery process. The court found that the dispute over additional discovery disclosures could have been immediately

resolved during the December 18 hearing if SSI had properly informed the court of the sale. Therefore, the court found that an award of fees to defendants in the amount of \$1,181.25, for work related to the discovery motion, was reasonable and just under the circumstances.

¶ 21 On May 8, 2013, SSI filed a motion to reconsider. SSI offered a number of "additional facts in mitigation of the occurrences leading up to the Court's order," claiming that it had been "unaware that the Court would be sanctioning counsel for the preceding year's events." SSI addressed and offered excuses for counsel's failure to appear at certain hearings and for his slow production of documents. Regarding the timing of his e-mail on the date of the December 18 hearing, SSI's counsel also explained that "sometimes e-mails that are large get hung up in the outbox." As to his failure to disclose the pending sale, he stated that he "assum[ed] that everyone, including the court, was clear that there was a prospective sale pending."

¶ 22 On September 19, 2013, the court denied SSI's motion. The court included a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason to delay enforcement or appeal of its order awarding attorney's fees. SSI timely appealed.

¶ 23 ANALYSIS

¶ 24 A. Fees for Discovery Violations

¶ 25 SSI contends that the court abused its discretion in awarding defendants attorney's fees pursuant to Rule 219(c). It argues that Rule 219(c) did not support an award of sanctions because defendants were required to obtain leave to issue discovery anyway. SSI maintains that the court's award of sanctions in this case was purely punitive in nature. Further, it claims that there was no discovery violation and objects that the court did not weigh certain "factors" allegedly contained in *Blott v. Hanson*, 283 Ill. App. 3d 656 (1996).

¶ 26 "Rule 219(c) authorizes a trial court to impose a sanction *** upon any party who unreasonably refuses to comply with any provisions of [the supreme court's] discovery rules or any order entered pursuant to these rules." *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). The sanction imposed by the court must be just and proportionate to the offense. *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 464 (2006). "A just order of sanctions under Rule 219(c) is one which, to the degree possible, insures both discovery and a trial on the merits." *Shimanovsky*, 181 Ill. 2d at 123. The purpose of a Rule 219(c) sanction is "to coerce compliance with discovery rules and orders, not to punish the dilatory party." *Id.*

¶ 27 "The determination of an appropriate sanction is circumstance specific." *Gonzalez*, 369 Ill. App. 3d at 465 (quoting *Smith v. City of Chicago*, 299 Ill. App. 3d 1048, 1052 (1998)). "Consequently, the review of such an order must necessarily focus upon the particular behavior of the offending party that gave rise to the sanction and the effects that behavior had upon the adverse party." *Id.* (quoting *Smith*, 299 Ill. App. 3d at 1052). Factors to be considered in determining what sanction, if any, is appropriate are: "(1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence." *Shimanovsky*, 181 Ill. 2d at 124. No one factor is determinative. *Id.* "The decision to impose a particular sanction under Rule 219(c) is within the discretion of the trial court and, thus, only a clear abuse of discretion justifies reversal." *Shimanovsky*, 181 Ill. 2d at 120.

¶ 28 The record shows that the court awarded fees to defendants because they were required to prepare and argue a motion for discovery that would not have been necessary had SSI's counsel

properly disclosed the pending sale before or during the December 18 hearing. The circuit court noted a pattern of recalcitrance when it came to discovery regarding the valuation of the property. We agree that the circumstances of this case warranted an award of fees as sanctions.

¶ 29 Following an unsuccessful mediation between the parties, the court set a March 16, 2012 deadline for the parties to supplement their discovery; defendants specifically requested supplemental discovery regarding the valuation of the property. A six-month ordeal followed. SSI failed to meet the court's deadline, and its counsel was absent from the following status hearing on March 27. At the next status hearing, the court granted SSI almost an additional month—until April 24—to respond to the outstanding supplemental discovery requests. SSI again failed to meet the court's deadline, which prompted defendants to file their motion to compel. SSI was ordered to respond to produce the discovery by August 6, and, again, failed to comply with the court's discovery order. Further, SSI's counsel failed to appear at the August 16 hearing because he was on vacation. After defendants sought a rule to show cause, the court ordered SSI to supplement discovery by September 24. On September 26, SSI's counsel again failed to appear at the hearing because, presumably, he was in another courtroom at the time the case was called.

¶ 30 Discovery progressed for about two months. However, counsel for SSI missed another status hearing on November 29, 2012. At this point, the court threatened sanctions if counsel failed to appear at the next hearing. A few weeks later, at the December 18 status hearing, the court was informed that SSI was still supplementing discovery as of the previous day. When asked if the property had been sold, SSI's counsel indicated that it had not been sold. Given the fact that an e-mail with documents related to a sale agreement for the property was sent to

defendants' counsel on the morning of December 18—around the time of the status hearing, it is not unreasonable to conclude that SSI's lack of disclosure resulted from a deliberate omission.

¶ 31 The supreme court rules impose a duty upon parties to "seasonably" supplement discovery when new information becomes known. Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007), 214(d) (eff. Jan. 1, 1996). Here, we agree with the circuit court that SSI was "recalcitrant in producing pertinent discovery about a central issue of the case—the value of the property." Counsel for SSI failed to comply with the circuit court's deadlines for supplementing discovery on four separate occasions. He was also routinely absent from status hearings following these missed deadlines. At the December 18, 2012 status hearing, counsel for SSI was undoubtedly less than forthcoming with the court. Counsel clearly knew about a pending sale of the property; indeed, he purportedly "proceeded from the assumption that everyone, including the court, was clear that there was a prospective sale pending." Notably, SSI's counsel had previously represented that he did not know there was a purchase and sale agreement at the time of the December 18, 2012 status hearing. This representation, however, is clearly contradicted by his alleged assumption that "a prospective pending sale" was clear to the court and defendants. When later challenged on his lack of forthrightness, he explained that the property was not technically "sold." Counsel's reliance on a purported distinction is disingenuous and pure gamesmanship. It is apparent from the record that the court would want to know that the property at the heart of the parties' dispute was under contract, especially because such a sale would necessitate further discovery.

¶ 32 We affirmed an award of attorney's fees as a sanction under similar circumstances in *In re Marriage of Davis*, 261 Ill. App. 3d 617 (1994). In that case, the trial court ordered the wife in a divorce proceeding to provide proof of insurance for the couple's automobile. *Marriage of Davis*, 261 Ill. App. 3d at 617. Subsequently, at a hearing on a rule to show cause, the wife

presented the court with a current insurance policy. *Id.* at 618. Her attorney had received the policy earlier that day and was in possession of it when the case was called, but he had not provided it to opposing counsel. *Id.* The court awarded legal fees for four hours of opposing counsel's time, reasoning that if the wife's attorney had tendered opposing counsel a copy of the insurance policy earlier that morning, "it would have obviated the need to have a hearing on the matter." *Id.* at 619. We found that the court had authority to award attorney's fees under Rule 219(c) and affirmed "the sanction imposed by the court for [the wife's attorney's] inexcusable failure to provide the discovery document requested *** in a timely manner." *Id.* at 619, 621.

¶ 33 Here, the court similarly noted that, if it had known of the pending sale of the property, it could have dealt with the discovery implications at the December 18, 2012 status hearing. Because counsel for SSI failed to disclose the pending sale, defendants were required to prepare and present the court with a motion for additional discovery. We cannot say that the court abused its discretion in awarding defendants attorney's fees where such a motion would have been unnecessary had counsel been more forthcoming about the sale of the property.

¶ 34 SSI maintains that the court was "wrong to sanction [it] without weighing any of the factors" that were previously cited.³ However, there is no evidence to suggest that the court did not consider all of the necessary factors. The mere fact that the court did not make a finding as to each specific factor does not render the award of sanctions erroneous. *In re Marriage of Powers*, 252 Ill. App. 3d 506, 510 (1993). " 'All reasonable presumptions are in favor of the action of the trial court, and absent an affirmative showing to the contrary, the reviewing court will assume that the trial court understood and applied the law correctly.' " *Id.* (quoting *In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1102-03 (1992)).

³ SSI cites to the factors that we have cited above, but as "enunciated" in *Blott v. Hanson*, 283 Ill. App. 3d 656 (1996). The above factors do not appear in *Blott*. Instead, they appear in *Polk v. Cao*, 279 Ill. App. 3d 101, 105 (1996), another case cited by SSI.

¶ 35

B. Fees for Appeal

¶ 36 Defendants have requested an award of attorney's fees for responding to this appeal. They claim that SSI's appeal is not well grounded in fact or warranted by existing law or any good faith argument for the extension, modification, or reversal of existing law, warranting a sanction under Illinois Supreme Court Rule 375 (eff. Feb. 1, 1994).

¶ 37 Rule 375 authorizes this court to impose an appropriate sanction "upon any party or the attorney *** of the party" where:

"it is determined that the appeal or other action itself is frivolous, or that an appeal or other action was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, or the manner of prosecuting or defending the appeal or other action is for such purpose." Ill. S. Ct. R. 375(b).

We agree that an award of sanctions should be entered against counsel for SSI. As noted above, the record shows a pattern of counsel failing to comply with court orders, missing deadlines, and missing court hearings. The circuit court in this case finally sanctioned counsel based on his clear lack of transparency as to the pending sale of the property, noting that counsel had toed the line of failing to disclose a material fact. Having reviewed the record in this case, we have no doubt that counsel deliberately kept quiet about the pending sale of the property to further delay the discovery process. We find that this appeal has done nothing more than delay these proceedings further and needlessly increase the cost of litigation.

¶ 38 Defendants have not submitted a statement of the reasonable expenses and attorney's fees incurred because of this appeal. We direct them to file such a statement within 14 days and grant

counsel for SSI 7 days to file a response. Thereafter, we will issue a supplemental order determining the appropriate sanction to be award against counsel for SSI.

¶ 39

CONCLUSION

¶ 40 For the reasons stated, we affirm the order of sanctions entered by the circuit court of Cook County.

¶ 41 Affirmed.