2017 IL App (2d) 170069-U
No. 2-17-0069
Order filed December 14, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AMERICAN CONSUMER PRODUCTS CORPORATION, ROBIN ZAHRAN, and KAREN ZAHRAN,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs,	)	
v.	)	No. 09-L-1111
INLAND REAL ESTATE AUCTIONS, INC., and THE INLAND REAL ESTATE GROUP OF COMPANIES, INC.,	)	
Defendants	)	
(American Consumer Products Corporation, Plaintiff-Appellant; Frank Diliberto, Defendant; Inland Real Estate Auctions, Inc., Paul L. Rogers, and the Inland Real Estate Group of Companies, Inc., Defendants-Appellees).	)	Honorable Ronald Sutter, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justice Schostok concurred in the judgment.
Justice Jorgensen specially concurred.

ORDER

¶ 1 *Held*: The trial court acted within its discretion in ordering that plaintiff pay attorney fees as a sanction for discovery violations under Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). However, the trial court abused its discretion in further

> dismissing with prejudice plaintiff's third amended complaint as a sanction, because the trial court had not previously imposed intermediate sanctions or warned plaintiff that further noncompliance with discovery could result in the dismissal of its case. Therefore we affirmed in part, reversed in part, and remanded the cause.

¶ 2 Plaintiff-appellant, American Consumer Products Corporation (ACPC), appeals from the trial court's dismissal with prejudice of its third amended complaint and imposition of attorney fees as discovery sanctions under Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). We affirm in part, reverse in part, and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 On September 1, 2009, ACPC and Robin and Karen Zahran[1] brought suit against defendants, Inland Real Estate Auctions, Inc., and The Inland Real Estate Group of Companies, Inc., alleging that they failed to properly market and auction a property owned by ACPC. Plaintiffs later added Frank Diliberto[2] and Paul L. Rogers as defendants. The trial court granted defendants' motion to dismiss the Zahrans as plaintiffs for lack of standing. Subsequently, ACPC's counsel withdrew, and the trial court granted defendants' motion to dismiss the action for want of prosecution. ACPC later moved to vacate the dismissal, but the trial court denied the motion. In a prior appeal, we reversed and remanded on this issue. We concluded that the trial court incorrectly believed that ACPC lacked standing to maintain the action following its bankruptcy, and that defendants did not meet their burden of showing that ACPC could not sue because it was allegedly a foreign company transacting business in Illinois without authority.

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[1] Robin Zahran was allegedly "an officer and owner of ACPC."

[2] ACPC eventually settled with Diliberto, and he is not a party to this appeal. Therefore, we use the designation "defendants" to refer to Inland Real Estate Auctions, Inc., Paul L. Rogers, and the Inland Real Estate Group of Companies, Inc.

American Consumer Products Corp. v. Inland Real Estate Auctions, Inc., 2013 IL App (2d) 121174-U, ¶ 36.

¶ 5 Proceedings then resumed in the trial court. On March 27, 2014, defendants filed an amended motion to dismiss or stay ACPC's action; the trial court denied the motion on January 22, 2015.

¶ 6 On March 19, 2015, the trial court ordered the parties to issue written discovery by April 13, 2015. About one month after the deadline, on May 14, 2015, ACPC moved for an extension of time. It stated that it had not responded to discovery "due to the press of other matters involving various legal and business affairs" of its attorney, and because the attorney had been trying to identify substitute counsel. On May 19, 2015, the trial court granted ACPC's motion for an extension of time, over defendants' objection. ACPC was given until June 18, 2015, to respond to defendants' discovery requests and propound written discovery on defendants.

¶ 7 After that date, on June 26, 2015, ACPC filed a motion for a further extension of time in which to answer defendant's written discovery. It stated as follows. Counsel was unaware at the prior hearing that ACPC's agent, Robin Zahran, had recently put his house on the market for sale. Shortly after the issuance of the order, Zahran informed counsel that he had to close by the end of the month and was moving to Wisconsin. Therefore, Zahran had no time to assist counsel with the retrieval and review of documents. Zahran then suffered a head injury during the course of the move. Prior to the deadline, counsel and Zahran met for over five hours regarding discovery, but "many of the documents requested remain[ed] in the possession of and control of lawyers and law firms in Georgia" (where ACPC had operated and had been involved in litigation). During the past week, Zahran was recovering from a hand injury, which hampered his ability to assist counsel with discovery. Counsel was also still trying to secure substitute

counsel.

¶ 8 On June 30, 2015, the trial court granted ACPC a "FINAL" extension and ordered it to comply with defendants' written discovery by July 21, 2015.

¶ 9 At a hearing on July 28, 2015, defendants stated that ACPC had served its written response to interrogatories. Defendants were reviewing the answers, and they asked for a hearing to determine written discovery compliance status before moving ahead. The trial court set a hearing for August 25, 2015. That day, the trial court ordered that the parties propound additional written discovery and Illinois Supreme Court Rule 201(k) (eff. July 30, 2014) correspondence by September 8, 2015.

¶ 10 On September 8, 2015, defendants sent ACPC a letter seeking supplemental responses under Rule 201(k) to ACPC's answers to written discovery. They requested a response by September 21, 2015.

¶ 11 At a hearing on October 6, 2015, defendants stated that they had not received a response to their Rule 201(k) letter. They stated that ACPC's counsel had said that some documents would be reviewed in Georgia in the next couple of weeks, but given that the case had been going on for six years, it seemed that ACPC was not taking its discovery responsibility seriously. ACPC replied that the Rule 201(k) responses should not be holding up any other phase of the written discovery process. It argued that "60 to 70 percent" of the information requested in the Rule 201(k) letter involved documents located in Georgia. Counsel in Georgia had been handling another ACPC matter that had concluded about two weeks prior, and Illinois counsel had received a letter from that attorney saying that ACPC could "come and get [its] stuff." Zahran planned to do that within 10 days, and counsel would have it in about two weeks. The trial court asked ACPC's counsel when he would be able to get the documents, and he replied

that he "should have them in two weeks" and be able to produce them by October 29, 2015. The trial court ordered them to be produced by that date. It stated:

> "I just want it done, all right. I don't want to be back and go, oh, we didn't get it done because at that point I would expect counsel for the defense to file an appropriate motion."

The trial court also ordered ACPC to respond to defendants' Rule 201(k) correspondence by October 12, 2015.

¶ 12 On October 13, 2015, ACPC sent a "preliminary response" to the Rule 201(k) letter. It did not produce additional documents by October 29, 2015.

¶ 13 On November 9, 2015, defendants filed a motion for sanctions under Rule 219(c). Defendants argued that ACPC had caused it to appear at several hearings which served no purpose other than ACPC explaining why it had not complied with previous orders, and that ACPC had ignored the court's final warning concerning discovery. Defendants requested attorney fees for attending the hearings and requested the dismissal, with prejudice, of ACPC's action.

¶ 14 At a status hearing on November 12, 2015, ACPC stated that it would be receiving the Georgia documents the next week.

¶ 15 ACPC filed a response to the sanctions motion on December 10, 2015, arguing as follows. In April 2015, in the course of discovery review and preparation of responses, counsel asked Zahran about the location of ACPC's business records, particularly those implicated by the requests. Zahran said that the records had been retained by counsel in Georgia for litigation in that state, and that he had unsuccessfully attempted to retrieve the records. In ACPC's initial discovery responses, it informed defendants that it did not have in its possession and control all

of the information and records necessary to complete the responses. At the October 6, 2015, status hearing, defendants sought to bar further production of documents. The trial court declined this request, but it asked for a commitment to produce the material by a certain date. ACPC's counsel proposed, and the trial court accepted, an aggressive timetable for supplemental production in the interest of moving the case forward. In retrospect, "counsel's calculation was not reasonable in view of the unavailability of documents in possession of a third party and the scheduling difficulties experienced by *** Zahran, who informed [ACPC's] counsel that he would travel to Georgia to review the documents, if necessary." As of October 29, 2015, counsel still did not have the documents. Counsel updated defendants on November 9, 2015, stating that he had not yet received the records and would let them know as soon as he had, but defendants still proceeded with their motion for sanctions.

¶ 16 ACPC argued that at each stage of the litigation, it had notified defendants and reported to the trial court the difficulties experienced in proceeding expeditiously, arising from its status as "a previously-insolvent and now-defunct company operated in Georgia with no resources or personnel to assist counsel in the litigation of its claims." ACPC argued that it was only at the October 6, 2015, status hearing that the trial court raised the possibility of a sanction. ACPC argued that a sanction was not warranted because it did not have possession or control of the requested documents; it was able to retrieve the remaining business records from Georgia as of November 18, 2015, when counsel there "finally" shipped 14 boxes of records; and Zahran "experienced health issues and a loss of [a] motor boat in Green Bay that prevented him to [*sic*] pressing for the more timely retrieval of documents from Georgia." ACPC argued that far from deliberately avoiding its discovery obligations, many of the documents could only assist ACPC in its proof of its claims and damages.

¶ 17 ACPC attached to its response an affidavit of Zahran, who averred as follows. He had made many inquiries and demands to counsel in Georgia and its successor firm "during the summer and early autumn of 2015" for the documents, but the attorneys could not or would not release or transmit the documents until all appeals of litigation previously filed there were completed. Zahran was informed of the necessity of retrieving the documents and producing them to defendants, and he worked diligently at all times to obtain them, but "the attorney in Georgia had placed the records in storage." Zahran was further delayed in his efforts to retrieve them by medical procedures on October 2, 2015; a storm on October 6 and 7, 2015, that damaged his boat and required several days of constant monitoring to stabilize and prevent the release of pollutants in a public waterway; and the volume of documents requiring retrieval and review by Georgia counsel before transmittal.

¶ 18 ACPC also attached the affidavit of Matthew Carlton, a Georgia attorney, who averred as follows. Carlton's prior law firm retained ACPC's business records in 2011 in connection with litigation. The firm then dissolved, and Carlton retained possession of the records. He put them in storage in October 2015, and on November 18, 2015, he released them and sent them via Federal Express to ACPC's counsel in Illinois. They consisted of 12 banker boxes and two larger shipping boxes.

¶ 19 A hearing on the sanctions motion took place on January 27, 2016. Defendants stated that they received an e-mail from ACPC's counsel the previous week stating that he had received the documents in November and had six boxes of potentially responsive papers. Defendants replied that they were not willing to sift through potentially responsive documents but rather wanted documents responsive to their specific discovery requests. ACPC also had not amended its response to interrogatories.

¶ 20 ACPC argued that it had tried to apprise the trial court at every step of the difficulties it was having obtaining the documents. It may have been better to file a "214" affidavit that it could not obtain the documents, but it did not want to be in the position of having them one or two years later. Counsel had gone "through the written submissions last night" and "actually prepared supplemental written discovery." He was willing to sort them to facilitate review.

¶ 21 The trial court questioned why the Georgia documents could not have been copied and sent to Illinois. ACPC's attorney responded that it would have been a waste of money because out of the approximately 14 boxes, there were about six boxes of potentially relevant documents. Copying all of the documents from Georgia was not "an expense [ACPC was] in the position to front." Counsel argued that ACPC had complied with discovery in July 2015, and the problem with the Georgia documents originated with the 201(k) letter in September.

¶ 22 In ruling on the motion, the trial court began by reading the following paragraph of defendants' motion for sanctions:

> "Plaintiff filed this action in 2009. Over six years later, its investigation continues to locate documents that go to the heart of its allegations and refuses to answer basic questions concerning their positions and evidence."

The trial court then stated as follows. ACPC had only partially complied with discovery in July 2015, as its answers were evasive. ACPC had demonstrated a deliberate and contumacious disregard for the trial court's orders and authority. Over defendants' objections, the trial court had repeatedly granted ACPC extensions. ACPC's attorney came to court and had reasons for not complying. The trial court was not faulting just the attorney, as part of the blame could rest with the client. The trial court continued:

> "But the point is, I continued this, you know, time and time and time again. And

> plaintiff still failed to comply with discovery.
>
> And to me, what makes this worse, it says, it's the plaintiff who [has] shown the deliberate disregard for this Court's authority. The plaintiff, who filed this case in 2009 and should have documents in its possession necessary to prosecute its claim and necessary to respond to discovery requests, which the bulk of the discovery request[s] made by the defendant[s] in this case were quite reasonable requests.
>
> So I'm granting the Motion. And since I believe this is a very extreme case, I'm going to dismiss this lawsuit with prejudice."

The trial court stated that it was also going to grant defendants' request for attorney fees in part. It ordered ACPC's attorney to pay attorney fees for the preparation of the motion for sanctions and the appearance that day.

¶ 23 On February 2, 2016, ACPC filed a motion for clarification, questioning, among other things, whether the trial court intended to dismiss the counts against Diliberto. In an order dated February 9, 2016, the trial court stated that the dismissal of defendants with prejudice did not include Diliberto. ACPA sought a default against him in a motion filed on May 4, 2016.

¶ 24 On July 22, 2016, the trial court awarded attorney fees of $3,350 in defendants' favor.

¶ 25 On January 5, 2017, the trial court entered an agreed order dismissing Diliberto with prejudice, pursuant to settlement agreement between him and ACPC. ACPC timely appealed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, ACPC argues that the trial court abused its discretion in dismissing its complaint with prejudice and awarding attorney fees as sanctions under Rule 219(c). Rule 219(c) states:

"**Failure to Comply with Order or Rules.** If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(i) That further proceedings be stayed until the order or rule is complied with;

(ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) That a witness be barred from testifying concerning that issue;

(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice;

(vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue; or

(vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.

In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an

appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty. When appropriate, the court may, by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under these rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.

Where a sanction is imposed under this paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

¶ 28 The purpose of the a Rule 219(c) sanction is to ensure compliance with discovery rather than to punish a party, and a just order of sanctions is one that, to the degree possible, insures both discovery and a trial on the merits. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998). In determining an appropriate sanction, "the court must weigh the competing interests of the offending party's right to maintain a lawsuit against the need to accomplish the objectives of discovery and promote the unimpeded flow of litigation." *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 791 (2002).

¶ 29 The trial court should use the following factors to determine what sanction, if any, to impose: (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.* A sanction resulting in the dismissal of the case with prejudice is a drastic sanction that should only be invoked when the party's actions show a deliberate, contumacious, or unwarranted disregard of the court's authority. *Id.* Such a sanction should be imposed as a last resort and only after all of the trial court's other enforcement powers have failed to advance the litigation. *Id.* at 123. We will reverse a trial court's decision to impose a particular sanction only if the record establishes a clear abuse of discretion. *Id.*

¶ 30 ACPC cites *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, where the court stated as follows. The purpose of a Rule 219(c) sanction is to both combat abuses of the discovery process and maintain the court system's integrity. *Id.* ¶ 27. "To the maximum extent that is practicable, sanctions should be customized to address the nature and extent of the harm while prescribing a cure to the specific offense." *Id.* Before imposing the ultimate sanction of default or dismissal, the trial court should have already concluded that sanctions are warranted under the six *Shimanovsky* factors (see *supra* ¶ 29) and then weigh the following four additional factors: (1) the degree of the party's personal responsibility for the noncompliance; (2) the level of cooperation and compliance with previous discovery and sanction orders; (3) whether less coercive measures are available or would be futile; and (4) whether the recalcitrant party has been warned about the possibility of entry of an order of default or dismissal. *Id.* ¶ 35.

¶ 31 The *Locasto* court stated that regarding the first factor, if the lawyer is responsible for the noncompliance, the court should consider sanctioning the lawyer before dismissing the client's case. *Id.* ¶ 36. However, if a lesser sanction had already been imposed, a dismissal might be

warranted. *Id.* The second factor involves the amount of progress the noncompliant party has made. The third factor considers the availability of intermediate sanctions and the likelihood of their impact. *Id.* "It would be a rare case in which the trial court could not formulate increasingly severe sanctions." *Id.* ¶ 37. For the last factor, "the trial judge must have alerted the recalcitrant party, orally or in writing, of the possibility that default or dismissal may be appropriate." *Id.* ¶ 36.

¶ 32 In *Locasto*, the appellate court reversed the trial court's imposition of a default judgment as a Rule 219(c) sanction. *Id.* ¶ 46. It stated that the record did not indicate that the trial court found that the defendants' actions showed a deliberate, contumacious, or unwarranted disregard for its authority, nor did the trial court ever warn the defendants that their failure to comply could result in a default judgment. *Id.* ¶ 42. The appellate court stated that the trial court should have instead considered and imposed a less onerous sanction. *Id.* ¶ 41. It stated that it found the judgment of default unwarranted "[i]n the absence of any consideration of intermediate sanctions and an advance warning that continued dilatory responses could result in a default." *Id.* ¶ 46.

¶ 33 ACPC argues that because the trial court did not analyze the six *Shimanovsky* factors, its ruling was an abuse of discretion and must be reversed. It argues that even if that test warranted a sanction, the trial court failed to analyze the additional four factors presented in *Locasto*. ACPC argues that neither it, nor its counsel, were personally responsible for the Georgia firm's indifference or obfuscation in the retrieval and production of ACPC's business and litigation records. ACPC argues that in the absence of a progressive sanction or the consideration of a less harsh, but effective sanction, the trial court abused its discretion in dismissing its pleading.

¶ 34 ACPC also places some of the blame on defendants. It maintains that defendants could have avoided attending several hearings if their counsel had conferred with ACPC's counsel

about a reasonable timetable for the retrieval of the Georgia documents and the completion of written discovery. ACPC argues that defendants' own motion practice and discovery tactics contributed to the proliferation of status hearings and delays. ACPC argues that instead of seeking the amelioration of its expenses or inconvenience, defendants demanded sanctions in order to avoid a disposition of the case on the merits.

¶ 35 ACPC further argues that only a pattern of misconduct could subject it to a dismissal with prejudice. See *Cronin v. Kotte Associates*, LLC, 2012 IL App (1st) 111632, ¶ 55 (finding that there was no "pattern of misconduct throughout the course of [the] litigation which justified dismissal with prejudice"). ACPC argues that any delay in its supposed failure to comply with discovery cannot be found before defendants' tender of its Rule 201(k) letter on September 8, 2015. ACPC argues that from this perspective, the delay amounted to less than two months from the time of that correspondence to the request for sanctions. ACPC contends that although it had sought and received prior extensions, its continued difficulties with "the release of an attorney's lien placed on the Georgia Documents by the Georgia law firm" did not become evident to it until late August 2015. ACPC argues that the October 6, 2015, order setting the October 29, 2015, deadline was the only order allegedly violated by its inability to obtain the Georgia documents.

¶ 36 Last, ACPC argues that the trial court abused in discretion in awarding defendants attorney fees. It maintains that the trial court failed to make specific findings about the relationship between the fees sought and the violation of any discovery rules or court order. ACPC argues that if any monetary sanction could be awarded, the trial court should have restricted it to fees related to the "October 29, 2015," hearing at which ACPC's counsel had to again report that ACPC had not succeeded in retrieving the Georgia documents. In support of its

argument, ACPC cites *County Line Nurseries & Landscaping, Inc. v. Glencoe Park District*, 2015 IL App (1st) 143776. There, the appellate court reversed and remanded on the issue of attorney fees under Rule 219(c). It concluded that the defendant had only requested fees and costs incurred as a result of the plaintiff's failure to comply with an order, and the rule authorized just those expenses incurred " 'as a result of the misconduct' " (*id.* ¶ 49 (quoting Ill. S. Ct. R. 219(c) (eff. July 1, 2002)), but the fee award included expenses related to other parts of the litigation. *Id.*

¶ 37 Defendants respond that the trial court acted within its discretion in dismissing ACPC's third amended complaint as a sanction under Rule 219(c). Defendants take the position that progressive discipline or warnings about the consequences of not complying with discovery were not necessary. They cite *Chabowski v. Vacation Village Ass'n*, 291 Ill. App. 3d 525, 529 (1997), where we stated:

> "Plaintiff suggests that a party must violate more than one court order before the court may rely on a dismissal with prejudice as a sanction. We disagree. *Sander* requires only that a party demonstrate a deliberate and contumacious disregard for the court's authority. The type of conduct that can evince a deliberate and contumacious disregard for the court's authority is obviously varied and will differ from case to case. However, *Sander* also explained:
>
> > 'Where it becomes apparent that a party has willfully disregarded the authority of the court, and such disregard is likely to continue, the interests of that party in the lawsuit must bow to the interests of the opposing party.'
>
> We believe that this is such a case." *Id.* (quoting *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 69 (1995)).

¶ 38 Defendants argue that, therefore, the only question is whether the trial court abused its discretion in finding that ACPC demonstrated a deliberate and contumacious disregard for its authority and orders. Defendants assert that it did not, as its ruling was based on ACPC's conduct at and between hearings spanning seven months. Defendants argue that the trial court properly found that even after being granted a final extension on June 20, 2015, ACPC never tendered substantially compliant responses to their written discovery, despite the numerous issues defendants raised in their Rule 201(k) letter. Defendants contend that that trial court seized on the most salient issue, that being that even six years after ACPC chose to file the case, it still failed to produce documents going to the heart of its allegations. Defendants argue that the trial court even warned ACPC that it expected defendants to file the "appropriate motion" if ACPC failed to produce the necessary discovery, and defendants argue that the trial court reasonably determined that any lesser sanction than dismissal would have been futile in light of all of the previous extensions.

¶ 39 Finally, defendants argue that ACPC's response to their motion for sanctions shows an even deeper disregard for the trial court's orders, as even though discovery was propounded in April 2015, ACPC's principal did not even inquire into the production of the Georgia documents until "summer and early autumn of 2015." Defendants argue that there is also no evidence that ACPC could not have reviewed and copied the relevant documents, even if they were needed as part of another proceeding. According to defendants, at every turn, ACPC flouted its obligations under the discovery rules and the trial court's orders.

¶ 40 We first address ACPC's argument that the trial court's ruling must be reversed because it did not analyze the six *Shimanovsky* factors (see *supra* ¶ 33). Contrary to ACPC's position, a trial court's failure to state its reasons for imposing a Rule 219(c) sanction is not *per se*

reversible error, especially where the sanction was entered pursuant to a written motion. *Glover v. Barbosa*, 344 Ill. App. 3d 58, 63 (2003). Here, in addition to the trial court imposing the sanctions pursuant to defendants' motion, it gave a detailed explanation as to why it was sanctioning ACPC. The trial court was not required to explicitly go through the *Shimanovsky* factors before imposing the sanction.

¶ 41 We next address the question of whether the trial court abused its discretion in determining that sanctions were warranted, before turning to the issue of the particular sanctions imposed. Looking at the *Shimanovsky* factors (*Shimanovsky*, 181 Ill. 2d at 124), the first three factors relate to the nature of the evidence, the particulars of which we are still unaware. The second two factors look at the adverse party's actions, and here defendants were diligent in seeking the discovery and objecting to ACPC's request for extensions and arguments relating to the disputed discovery.

¶ 42 The last factor looks at the good faith of the party offering the evidence (see *id.*), for which we observe the following. In March 2015, the trial court ordered the parties to issue written discovery by April 13, 2015. ACPC admittedly knew by April 2015 that its necessary business records were in Georgia. See *supra* ¶ 15. ACPC then received an extension for discovery to June 18, 2015. Subsequently, on June 26, 2015, it asked for a further extension, stating that "many of the documents requested remain[ed] in the possession of and control of lawyers and law firms in Georgia." On June 30, 2015, the trial court granted ACPC a "FINAL" extension and ordered it to comply with defendants' written discovery by July 21, 2015. ACPC tender its written response to interrogatories in July 2015. Defendants sent ACPC a letter on September 8, 2015, seeking supplemental responses under Rule 201(k). At a hearing on October 6, 2015, ACPC said that the Georgia lawyer had sent a letter saying that ACPC could "come and

get [its] stuff." ACPC's counsel said that he should be able to produce the documents by October 29, 2015. The trial court stated that it "want[ed] it done" and that it if did not get done, it "would expect counsel for the defense to file an appropriate motion," thereby warning ACPC of the possible sanctions. ACPC did not produce the documents by October 29, 2015, and defendants filed their motion for sanctions on November 9, 2015. When asked at the hearing on sanctions why ACPC did not simply have the Georgia documents copied, ACPC replied that it was not "an expense [it was] in the position to front."

¶ 43 The trial court agreed with defendants' position that six years after filing its action, ACPC did not secure documents central to its allegations, and it refused to answer basic questions concerning its positions and evidence. It stated that ACPC had only partially complied with discovery in July 2015, as its answers were evasive, and that despite repeated extensions, ACPC still failed to comply with discovery.

¶ 44 We conclude that the trial court acted within its discretion in determining that sanctions were warranted. It is clear that ACPC was not proactive in attempting to collect all potentially relevant documents in the years following the filing of its suit, even though Zahran should have known from the beginning that many records were in Georgia. Even looking at just 2015, ACPC was ordered to issue discovery in April 2015, and it admittedly knew then that many relevant documents were in Georgia. However, although it allegedly requested them from the Georgia attorneys, it did not prioritize obtaining them, as Zahran did not even inquire about them and demand them until "the summer" of 2015. See *supra* ¶ 17. ACPC still did not have them by October 29, 2015, a deadline that ACPC itself had suggested, even after receiving a "FINAL" extension and being told that sanctions might be imposed. Tellingly, ACPC's counsel stated that he did not request copies of the documents (as opposed to the original documents) simply due to

the expense, while at the same time subjecting defendants to the expense of trying to enforce discovery orders, and eventually both parties to the expense of this appeal. ACPC even goes so far as to blame defendant for their attempts to enforce the court's orders. Based on the circumstances of this case, we conclude that the trial court acted within its discretion in determining that sanctions were warranted.

¶ 45 We now turn to whether the particular sanctions imposed constitute an abuse of discretion, keeping in mind the four *Locasto* factors. See *supra* ¶¶ 30-31. We begin with the sanction of attorney fees. ACPC argues that the trial court failed to make specific findings about the relationship between the fees sought and the violation of any discovery rules or court order. However, the trial court clearly stated that the attorney fees were for the preparation of the motion for sanctions and defense counsel's appearance at the hearing on the motion. ACPC alternatively argues that, under *County Line Nurseries & Landscaping, Inc.*, 2015 IL App (1st) 143776, the trial court should have restricted the attorney fees to the "October 29, 2015," hearing where it reported that it had not been able to retrieve the Georgia documents. Problematically, there is no reference to such a hearing in the common law record, the reports of proceedings on file, or even ACPC's statement of facts. Assuming that ACPC meant to refer to the status hearing on November 12, 2015, we still do not find its argument persuasive. *County Line Nurseries & Landscaping* stated that Rule 219(c) fees must be related to the misconduct (*id.* ¶ 49), and here the motion for sanctions and hearing on that motion were directly related to the discovery misconduct.

¶ 46 The issue still remains of the sanction of dismissal with prejudice of ACPC's third amended complaint. *Locasto* clearly states that before dismissing an action, "the trial judge must have alerted the recalcitrant party, orally or in writing, of the possibility that default or dismissal

may be appropriate" (*Locasto*, 2014 IL App (1st) 113576, ¶ 36), and it reversed the trial court's imposition of a default judgment as unwarranted "[i]n the absence of any consideration of intermediate sanctions and an advance warning that continued dilatory responses could result in a default" (*id.* ¶ 46). Under *Locasto*'s reasoning, the trial court here necessarily abused its discretion in dismissing ACPC's third amended complaint with prejudice, because it never warned ACPC that it was contemplating the dismissal of the case if ACPC did not comply with the next discovery deadline, and it had never imposed a prior discovery sanction.

¶ 47 Defendants do not attempt to distinguish *Locasto* but instead rely exclusively on *Chabowski*, 291 Ill. App. 3d at 529, where we stated that a party need not have violated more than one court order before the trial court could dismiss the action with prejudice as a sanction. *Chabowski* cited *Sander*, 166 Ill. 2d at 69, for this proposition. *Chabowski*, 291 Ill. App. 3d at 529. However, *Sander* also stated that "[d]ismissal of a cause of action or sanctions which result in a default judgment 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 68-69) and it upheld the dismissal of the cause of action under Rule 219(c) based on the "plaintiffs' repeated violations of the court's orders." (*id.* at 71). Moreover, our supreme court's decision in *Shimanovsky* came out after *Chabowski*, and the supreme court again stated that dismissal with prejudice is a severe sanction to be imposed as a last resort, only after all of the trial court's other enforcement powers have failed to advance the litigation. *Shimanovsky*, 181 Ill. 2d at 123.

¶ 48 It is understandable that the trial court and defendants were frustrated with ACPC for not making the effort necessary to secure the Georgia documents in a timely fashion. However, the trial court's initial grants of ACPC's requests for extension could have been interpreted by

ACPC as the trial court agreeing that it had good cause for those requests. Moreover, the purpose of Rule 219(c) sanctions is to ensure compliance with discovery rather than to punish a party, and fair sanction should, to the extent possible, ensure both discovery and a trial on the merits. *Id.* Here, the dismissal effectively served to punish ACPC as opposed to coercing it to comply with discovery so that the parties could move on to resolving their dispute on the merits. Furthermore, as discussed, given that dismissal is such a drastic sanction, the trial court should have first imposed intermediate sanctions and directly warned ACPC that additional noncompliance could result in a dismissal with prejudice. *Locasto*, 2014 IL App (1st) 113576, ¶¶ 36, 46. Therefore, we must conclude that the trial court abused its discretion in dismissing with prejudice ACPC's third amended complaint. On remand, the trial court may consider whether to impose an alternative sanction, keeping in mind that it has already granted defendants $3,350 in attorney fees pursuant to their motion for sanctions.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm the trial court's award of attorney fees in defendant's favor as a sanction under Rule 219(c). However, we reverse its dismissal with prejudice of ACPC's third amended complaint, and we remand for further proceedings consistent with this order.

¶ 51 Affirmed in part and reversed in part; cause remanded.

¶ 52 JUSTICE JORGENSEN, specially concurring.

¶ 53 I agree with the majority's analysis and conclusion, but I write separately to clarify that our decision should not be read to require progressive/intermediate sanctions as a prerequisite to dismissal of an action. Rule 219(c) does not contain such a requirement. Indeed, once a party fails to comply with any order, the rule grants the trial court, on motion, "broad discretion"

(*Locasto*, 2014 IL App (1st) 113576, ¶ 26) to dismiss an action, with or without prejudice. The rule does not contain any language requiring progressing or intermediate sanctions before a trial court can dismiss a case.

¶ 54 I wish to emphasize that "no single factor controls and each situation presents a unique factual scenario that bears on the propriety of a particular sanction." *Locasto*, 2014 IL App (1st) 113576, ¶ 26. In discussing the factor of availability of intermediate sanctions/less coercive measures, the *Locasto* court explained that a court must consider whether "there is something short of dismissal or default that can get results or has it come to the point that less onerous sanctions would be counterproductive." *Id.* ¶ 36. Here, there is no indication that a lesser sanction would have been counterproductive. Indeed, it was on the same day that the trial court imposed a monetary sanction, yet did not allow time to see if that sanction would produce the expected, obligatory compliance with the court's orders. I agree that the trial court's initial grants of extensions could reasonably have been interpreted by ACPC as findings of good cause for each extension. Thus, the dismissal with prejudice—the harshest sanction—of ACPC's third amended complaint was unreasonable in this context. There were no prior intermediate sanctions or warnings that additional noncompliance would result in a dismissal with prejudice.

¶ 55 The factors that have developed in the case law *do* consider the availability of intermediate sanctions, but I wish to highlight that neither the rule nor case law *require* a trial court to impose progressive sanctions in *every* case before the court may, in the exercise of its discretion, dismiss a complaint. Accordingly, I specially concur.

¶ 56